

TERMINATION OF TENANCY IN COMMON BY ADVERSE POSSESSION: A COMPARATIVE LESSON FROM THE UNITED STATES

I INTRODUCTION

The common law recognised four types of co-ownership: joint tenancy, tenancy in common, coparcenary, and tenancy by the entirety. Of these, only the joint tenancy and the tenancy in common retain relevance in Australian law.¹ And of those, the tenancy in common is the simplest: tenants in common share possession, but otherwise each cotenant's interest, although undivided, is alienable, devisable, and inheritable. Unlike joint tenancy, tenancy in common provides no right of survivorship, and there is no requirement that the cotenants' shares be equal. Notwithstanding the simplicity of the estate, tenancy in common can cause some of the trickiest problems in one particular instance: the operation of the law of adverse possession.

In American law, adverse possession continues generally to operate according to common law principles.² It is a common assumption that in Australian law the operation of Torrens title, and especially the concept of indefeasibility, obviates the operation of adverse possession.³ That misunderstands the Australian position. In fact, while it is true that adverse possession fundamentally undermines the operation of a system of title by registration, every Australian state nonetheless recognises circumstances in which an adverse possessor may still acquire either an enforceable interest or title to land over a registered owner with indefeasible title.⁴ The strength of

* JD (Harvard, 1974); PhD (Harvard, 1977); William Rand Kenan, Jr Professor of Law, University of North Carolina. Parts of this article draw upon Paul Babie, 'The Crown and Possessory Title of Torrens Land in South Australia' (2016) 6(1) *Property Law Review* 46; Paul Babie and John Orth, 'The Troubled Borderlands of Torrens Indefeasibility: Lessons from Australia and the United States' (2017) 7(1) *Property Law Review* 33. The author gratefully acknowledges the assistance of Professor Paul Babie with the Australian authorities.

¹ Anthony P Moore, Scott Grattan and Lynden Griggs, *Bradbrook, MacCallum and Moore's Australian Real Property Law* (Lawbook, 6th ed, 2016) 562–3.

² See John Lovett, 'Disseisin, Doubt, and Debate: Adverse Possession Scholarship in the United States (1881–1986)' (2017) 5(1) *Texas A&M Law Review* 1.

³ See Lynden Griggs, 'Possessory Titles in a System of Titles by Registration' (1999) 21(2) *Adelaide Law Review* 157. Griggs argues that titles based upon possession are inconsistent with a system of title by registration.

⁴ Moore, Grattan and Griggs (n 1) 122–3.

such a claim, however, varies significantly across different Australian jurisdictions.⁵ In Victoria and Western Australia, for instance, and to some extent in Tasmania, the ‘acquisition of title by possession applies fully to Torrens land’.⁶ In Queensland, the legislation also recognises adverse possession as an exception to indefeasibility of title, but only where the adverse possessor can demonstrate they have been in adverse possession of the land for the requisite statutory period.⁷ In New South Wales, the legislation provides that an adverse possessor may only make a claim to acquire title against a registered title to land to the Registrar-General where ‘the title of the registered proprietor would ... have been extinguished’ under the limitation statute and the application is made in respect of a ‘whole parcel of land’.⁸ And in South Australia, subject to legislative conditions,⁹ title by adverse possession can only be obtained over Torrens land where a person who would have extinguished the title of the true owner of the land, would have done so if the land had been held under the general law.¹⁰ The South Australian provisions

strike a balance between absolutely securing the title to a person’s estate or interest and the competing principle that public interest demands that if a person chooses to abandon those rights for a long period of time there should be a method of clearing the title to the land so that it can be utilised for public benefit.¹¹

Australian Torrens title legislation seems therefore to allow the cutting short of an otherwise indefeasible title through satisfying the conditions of adverse possession.

But what about a tenant in common? Typically, because all cotenants have an equal right to possession, the possession of one cotenant is not considered adverse to the rights of other cotenants: ‘[i]n the absence of wrongful exclusion and of statutory intervention, possession by one co-owner for any period of time would not bar the right and title of the co-owners out of possession’.¹² To start the running of the limitation period on which the doctrine of adverse possession is based, a cotenant who claims more than the cotenant’s share must oust, or wrongfully exclude, the other cotenants. A recent case decided by the Supreme Court of Montana addressed the question of whether a deed (in Torrens, the registration of a transfer) by less than all cotenants purporting to convey the entire estate to a third party constitutes ouster or wrongful exclusion and begins the running of the limitation period. This remains

⁵ Ibid 122–3, 178–85.

⁶ Ibid 179–81. See also *Transfer of Land Act 1958* (Vic) ss 42(2)(b), 60–2; *Transfer of Land Act 1893* (WA) ss 68(1A), 222–223A; *Land Titles Act 1980* (Tas) ss 40(3)(h), 138T–138Y.

⁷ *Land Title Act 1994* (Qld) pt 6 div 5, s 185(1)(d), sch 2 (definition of ‘adverse possessor’); *Limitation of Actions Act 1974* (Qld) s 13.

⁸ *Real Property Act 1900* (NSW) s 45D(1).

⁹ *Real Property Act 1886* (SA) ss 80A–80I, 251.

¹⁰ Ibid s 80A.

¹¹ Douglas J Whalan, *The Torrens System in Australia* (Lawbook, 1982) 328.

¹² Moore, Grattan and Griggs (n 1) 161.

an open question in both Australian and American law, and so the case provides important guidance for both jurisdictions.¹³

II THE FACTUAL BACKGROUND

The chain of events that resulted in the lawsuit began in 1987 when Rose Bisceglia died intestate. The one-half interest in certain real property that she owned at death passed in equal shares to her husband George Salituro and her daughter by a prior marriage, Josephine Palese. Angelo Bisceglia, Rose's brother and the owner of the other one-half interest in the property, recorded an affidavit of heirship in the county property records which listed Rose's surviving child Josephine, but did not include Rose's surviving husband George.¹⁴ According to the record, neither Angelo nor Josephine realised that George took an interest in Rose's property by intestate succession.¹⁵ In 1988, Josephine and Angelo¹⁶ executed a deed purporting to convey the entire estate to Josephine's two children, Mary Jo Davis and Anthony Palese.¹⁷ From 1988 to 1997, Mary Jo and Anthony paid all the property taxes and executed leases for grazing and farming. In 1997, they sold the property to Mark Nelson and Jo Marie Nelson ('the Nelsons'),¹⁸ reserving to themselves an undivided one-half interest in 'oil, gas, and other minerals in and under' the property.¹⁹

From 2006, the Nelsons began leasing the property for oil and gas development. A subsequent title examination discovered the overlooked one-quarter interest that had passed to George on the death of his wife, Rose. George died intestate in 1991 and his one-quarter interest passed in equal shares to his two children by a prior marriage, George Salituro Jr and Rose Salituro ('the Salituros').

III THE DECISION OF THE MONTANA SUPREME COURT

The present action began when the Nelsons filed a quiet title action against Mary Jo and Anthony, their grantors and claimants of a one-half interest in the mineral estate,

¹³ *Nelson v Davis*, 417 P 3d 333 (Mont, 2018) ('*Nelson*').

¹⁴ The judgment indicates that there were no intestacy proceedings, so it is unclear in what capacity Angelo was acting when he filed the affidavit of heirship, nor is it explained why George took no part in settling his wife's estate.

¹⁵ *Nelson* (n 13) 335–6.

¹⁶ Josephine and Angelo were joined in the deed by their respective spouses, presumably to waive any spousal survival rights: *ibid* 336.

¹⁷ The opinion does not mention whether the deed to Mary Jo and Anthony included warranties of title, or whether Mary Jo and Anthony were purchasers for a valuable consideration.

¹⁸ Although not stated in the judgment, Mark Nelson and Jo Marie Nelson are assumed to be husband and wife.

¹⁹ *Nelson* (n 13) 336. It is not indicated whether the deed to the Nelsons included warranties of title.

and the Salituros, joint claimants of an undivided one-quarter interest in fee as heirs of their father George.²⁰ Concluding that Mary Jo and Anthony had extinguished the Salituros' interest by adverse possession prior to 1997, the District Court granted summary judgment in favour of the Nelsons and quieted title in them, except for the one-half interest in the mineral estate reserved by Mary Jo and Anthony.

On appeal to the Supreme Court of Montana, the Salituros argued that they had received no notice of any adverse claim and that the acts of the other cotenants were consistent with their all holding together as tenants in common. In reply, the Nelsons, and Mary Jo and Anthony, argued that 'a conveyance of the whole property to a stranger to the cotenancy, together with taking possession thereof, amounts to an ouster of one's cotenants'.²¹ Montana law on adverse possession, like that in most American states, requires that an adverse possessor must prove 'actual, visible, exclusive, hostile and continuous possession for the full statutory period'.²² In Montana, the statutory period is five years for an occupant who enters and founds a claim of title 'upon a written instrument as being a conveyance of the property',²³ and pays the property taxes.²⁴ A person enters under such a claim if the person holds the land under 'any instrument purporting to convey the land or the right to its possession, provided the claim is made thereunder in good faith'.²⁵

²⁰ A quiet title action is an action commenced by a plaintiff against all adverse claimants to establish title to land. Because few American titles are registered in a Torrens-type system, the action provides a means to secure a judicial determination of title.

²¹ *Nelson* (n 13) 337.

²² *Ibid*, quoting *Y A Bar Livestock Co v Harkness*, 887 P 2d 1211, 1213 (Mont, 1994) ('*Y A Bar Livestock Co*'). The principles in Australian law are virtually identical, requiring that the possession be 'open, not secret; peaceful, not by force; and adverse, not by consent of the true owner': *Mulcahy v Curramore Pty Ltd* [1974] 2 NSWLR 464, 475 (Bowen CJ in Eq). See also *Re Riley and the Real Property Act* [1965] NSWLR 994; *Harris v Wogama Pty Ltd* [1969] 1 NSWLR 245; *Solling v Broughton* [1893] AC 556; *Cawthorne v Thomas* (1993) 6 BPR 97,515.

²³ Mont Code Ann § 70-19-407 (LexisNexis 2019). Such a written instrument is commonly said to give the claimant color of title. '[Color of title is created by] a title that is imperfect, but not so obviously so that it would be apparent to one not skilled in the law': *Nelson* (n 13) 338, quoting *Y A Bar Livestock Co* (n 22) 1216 (alterations in original).

²⁴ Mont Code Ann § 70-19-411 (LexisNexis 2019). Different limitation periods exist in each Australian state and territory. An excellent summary of each is found in Robina Kidd et al, 'Overview — Possessory Title', *LexisNexis Practical Guidance* (Web Page, 2019) <<http://lexisweb.lexisnexis.com.au/Practical-Guidance-Topic.aspx?tid=1094>>. In South Australia, for instance, claims for recovery of land must be made within 15 years after the right of action has accrued: *Limitation of Actions Act 1936* (SA) s 4.

²⁵ *Nelson* (n 13) 337, quoting *Fitschen Bros Commercial Co v Noyes' Estate*, 246 P 773, 779 (Mont, 1926) ('*Fitschen Bros Commercial Co*'). The Court created some confusion when, later in the opinion, it stated that the deed from Angelo and Josephine gave Mary Jo and Anthony color of title 'because the deed purported to convey the entirety of the Property, was not void on its face, and was made in good faith': *Nelson*

Although traditionally ouster required notice to the other cotenant that the possessor was claiming an interest ‘hostile and adverse to the fellow cotenant’s interest’,²⁶ a prior Montana judicial decision held that possession under a deed purporting to convey the entire property is hostile to another cotenant who is ‘charged with knowledge of the hostile character thereof’.²⁷ Affirming the District Court’s ruling in favour of Mary Jo and Anthony, the Supreme Court held that ‘[t]heir entry under color of title constitutes ouster’.²⁸

Although the Court did not use the term in referring to the ouster, it would normally be described as ‘constructive ouster’, just as the notice charged to the Salituros would be described as ‘constructive notice’.²⁹ For the statute of limitations to perform its title-clearing function in cases of cotenancies, there must be an ouster to begin its running. The ouster, whether actual or constructive as in this case, is the moment when the cause of action for possession accrues. Qualifying ouster and notice as ‘constructive’ is merely a legal fiction to reconcile the rules of cotenancies with a result the Court finds just under all the circumstances.³⁰

It is unclear what weight the Court attached to recordation in this case. While in its statement of facts the Court mentioned that the public records in the county ‘included an affidavit of heirship from Angelo purporting to account for all Bisceglia heirs’,³¹ only in the penultimate paragraph of the opinion did the Court add that the record also included the deed from Angelo and Josephine to Mary Jo and Anthony. And only in the last paragraph did the Court state that because Mary Jo and Anthony had ‘entered under a recorded deed that purported to convey to them the entirety of the Property, Davis and Palese’s [Mary Jo and Anthony’s] initial entry of the Property was “obviously consistent with the disclaimer and disavowal of other tenants’ interests”’ that is required for ouster.³² Further complicating the issue is the Court’s statement in a footnote that its holding was ‘consistent with the clear weight of authority that ouster occurs when one cotenant purports to convey the entire property to a party

(n 13) 338. The proper test seems to be whether the grantees (Mary Jo and Anthony) took title in good faith, not whether the grantors (Angelo and Josephine) conveyed the property in good faith.

²⁶ Ibid 337, citing *Y A Bar Livestock Co* (n 22) 1214–15.

²⁷ Ibid, quoting *Fitschen Bros Commercial Co* (n 25) 780.

²⁸ Ibid 339. Because the Court held that ‘[w]hen Davis and Palese conveyed the Property to the Nelsons in 1997, the Salituros’ interests in the Property already had been extinguished’, there was no need to discuss adverse possession of the mineral estate: at 339.

²⁹ The only mention of constructive knowledge in the opinion was the finding that Mary Jo and Anthony had ‘no actual or constructive knowledge that they were cotenants with anyone’: *ibid* 338.

³⁰ On the use of legal fictions in property law: see John V Orth, *Reappraisals in the Law of Property* (Taylor & Francis, 2010) 105–15.

³¹ *Nelson* (n 13) 338.

³² Ibid 339, quoting *Fitschen Bros Commercial Co* (n 25) 779. Of course, had Angelo and Josephine not conveyed to Mary Jo and Anthony, there would have been no deed of record but only the affidavit of heirship.

that was not previously a cotenant, *a deed of transfer is recorded*, and the transferee takes possession of the property'.³³

It is difficult to see what the Salituros should have done to get actual notice of the 'disclaimer and disavowal' of their interest. Even if they had learned of their father's intestate succession to a one-quarter interest in the property, which passed to them on his death, observation of their cotenants' occupancy would not necessarily have put them on notice that their cotenants were claiming sole ownership of the entire estate. As the Court recognised, 'many of the acts upon which Mary Jo and Anthony rely to demonstrate possession and occupation would be consistent with holding an interest in a cotenancy if Mary Jo and Anthony's interest were not hostile'.³⁴ And it would be inconsistent with the usual effect attributed to recordation to charge the Salituros with record notice of the hostile claim. Although it is sometimes said that recording a deed gives constructive notice to all the world, it is generally recognised that it is 'constructive notice only to those who are bound to search for it: [such as] subsequent purchasers and mortgagees, and perhaps all others who deal with or on the credit of the title';³⁵ a category of persons that does not include cotenants.

IV CONCLUSION

To a great extent, the doctrine of indefeasibility eliminates many common law principles relating to possessory title to land. In the initial period following the introduction of Torrens title in Australia, it was thought that adverse possession was one of those vestiges of the common law that would disappear with the operation of title by registration. That has not been the case, with all Australian jurisdictions either retaining, or reintroducing in statutory form, the operation of adverse possession. Questions remain unanswered, including those raised by the facts in *Nelson*. As such, the decision of the Supreme Court of Montana proves instructive not only for American law, but Australian too.

³³ Ibid 338 n 2 (emphasis added). The Court cited nine cases from other jurisdictions. 'A minority of jurisdictions hold that a deed purporting to transfer the entire estate to a non-cotenant party does not meet the requirements of ouster': at 338 n 2, citing *Johnson v McLamb*, 101 SE 2d 311 (NC, 1958).

³⁴ Ibid 339. The fact that Mary Jo and Anthony paid the property taxes is not itself conclusive of their adverse claim since tax-paying cotenants are entitled to demand contribution from the other cotenants. See David A Thomas (ed), *Thompson on Real Property* (LexisNexis, 2nd ed, 2004) vol 4, § 31.07(b).

³⁵ *Maul v Rider*, 59 Pa 167, 171 (1868).