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LAW NOTES

CONSTRUCTIVE ADVERSE POSSESSION UNDER COLOR OF TITLE IN SOUTH CAROLINA

As used in treating of adverse possession, "color of title" is an instrument or a record which appears to convey title but which in fact does not have that effect.[1] Though the doctrine of color of title seems to be a product of American jurisprudence,[2] there is a doctrine of evidence applicable to prescriptive possession and somewhat similar to the doctrine of color of title which has been fully developed in England.[3] This doctrine will be discussed later. While accepting the authority relative to an American origin, the writer has found no acceptable authority as to when and where the idea denoted by the phrase "color of title" was first utilized in the substantive law of real property. As early as 1824 Judge Henderson, a member of a highly respected court, in discussing adverse possession said:

> Color of title, as applicable to the present subject is evidently the production of our own country. I will not therefore go abroad for an explanation; the name, I presume, is taken from that which is called giving colour in pleading, which is never used in this state, and not often, I believe, in England. * * * Giving colour in pleading, is giving to your adversary a title which is defective, but not obviously so, that it would be apparent to one not skilled in the law; it must be such as would perplex a layman; it, therefore, draws the consideration of the question from the jury (the lay gents) to the court, which is the object of the pleading.[4]

Even earlier the rule was acknowledged and applied in Vermont,[5] and, in 1818, in the case of *Read v. Eifert*,[6] our Court construed an old statute[7] in holding that possession of a part under color of title give possession of the whole.

1. 3 AMERICAN LAW OF PROPERTY, p. 785 (1st ed. 1952).
2. Philbin v. Carr, 75 Ind. App. 560, 129 N. E. 19 (1920); Tate v. Southard, 3 Hawks 119 (N. C. 1824).
3. 2 WIGMORE, EVIDENCE § 378 (3rd ed .1940).
4. Tate v. Southard, 3 Hawks 119 (N. C. 1824).
5. Pearsal v. Thorp, 1 D. Chip 92 (Vt. 1797).
6. I Nott & McCord 374 (S. C. 1818).
7. Apparently passed in 1712 according to a statement in King v. Smith, Rice 10 (S. C. 1838), to the effect that Read v. Eifert was decided with reference to such a statute.

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Despite the fact that a statute was the basis for the definite adoption of the rule in South Carolina, the Court placed more emphasis on practical considerations. Reference was made to the fact that few lawyers resided in the back country, and that consequently many deeds were defective. The Court also pointed out at some length the confusion which had resulted prior to the adoption of a definite standard as to the extent of possession under color of title. The decision in the case set at rest a controversy of approximately twenty years standing on the merits of the proposition that an adverse possessor under color of title should be given constructive possession to the limits of the tract described in his deed.[8]

But what is the significance of the phrase "color of title"? In the leading case of *Philbin v. Carr*,[9] the Appellate Court of Indiana, speaking through Justice Dausman, said:

> Literally, of course, it signifies that which resembles title, has the appearance of title, looks like title, purports to be title; but in fact is not title. Obviously that is its general meaning.

And Justice Cheves, speaking for the Constitutional Court of South Carolina in the year 1817, said:

> I understand, by colour of title any written muniment, purporting to vest title in the person claiming. I say written, for although I think a descent, cast, and the like, will equally, in an abstract sense, constitute color of title, it is not used, in this sense, by those who introduce it.[10]

Color of title in South Carolina has known a common law and a statutory existence. This note will be devoted to an

8. After reviewing the cases on the subject in South Carolina, and referring, incidentally, to the fact that no information was to be had prior to 1793, and pointing out that much confusion had resulted from the waivering attitude of the court on the point, the court said, in reference to the previous rule that the extent of possession was to be left to the jury, that: "This was not the only defect. Another still more insurmountable difficulty occurred under this rule. It was this; when the jury found one, two, three or four fold of wood land, neither they or anybody else, concerned in the case, knew where to locate it. They had no such power. They could not say, it shall be placed on the north or south, east or west of the cultivated land. Nor had the judge, who presided over the case, any such power. And the surveyors would be entirely premature if they should attempt to fix the boundaries before the trial; because they could never tell whom the Jury would find their verdict for, nor could they possibly devine how much woodland, or on what side the Jury would find it."

9. See Note 2 *supra*.

10. Williams v. McGee, 1 Mill's Const. 85 (S. C. 1817).

examination of the cases, both before and after the legislative enactments[11] relating to the doctrine, with a view in mind of determining its present status. Special consideration will be given to the two main elements of the rule: What is necessary to constitute color of title, and the extent of possession under color of title.

THE STATUS OF THE DOCTRINE IN SOUTH CAROLINA

In determining the status of the South Carolina doctrine, the first question to be considered is the requirement of a writing as color of title. The majority of states require, aside from any question as to the kind of writing, that there be a writing describing the boundaries before color of title can be claimed.[12] A few cases hold that color of title may exist under a parol gift or sale.[13] Most authorities agree that the reason for the minority holding is the failure of the courts to distinguish between "claim of title" and "color of title". Claim of title means nothing more than the person entering into possession must enter with the intention of claiming the land as his own in order to constitute his possession adverse.[14] Color of title is not an element of adverse possession, but is supplemental to it, extending the possession.[15]

Though the doctrine of color of title has not been adopted in England, a doctrine of evidence applicable to prescriptive possession has been fully developed.[16] Under the English doctrine possession of a whole tract of land may be inferred from specific instances of possession of parts of it, the idea being that the separate instances of conduct in relation to the land indicate a larger and habitual course of conduct. "The conditions of admissibility are that the various acts should be so connected with each other, as to the topography of the place where they are done, that they suggest a system or course of conduct with reference to other parts of the adjacent land; *i. e.*, that the various places where the acts are shown should be parts of one estate, manor, way, range, sec-

11. CODE OF LAWS OF SOUTH CAROLINA, 1952 §§ 10-2422 — 10-2425.
12. Walker v. Oswald, 156 S. C. 424, 153 S. E. 286 (1930); Roe v. Doe ex. dem. Tenn. Coal, Iron & Ry. Co., 162 Ala. 151, 50 So. 230 (1909); Barrett v. Brewer, 153 N. C. 547, 69 S. E. 614 (1910).
13. Simmons v. Parsons, 2 Hill 492 (S. C. 1829), note; Sumner v. Murphy, 2 Hill 488 (S. C. 1834).
14. Carr v. Mouzon, 86 S. C. 461, 68 S. E. 661 (1910).
15. Fore v. Berry, 94 S. C. 71, 78 S. E. 706 (1913).
16. Stanley v. White, 14 East 332, 104 Eng. Rep. 630 (K. B. 1811); Barnes v. Mawson, 1 M. & S. 78, 105 Eng. Rep. 30 (K. B. 1813).

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tion, survey, or other entity, so that the acts done upon these would naturally be done only as a part of a system to do them, upon the other parts of the same entity. * * * Where the possession of the part is under a deed which covers a larger tract, the principle is the same,[17] but here the inference is stronger, because the deed, by marking the singleness of the entire tract, supplies the place of other evidence or unity of character".[18] Thus we find that in England, under a doctrine somewhat similar to the doctrine of color of title, a writing is not necessary to extend possession, but that the conduct of the claimant may give rise to an inference that land constructively possessed was actually possessed.

In *Williams v. McGee,*[19] decided shortly after *Read v. Eifert,*[20] the Court recognized that the latter case had settled the point that naked possession will give title and the point that actual possession of a part will, under certain evidence of claim, be considered a legal possession of the whole quantity claimed. In facing the problem of what evidence would be sufficient to extend the possession, the Court recognized the general requirement of a writing as color of title, but determined that a writing would not be necessary if the claimant should introduce other sufficient evidence. The following rules were suggested for the consideration of the Court when again faced with the problem:

> 1. That in all cases, the extent of the claim ought to be established unequivocally, and ought to have been uniform for the period required by the act to give title. 2. That naked possession should carry with it only the spot occupied, (an extreme case may occur, but it should be treated as an exception,) and superadded inclosures. 3. That actual possession of a part, under an unequivocal reference to a colourable title in writing, (defining this title as already mentioned,) or a survey made by public authority, should establish a legal possession co-extensive with the claim of title. 4. That actual possession of a part of a tract of land, well defined by use, or obvious and well known boundaries, shall be co-extensive, with the limits of such boundaries.[21]

17. Lancy v. Brock, 110 Ill. 609 (1884).
18. 2 WIGMORE, EVIDENCE § 378 (3rd ed. 1940).
19. Williams v. McGee, 1 Mill's Const. 85 (S. C. 1817).
20. Read v. Eifert, 1 Nott & McCord 374 (S. C. 1818).
21. See Note 19 *supra*, at page 97.

Cogitation upon the above stated rules leads the writer to conclude that the Court, or at least one member thereof, felt that the doctrine of color of title was not an exclusive means of extending actual possession to include that constructively possessed, but that sufficient evidence other than a writing would also perform the same service.

In connection with the above stated conclusion, the case of *Turpin v. Brannon*[22] might be considered. Though the actual holding of the Court was that a plat of resurvey was admissible to show the extent of the defendant's claim, the Court again viewed the problem as one of evidence, and indicated, by way of dicta, that a writing would not be necessary for constructive possession to be deemed actual possession.

In 2 Hill's Law Reports appear three interesting cases wherein the facts warranted a consideration of the doctrine of color of title. In the case of *Simmons v. Parsons*,[23] the plaintiff relied upon the adverse possession of one Littleton Parsons under a parol contract of purchase to establish his title. The Supreme Court affirmed the following charge of the trial judge:

> Color of title I defined to be anything which shows the extent of the occupant's claim. I told them that an equitable title, such as a bond, a receipt, or a written contract of purchase, and finally, *a parol contract of purchase, with well defined and known limits and boundaries, would be color of title,* and coupled with five years adverse possession would confer a good title in law of granted lands. (Emphasis added.)

Though the trial judge charged that a parol contract of purchase would be color of title, he did not charge that such parol contract, nothing else appearing, would be color of title. Its application was limited to the extent that the limits and boundaries of the tract in question be known and well defined.

The decision in the *Simmons* case was the basis for the holding in *Sumner v. Murphy*.[24] In an action by a son of Mill Sumner where the defendant relied on the possession of another son under a parol gift to establish his claim, the following portion of the Court's opinion is significant:

22. 3 McCord 261 (S. C. 1825).
23. Simmons v. Parsons, 2 Hill 492 (S. C. 1829), note; Sumner v. Murphy, 2 Hill 488 (S. C. 1834).
24. *Ibid.*

> This is giving to the parol gift its true effect. It does not operate as title *per se*; but it gives a character to the possession, and operates as a color of title to show how far the actual possession should have constructive effect.

While the opinion does not reveal what evidence, other than the parol gift, the defendant relied on to show the extent of his claim, the writer can only surmise that he did, in fact, rely upon other evidence. Otherwise, it seems that it would have been impossible for the defendant to establish the extent of his claim.

In the case of *M'Elwee v. Martin*,[25] decided during the same term, the Court was again faced with the problem of whether a parol gift would operate as color of title. The Court allowed the gift to so operate, but limited that operation to the extent that the limits of the gift should be well defined.

Another early case involving the parol gift problem might be mentioned. In *Golson v. Hook*,[26] the Court refused to allow a parol gift, nothing else appearing, to constitute color of title. Once more, the Court recognized the problem to be one of evidence.

While the holding of the foregoing case seems to be in conflict with the holding of *Sumner v. Murphy*[27] the cases have been distinguished.[28] Where the view prevails that a written instrument is essential to confer color of title, a distinction is made as to whether the claim of color of title is set up against the donor or persons in privity with him, or against persons not in privity. Where a donee claims against a person not in privity with the donor, as in *Golson v. Hook*,[29] the gift is not sufficient to constitute color of title. In the *Sumner* case, where annotators[30] have found privity to exist between the person against whom adverse possession was

25. 2 Hill 496 (S. C. 1834).
26. 4 Strob. 23 (S. C. 1849).
27. See Note 23 *supra*.
28. See Nicholson, *Adverse Possession — Effect of Possession Held Under a Parol Gift*, 4 S. C. L. Q. 320, 322 (1951).
29. Golson v. Hook, 4 Strob. 23 (S. C. 1849).
30. 2 A. L. R. 1457, 1466 (1919). The writer would differ with the opinion of the annotators as Sumner v. Murphy did not involve a controversy between a donee and a donor or one in privity with him, but a controversy between a devisee of one Mil Sumner and a defendant who had succeeded to the estate of the donee of Mil Sumner. To find privity between the plaintiff and defendant in this case seems to stretch the concept of privity applicable to the parol gift situation.

claimed and the donor, the Court allowed the parol gift to operate as color of title. It is significant to note that the Court did not mention this distinction in either case, and the presence or absence of privity was not alluded to by the Court in either opinion.

In 1870, there were enacted in this State certain statutes[31] which require any claim constituting color of title to be in writing. Three cases[32] decided subsequent to that year have adopted the definition of color of title announced in *Simmons v. Parsons*,[33] thereby indicating that, notwithstanding the aforementioned statutes, a writing is not necessary for color of title. Two observations might be made concerning these cases. First, in each case a writing was present; and, second, no mention was made of the statutory provisions bearing on the subject.

Several cases[34] involving a consideration of these statutes indicate that a writing is necessary for color of title. Probably the most interesting of these cases is *Haithcock v. Haithcock*.[35] In a portion of his charge to the jury in an action for recovery of real estate, the trial judge stated that a parol gift is not color of title and that color of title means a writing. In an earlier portion of his charge, however, the judge stated that if one in possession of a part of a tract of land marked out and fenced the tract, he would be in possession under color of title. In the words of the South Carolina Supreme Court, "His Honor charged the law applicable to the case, clearly and correctly * * * ." The reference to the conflicting statements made by the trial judge is not without purpose. It serve to illustrate a point which the writer would convey — that the definitions of color of title which may be found in the South Carolina cases are of negligible practical value.

In the writer's opinion, to view the problem from the standpoint of evidence as well as the standpoint of color of title is to view the problem properly. If sufficient evidence other

31. CODE OF LAWS OF SOUTH CAROLINA, 1952 §§ 10-2422 — 10-2425.
32. Duren v. Strait, 16 S. C. 465 (1881); Stanley v. Shoolbred, 25 S. C. 181 (1886); Heyward v. Farmer's Mining Company, 42 S. C. 138, 19 S. E. 963 (1894); reh. den. 42 S. C. 138, 20 S. E. 64 (1894).
33. Simmons v. Parsons, 2 Hill 492 (S. C. 1829), note; Sumner v. Murphy, 2 Hill 488 (S. C. 1834).
34. Haithcock v. Haithcock, 123 S. C. 61, 115 S. E. 727 (1922); Lyles v. Fellers, 138 S. C. 31, 136 S. E. 13 (1926); Walker v. Oswald, 156 S. C. 424, 153 S. E. 286 (1930).
35. *Ibid.*

than written evidence be introduced to show the extent of the claim, then the necessity for a writing disappears. As the amount of other evidence decreases the necessity for written evidence (color of title) increases. In conclusion, though the present status of the doctrine of color of title cannot be clearly determined from an examination of the cases, the writer feels that future problems may be obviated by a proper analysis of the situation.

WHAT INSTRUMENTS WILL SUFFICE

When a party claims title to land by adverse possession and introduces a writing in support of his claim, the question of the sufficiency of the writing to operate as color of title arises. Under Section 10-2422 of the 1952 Code, it is clear that color of title may consist only of a written instrument as being a conveyance of the premises in question, or a decree or judgment of a court.[36] In applying the above stated statute, the Court concluded that the words "as being a conveyance of the premises" show that the extent of the occupant's claim, founded on an instrument of writing, is not dependent upon the validity of such instrument.[37] Accordingly, a quit claim deed was held to be color of title although the grantor was without interest in the land conveyed.[38] However, a deed made with the intent to defraud creditors was held not to constitute color of title in the case of *Garvin v. Garvin.*[39] The Court therein adopted the rule[40] that the claim of color of title must be *prima facie* valid, or what purports to be valid.

Should a party find that his deed is defective, the possibility exists that he may relinquish his claim under the deed as a conveyance and seize upon the statute of limitations as a panacea, relying on the deed as color of title. Thus in the case of *Lyles v. Kirkpatrick,*[41] the Court held that possession for ten years under a deed deficient in point of proof for want of two subscribing witnesses cured the defect. Similarly, the statute may be relied upon to cure the defect arising

36. Lyles v. Fellers, 138 S. C. 31, 136 S. E. 13 (1926).
37. Kennedy v. Kennedy, 86 S. C. 483, 68 S. E. 664 (1910).
38. Graniteville Co. v. Williams, 209 S. C. 112, 39 S. E. 2d 202 (1946).
39. 40 S. C. 435, 19 S. E. 79 (1894).
40. TYLER, EJECTMENT, p. 870 (1st ed. 1876).
41. 9 S. C. 265 (1877).

from the omission of words of inheritance in deeds.[42] Further, an early South Carolina case[43] is a holding to the effect that an unregistered deed will operate as color of title and support a claim of adverse possession, thereby defeating the claim of a party holding under a subsequent recorded deed.

As the only office of color of title is to define the extent of the claim beyond the actual occupancy to the whole property described in the writing, it is not necessary that the writing should be in the form of a deed.[44] Other instruments held to be color of title in this State are: (1) an award of arbitrators, though ineffectual to pass title to land,[45] (2) a master's deed in partition, even though the proceedings were irregular,[46] (3) a will of a foreign state executed before two witnesses only an therefore insufficient to pass title to land,[47] (4) a mortgage,[48] and (5) a plat.[49] There exist, of course, other possibilities and the above list is not intended to be exclusive.

Suppose that the writing relied upon for color of title cannot be produced by the adverse claimant. Under such circumstances, the trial judge may in his discretion admit secondary evidence of its contents and thereby enable him to show the extent of his claim.[50] The writing, however, must have been in the possession of the claimant or of those under whom he held at sometime prior to the commencement of the action.[51]

It is well settled that the instrument under which a party holds adversely by color of title must define the extent of the claim.[52] But the mere fact that a mistake has been made in describing the land is not fatal. In *Fore v. Berry*,[53] the Court held that a description, although indefinite, is sufficient if the Court can, with the aid of extrinsic evidence which does not add to, enlarge, or in any way change the description fit it to the property conveyed by the deed. Accordingly, the

42. Carolina Sav. Bank v. McMahon, 37 S. C. 309, 16 S. E. 31 (1892). See Means, *Words of Inheritance in Deeds of Land*, 5 S. C. L. Q. 354-357.
43. Gordon's Lessee v. Parson's Ex'rs., 1 Bay 37 (S. C. 1786).
44. Fore v. Berry, 94 S. C. 71, 78 S. E. 706 (1913).
45. *Ibid.*
46. Weston v. Morgan, 162 S. C. 177, 160 S. E. 436 (1931).
47. Love v. Turner, 78 S. C. 513, 59 S. E. 529 (1907).
48. Frady v. Ivester, 129 S. C. 536, 125 S. E. 134 (1924).
49. Sprott v. Sprott, 114 S. C. 62, 96 S. E. 617 (1918).
50. Congdon v. Morgan, 14 S. C. 587 (1879).
51. Stanley v. Shoolbred, 25 S. C. 181 (1886).
52. Garvin v. Garvin, 40 S. C. 435, 19 S. E. 79 (1894).
53. Fore v. Berry, 94 S. C. 71, 78 S. E. 706 (1913).

Court therein held that a description as a three hundred acre tract of land in dispute between Willis Fore and E. B. Berry on January 4, 1886, was sufficient. Thus all that appears to be necessary is that there should be such a designation that the land may be identified by the description.[54] And a long continued possession appears to have the effect of curing a deficiency in the description contained in a deed when it is relied upon as color of title to establish an adverse possessor's claim.[55]

EXTENT OF POSSESSION

The difference in the extent of possession to which an adverse claimant is entitled where he claims under a written instrument as color of title and where his claim is not founded upon a written instrument is readily discernible from an examination of the statutory provision relating thereto.[56] In

54. Kirkland v. Way, 3 Rich. 4 (S. C. 1846). In the words of the court: "In order to give effect to a deed it is necessary that it should contain such a designation of the thing granted that it may be identified by the description. Land may be described by the name of the owner or occupant, or by the name of the tract, if, by either, the tract is well and commonly known; or by boundaries; or by reference to a plat; or by the number of acres. The certainty of the description depends on the accuracy with which these terms are applied. By the use of one, or all of them, the subject must be so described, that it may, with reasonable certainty be identified. The rules defining the certainty necessary in the description in a deed must be few and very general. In Shepard's Touchstone two are given pertinent to this case. First; where there is, in the first place a sufficient certainty and demonstration; and afterwards, an additional term of description, which fails in point of accuracy, it may be rejected as surplusage; and second, that if the terms of designation, which are essential to the description, cannot be satisfied, the grant must fail of effect entirely; or so far as the terms of the description cannot be satisfied."

55. Gourdin v. Davis, 2 Rich. 481 (S. C. 1846).

56. CODE OF LAWS OF SOUTH CAROLINA, 1952 §§ 10-2422 through 10-2425: § 10-2422. Occupation under written instrument, etc. "Whenever it shall appear (1) that the occupant or those under whom he claims entered into the possession of premises under claim of title, exclusive of any other right, founding such claim upon a written instrument as being a conveyance of the premises in question or upon a decree or judgment of a competent court and (2) that there has been a continued occupation and possession of the premises, or of some part of such premises, included in such instrument, decree or judgment under such claim for ten years the premises so included shall be deemed to have been held adversely, except that when the premises so included consist of a tract divided into lots the possession of one lot shall not be deemed a possession of any other lot of the same tract."

§ 10-2423. What constitutes adverse possession under written instrument, etc. "For the purpose of constituting an adverse possession by any person claiming a title founded upon a writen instrument or a judgment or decree, land shall be deemed to have been possessed and occupied in the following cases:

(1) When it has been usually cultivated or improved;
(2) When it has been protected by a substantial enclosure;

the case of *Walker v. Oswald*,[57] the Supreme Court, speaking through Justice Cothran, said:

> Under the Code * * *, there is a marked difference in the establishment of adverse possession, where the party setting it up is claiming under a written instrument, and where he is not.
>
> In the former he shall be deemed to have been possessed of and occupied the premises: where they have been usually cultivated or improved; where they have been protected by a substantial enclosure, or where, though not enclosed, they have been used for the supply of fuel, or of fencing timber, or for the purposes of husbandry, or for the ordinary use of the occupant. In the latter he shall be deemed to have been possessed in the following cases only: where the premises have been protected by a substantial enclosure; or where they have been usually cultivated and improved.

Generally, the courts hold that the constructive possession allowed the adverse possessor under color of title will extend only to the boundaries described in the instrument.[58] However, the case of *Witcover v. Grant*[59] seems to be an exception to this rule. This was an action to recover from the defendant 13.4 acres of land in a 238 acre tract. The Court held that a deed describing the defendant's holding as 25 acres and a plat describing his holding as 27.5 acres gave

(3) When, although not enclosed, it has been used for the supply of fuel or of fencing timber, for the purposes of husbandry or for the ordinary use of the occupant; and
(4) When a known farm or a single lot has been partly improved the portion of such farm or lot that may have been left not cleared or not enclosed, according to the usual course and custom of the adjoining country, shall be deemed to have been occupied for the same length of time as the part improved and cultivated."

§ 10-2424. Premises held adversely but not under written instrument. "When it shall appear that there has been an actual continued occupation of premises under a claim of title, exclusive of any other right but not founded upon a written instrument or a judgment or decree, the premises so actually occupied, and no other, shall be deemed to have been held adversely."

§ 10-2425. Adverse possession under claim of title not written. "For the purpose of constituting an adverse possession by a person claiming title not founded upon a written instrument or a judgment or decree, land shall be deemed to have been possessed in the following cases only:
(1) When it has been protected by a substantial enclosure; and
(2) When it has been usually cultivated or improved."

57. 156 S. C. 424, 426, 153 S. E. 286 (1930).
58. Johnson v. McMillan, 1 Strob. 143 (S. C. 1846).
59. 93 S. C. 190, 76 S. E. 274 (1911).

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him color of title to the line marked by the surveyor which gave him 38.4 acres. Here the plaintiff, as *holder of the legal title,* was in constructive possession of the land in dispute by virtue of his actual possession of part of the land. Under circumstances such as these, the adverse claimant should be limited to the land actually occupied by him; for such is the general rule[60] and an early South Carolina case[61] so holds. The undisputed evidence was to the effect that the defendant had used the disputed area for the purposes of husbandry and the ordinary uses of the occupant. Thus it seems that our statutory provisions raise a presumption of actual occupancy under such circumstances and that this presumption cannot be overcome by a showing of constructive possession in the owner. The case of *Battle v. DeVane*[62] is a holding by our Supreme Court that where land is used for any purpose mentioned in Section 10-2423 of the 1952 Code such use will overcome the constructive possession of the owner under a valid deed. To allow such acts as using the land for the supply of fuel or fencing timber to defeat the constructive possession of the true owner who may be unaware of such acts seems unconscionable, and therefore these holdings are subject to criticism.

CONCLUSION

Though there were two writings present in the *Witcover* case, *supra,* the Court awarded the defendant possession of a larger area than that evidenced by either writing. As the defendant's possession was extended to a line marked by a surveyor, it appears that a writing as color of title is not singularly determinative of the extent of the award to be made the adverse claimant, but that the Court will view all available evidence in reaching its decision. As it has been shown that under an English doctrine a writing is not necessary to support constructive possession, the writer feels that it is not unreasonable to assert that in this State evidence, other than written, will support constructive possession.

As a result of the statutory enactments and cases relating thereto, another problem involving the extent of possession has arisen. These cases, previously discussed, show that the constructive possession of an adverse claimant may overcome

60. 3 AMERICAN LAW OF PROPERTY, p. 820 (1st ed. 1952).
61. McBeth v. Donnelly, Dud. 177 (S. C. 1838).
62. 140 S. C. 305, 138 S. E. 821 (1927).

the constructive possession of an owner in actual possession of a portion of his land if the adverse claimant uses the land in dispute for any of the purposes listed in Section 10-2423 of the 1952 Code.

It is hoped that the Supreme Court will render proper solutions to these problems when they next present themselves.

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