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## Adverse Possession--Personal Property--Acquiring Title to Personal Property by Adverse Possession in West Virginia

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## STUDENT NOTES

### **Adverse Possession — Personal Property — Acquiring Title to Personal Property by Adverse Possession in West Virginia**

The expression common to children, “finders, keepers; losers, weepers,” is often sufficient to resolve a dispute over the ownership of some previously lost item of little value. When, however, the lost item is of substantial value, a question arises that may require claimants to resort to the courts for an answer. Frequently the question of ownership of property claimed by two people, one having possession and one asserting better title, can be resolved by looking to the statutes or the common law. This is especially true with real estate since the recording laws and the laws of adverse possession apply. A more difficult question arises when dealing with personal property. This can be illustrated by the following example. *D* was the owner of Blackacre, located in Monongalia County, West Virginia, in 1960. During that year *P* was hunting on Blackacre and inadvertently lost his valuable electric wristwatch when the strap got caught in the branch of a tree. A few days later *D* found the watch and attempted to locate the owner without success. *D* then had a new strap put on the watch and started wearing it and claiming it as his own.

*P* saw *D* wearing the watch last week and sought its return. *D* has refused to return the watch to *P*.<sup>1</sup>

This example focuses on the fundamental question to be considered in this note: Can title to personal property be acquired by adverse possession in West Virginia?

It is a rule of statutory law in most states that one in actual possession of realty, who meets certain basic requirements, can, on the expiration of a specified period, gain better title to that property than he had when he took possession. As the West Virginia Supreme Court of Appeals has stated, when one goes into open, obvious, notorious, and exclusive possession of land, which is adverse to the true owner, and continues in possession for a period of ten years under claim of right or color of title, the statute of limitations will have run and cut off the first owner's remedy of ejectment as well as

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<sup>1</sup> Problem submitted to author by Londo H. Brown, Professor of Law, West Virginia University. Originally an assignment for Land Transactions Seminar.

his rights of ownership in the land.<sup>2</sup> This is the typical rule of adverse possession as it concerns real property.

In West Virginia, the period of the statute of limitations for acquiring title to real property by adverse possession is ten years. The statute provides that an action to recover land must be brought, if at all, within ten years from the date the action accrued.<sup>3</sup> The passage of the ten years bars any action for recovery and vests title in the adverse possessor.<sup>4</sup> However, this statute is limited to actions to recover land and is not applicable to actions to recover possession of personal property. No statute specifically limits the time in which an action to recover personal property may be brought.

As a general proposition, statutes of limitation operate only on the remedy and do not extinguish the right.<sup>5</sup> Yet, when applied to the recovery of land, once the statute of limitations has run it operates to cut off one's right to bring an action for the recovery of the property adversely possessed by another and transfers the legal title to the adverse holder, thus disseising the previous owner of the title<sup>6</sup>.

At one time these same general principles applied to the acquisition of title to personal property.<sup>7</sup> As early as 1883, the West Virginia Supreme Court of Appeals said that "[w]hen the period prescribed by statute has once run, so as to cut off the remedy one might have had for the recovery of property in the possession of another, the title to the property [is] vested in the possessor . . . ."<sup>8</sup> Two things should be noted in this statement. First, the court used the word property and did not limit its meaning to realty. The word property is commonly used to denote everything subject to ownership; this includes real and personal property.<sup>9</sup> Second, the court referred to a "statutory period" that must run before title passes. Obviously, there must have been some statute of limitations established by the legislature after the running of which any remedy was lost and title passed. West Virginia did have such a statute of limitations that applied to personal property and would bar recovery from an adverse possessor after the running

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<sup>2</sup> *Core v. Faupel*, 24 W. Va. 238 (1884).

<sup>3</sup> W. VA. CODE ch. 55, art. 2, § 1 (Michie 1966).

<sup>4</sup> *Calvert v. Murphy*, 73 W. Va. 731, 81 S.E. 403 (1914); *Bennett v. Pierce*, 50 W. Va. 604, 40 S.E. 395 (1901).

<sup>5</sup> *Korczyk v. Solonku*, 130 W. Va. 211, 218, 42 S.E.2d 814, 819 (1947).

<sup>6</sup> *Core v. Faupel*, 24 W. Va. 238 (1884).

<sup>7</sup> *In re Estate of Wright*, 192 F. Supp. 812, 815 (D.V.I. 1961).

<sup>8</sup> *Hall v. Webb*, 21 W. Va. 318, 325 (1883).

<sup>9</sup> W. VA. CODE ch. 2, art. 2, § 10(r) (Michie 1966).

of the prescribed period. Prior to being substantially rewritten in 1959, this statute provided:<sup>10</sup>

Every personal action for which no limitation is otherwise prescribed, shall be brought within five years next after the right to bring the same shall have accrued, if it be for a matter of such nature that, in case a party dies, it can be brought by or against his representative and if it be for a matter not of such nature, shall be brought within one year next after the right to bring the same shall have accrued, and not after.

No other statute prescribed a limitation on the time to bring an action to recover possession of personal property. The West Virginia Supreme Court of Appeals, therefore, applied this statute of limitations to actions for the recovery of personal property and stated that the period under the statute of limitations for an action for the unlawful conversion of personal property, or for its proceeds, if sold, is five years.<sup>11</sup> In 1893 the West Virginia court again held, "the statute of limitations in this State is not only negative in barring the remedy, but [also] creates a positive, prescriptive right to personal property, as well as real estate . . ."<sup>12</sup> That principle was concisely stated in *Rees v. Rees*; the court held "where a statute of limitations is a bar to a suit for the recovery of personal property after a certain number of years, peaceable possession of the property for the statutory time will defeat a suit for its recovery by the former owner . . ."<sup>13</sup> Uninterrupted possession of personal property for more than five years barred a suit for recovery by the former owner.<sup>14</sup>

This statute remained unchanged in West Virginia until 1949 when it was amended. The 1949 amendment reduced the limitation period for actions that survive from five years to two years.<sup>15</sup> The statute was substantially amended in 1959 to its present form. Today that statute provides as follows:

Every personal action for which no limitation is otherwise prescribed shall be brought: (a) Within two years next after the right to bring the same shall have accrued, if it be for damage to property; (b) within two years next after the

<sup>10</sup> Acts of the 16th W. Va. Leg. ch. 102, § 12, Reg. Sess. (1882).

<sup>11</sup> *Thompson v. Whitaker Iron Co.*, 41 W. Va. 574, 23 S.E. 795 (1895).

<sup>12</sup> *Thornburg v. Bowen*, 37 W. Va. 538, 543, 16 S.E. 825, 827 (1893).

<sup>13</sup> *Rees v. Rees*, 82 W. Va. 598, 599, 96 S.E. 1019 (1918).

<sup>14</sup> *Id.*

<sup>15</sup> Acts of the 49th W. Va. Leg. ch. 2, Reg. Sess. (1949).

right to bring the same shall have accrued if it be for damages for personal injuries; and (c) within one year next after the right to bring the same shall have accrued if it be for any matter of such nature that, in case the party dies, it could not have been brought at common law by or against his personal representative.<sup>16</sup>

It is important to note that none of the three subsections could properly be called a statute of limitations for an action for recovery of wrongfully withheld (adversely possessed) property. Subsection (a) refers to damage to property; subsection (b) refers to personal injuries; and subsection (c) refers to actions that do not survive. An action to recover possession of real or personal property from an adverse holder was, at common law, an action that would survive the death of the owner of such property. "Causes of action . . . that survive, and may be prosecuted by or against a personal representative, primarily and generally are those which affect property or property rights, the wrong to the person being merely incidental."<sup>17</sup> Therefore, an action to recover possession of personal property is not included in subsection (c); the personal representative of the owner takes such rights as the owner had, subject to the same limitations as existed prior to his death.

Before the 1959 amendment the statute was in general terms; its limitations applied to all personal actions for which no limitation was otherwise prescribed. Although the statute was divided into two parts, one pertaining to actions that survive the owner's death, and the other pertaining to actions that do not survive, it could hardly be called restrictive. Actions either survive or do not survive; thus either special statutes of limitation for personal actions or the general statute<sup>18</sup> controlled the situation. The 1959 amendment completely revised the statute; the time limitations set forth restrict only those actions specifically named in the statute.

The West Virginia Supreme Court of Appeals has frequently applied the legal maxim *expressio unius est exclusio alterius* in the interpretation of statutes; the express mention of one thing implies the exclusion of another.<sup>19</sup> Thus, there is no reason to anticipate that a liberal construction of the terms of the amended statute will result

<sup>16</sup> W. VA. CODE ch. 55, art. 2, § 12 (Michie 1966).

<sup>17</sup> Kinney v. West Union, 79 W. Va. 463, 466, 91 S.E. 260, 261 (1917).

<sup>18</sup> Acts of the 49th W. Va. Leg. ch. 2, Reg. Sess. (1949).

<sup>19</sup> State ex rel. Battle v. Hereford, 148 W. Va. 97, 103, 133 S.E.2d 86, 88 (1963).

in an implied inclusion of a statute of limitations respecting personal property. The failure to provide for it would be presumed to show that such omission was intentional.

West Virginia needs a statute of limitations that would enable one to acquire title to personal property by adverse possession. Without such a statute, actions for recovery can be brought long after one could reasonably assume any claim to the item still exists. This presents a hazard for the public and a burden for the courts. Inequity results from permitting the prior owner to sit on his rights unreasonably without suffering any loss.

As for the hypothetical problem, under current West Virginia law, *P* would have no difficulty in recovering the watch from *D* even though *D* had acted reasonably in seeking the prior owner and had met all requirements for acquiring title to the watch by adverse possession customarily applied where real property is involved.

It would be relatively easy to amend the present statute so as to include actions for the recovery of property. Subsection (a) could be changed to read as follows: "Within two years next after the right to bring the same shall have accrued, if it be for damage to, *or the recovery of*, property." It would be necessary to add only the four italicized words in order for the statute to apply to actions for the recovery of personal property. Under the present law, it appears that West Virginia has been without a statute of limitations that would enable title to personal property to be acquired by adverse possession since 1959.

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