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## Effect of Disability of Landowner with Respect to the Acquisition of Adverse Rights by Another by Statutes of Limitations, Presumption of a Grand, and Prescriptive Right in South Carolina

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**EFFECT OF DISABILITY OF LANDOWNER WITH  
RESPECT TO THE ACQUISITION OF ADVERSE  
RIGHTS BY ANOTHER BY STATUTES OF  
LIMITATIONS, PRESUMPTION OF A  
GRANT, AND PRESCRIPTIVE  
RIGHT IN SOUTH  
CAROLINA**

**INTRODUCTION**

Both corporeal and non-corporeal interests in land may be affected by possession or use adverse to that of the landowner. South Carolina law recognizes two distinct types of adverse possession affecting corporeal interests. The first type is the presumption of a grant; this doctrine is part of the common law, and exists independently of any statute.<sup>1</sup> The second type is statutory, and is the result of the various statutes of limitations in force in the jurisdiction. The acquisition of incorporeal rights by adverse user is referred to as the acquisition of easements in land by prescription.<sup>2</sup>

The purpose of this note is to discuss the effect of the various disabilities of the owner of South Carolina land with respect to the acquisition of interests adverse to the landowner by the three foregoing types of adverse possession or user.

**PRESUMPTION OF A GRANT**

The common law presumption of a grant is based upon the theory that after a long period of peaceful possession, the possessor, or those under whom he holds, will be presumed to have entered under a valid grant, now lost. This is a pure legal fiction, impelled by the desire of the law to quiet the title to and the possession of real property. In South Carolina, twenty years peaceful possession, adverse to the holder of the paper title, is sufficient to raise this presumption.<sup>3</sup> It is apparently necessary that the period run the full twenty years; possession for sixteen years has been held insuffi-

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1. *The Trustees of Wadsworth Poor School v. McCully*, 11 Rich. 424 (S. C. 1858); *McLeod v. Rogers*, 2 Rich. 19 (S. C. 1845).

2. *Williams v. Haile Gold Mining Co.*, 85 S. C. 1, 66 S. E. 117 (1910).

3. *Haithcock v. Haithcock*, 123 S. C. 61, 115 S. E. 727 (1922); *Sutton v. Clark*, 59 S. C. 440, 38 S. E. 150 (1900).

cient.<sup>4</sup> The twenty-year period was originally adopted by analogy to the twenty-year statute of limitations in effect at that time, but in this state the presumption has nothing to do with the statute of limitations, being based entirely upon a presumed grant.<sup>5</sup> It was early held in this jurisdiction that this presumption was one of fact, and was rebuttable.<sup>6</sup> However, this view was overruled by later cases, and the law is now settled that the presumption is one of law, and is not rebuttable.<sup>7</sup>

The grant is presumed to have been made at or before the beginning of the twenty-year period. Therefore, the original entry must be presumed to have been rightful, rather than tortious.<sup>8</sup> The heir, grantee, or devisee of the original presumptive grantee then must be presumed to have taken a valid interest in the land. In this way it is reasoned that the periods of possession of several successive adverse holders of the property may be added together, or "tacked," to constitute the necessary twenty-year period, if the parties so tacking are in privity, and if the possession of these holders is continuous.<sup>9</sup>

It is said that a grant will not be presumed against one who is incapable of making such a grant.<sup>10</sup> Thus this type of adverse possession will not run against one under a disability. The grant is presumed to have been made at or before the beginning of the twenty-year period, and it would seem that in order for the landowner to be protected because of his disability, it would be necessary for him to show that such disability existed at the time the grant is presumed to have been made. If the landowner is of sound mind at the beginning of the period, but becomes insane five years later, he still would have been able to make a valid grant at the time the period began to run. However, in this jurisdiction the landowner will be protected in the event of a subsequent dis-

4. *Anderson v. Hughes*, 5 Strob. 74 (S. C. 1850).

5. *Shubuick v. Adams*, 20 S. C. 49 (1883); *Trustees of Wadsworth Poor School v. McCulley*, 11 Rich. 424 (S. C. 1858).

6. *McLeod v. Rogers*, 2 Rich. 19 (S. C. 1845); *Simmons v. Parsons*, 2 Hill 492 (S. C. 1829).

7. *Haithecock v. Haithecock*, 123 S. C. 61, 115 S. E. 727 (1922); *Lewis v. Pope*, 86 S. C. 285, 68 S. E. 680 (1910).

8. *Adams v. Adams*, 220 S. C. 131, 66 S. E. 2d 809 (1951); *Ellen v. Ellen*, 16 S. C. 132 (1881).

9. *Lewis v. Pope*, 86 S. C. 285, 68 S. E. 680 (1910); *Powers v. Smith*, 80 S. C. 110, 61 S. E. 223 (1908).

10. *Spears v. Oakes*, 4 Rich. L. 347 (S. C. 1851); *Habersham v. Hopkins*, 4 Strob. 238 (S. C. 1850).

ability. No period during which the landowner was under a disability may be included in computing the twenty-year period.<sup>11</sup> Hence, disabilities may be tacked in order to defeat the presumption of a grant.

The reasoning of the courts here must be that the true justification of the presumption is that after the landowner and his predecessors have slept on their rights for twenty years, they should not now be allowed to dispossess those who have been in peaceful enjoyment of the land for so long a time. The courts will not look harshly upon the failure to sue if the person entitled to bring such suit is under a disability. The courts, in tolling the running of the period because of a subsequent disability, can therefore overlook the logical fallacy they must necessarily encounter if they should literally follow the theory of the presumption of a lost grant.

The disabilities which the courts recognize as protecting the landowner from the running of this twenty-year period are not necessarily the same as those recognized by the statute of limitations. Cases in this state have recognized infancy<sup>12</sup> and coverture<sup>13</sup> as such disabilities, although coverture is no longer recognized.<sup>14</sup> Insanity is provided for as a disability in the statute of limitations,<sup>15</sup> and there have been at least two cases arising under such provisions;<sup>16</sup> but the writer has been unable to find a case in this jurisdiction involving insanity in relation to the presumption of a grant. Insanity would seem to be a greater disability than coverture. A married woman was, even in past generations, quite likely to be cognizant of her rights, and to be able to have them acted upon, whereas an insane person might very well be totally unaware of the status of his proprietary affairs, as was evidently the case in *Cleveland v. Jones*.<sup>17</sup> No case has been found from South Carolina involving imprisonment of the landowner. Absence beyond the seas has been expressly repudiated as being a disability such as would stop the running

11. *Garrett v. Weinberg*, 48 S. C. 28, 26 S. E. 3 (1896); *Massey v. Adams*, 3 S. C. 254 (1871).

12. *Fore v. Berry*, 94 S. C. 71, 78 S. E. 706 (1912); *Garrett v. Weinberg*, 48 S. C. 28, 26 S. E. 3 (1896).

13. *Garrett v. Weinberg*, 48 S. C. 28, 26 S. E. 3 (1896).

14. *Ibid.*

15. CODE OF LAWS OF SOUTH CAROLINA, 1952 Sec. 10-128.

16. *Cathcart v. Hopkins*, 119 S. C. 190, 112 S. E. 64 (1921); *Cleveland v. Jones*, 3 Strob. 379 (S. C. 1837).

17. 3 Strob. 379 (S. C. 1837).

of the period,<sup>18</sup> even though such absence was treated as a disability by the statute of limitations in effect at the time of that decision.<sup>19</sup>

The fact that an infant, or person under other disability, cannot be presumed to have made a grant does not affect the possibility, or the presumption, of a grant from his cotenant. The defense of infancy is personal to the infant, and cannot protect his cotenants from such a presumption.<sup>20</sup>

#### STATUTORY ADVERSE POSSESSION

The first English statute of limitations which provided that no action could be brought for the recovery of real property after the party bringing the action, or his predecessors, had been out of seizin for a certain number of years was enacted in 1540,<sup>21</sup> but this statute applied only to the old real actions, and was not applicable to the action of ejectment.<sup>22</sup> The earlier statutes had specified a particular date, rather than a definite period of years, after which the complaining party or his predecessor must have been seized in order to maintain the action.<sup>23</sup> The statute which is the basis of the American statutes of limitations is that of James I,<sup>24</sup> enacted in 1623. This statute, which in effect included the action of ejectment within its limitations, allowed twenty years within which to bring an action for the recovery of real property. Five disabilities were provided for: infancy, insanity, coverture, absence beyond the seas, and imprisonment. It was provided that persons under any of these disabilities at the time of the accrual of the cause of action, or their successors in title, could bring suit within ten years after the removal of the disability, or within ten years after the death of the person so disabled.

The first statute of limitations enacted in South Carolina was enacted in 1697. This law was repealed in 1712, and the statute itself has been lost.<sup>25</sup> The statute of 1712<sup>26</sup> barred ac-

18. *Godfrey v. Schmidt*, Cheves' Eq. 57 (S. C. 1840).

19. 2 STAT. AT LARGE, p. 583 (S. C.). This provision remained in force until repealed in 1870. 14 STAT. AT LARGE § 4-96 (S. C. 1870).

20. *Garrett v. Weinberg*, 48 S. C. 28, 26 S. E. 3 (1896).

21. 32 Henry VIII. c. 2.

22. 4 TIFFANY, THE LAW OF REAL PROPERTY, Sec. 1133 (3d ed. 1939); 1 WALSH, COMMENTARIES ON THE LAW OF REAL PROPERTY, Sec. 15 (1947).

23. *Ibid.*

24. 21 James I. c. 16.

25. 2 STAT. AT LARGE, p. 130 (S. C.).

26. 2 STAT. AT LARGE, p. 583 (S. C.).

tion after five years adverse possession. It was provided that those persons under coverture, or imprisoned, or out of the province could bring suit within seven years, instead of five years, after the accrual of the cause of action. Infants were allowed until two years after reaching majority within which to bring their actions; this period being extended to three if the infants were beyond the seas. Insane persons were allowed one year after their return to sanity, two if overseas. Of course, these persons could still sue any time within five years after the accrual of the right to sue. This early statute recognized that insanity and infancy were the more important disabilities; infants and persons *non compos mentis* could not be barred while their disabilities continued.

In 1788, the time after reaching majority within which an infant was allowed to bring his action was extended from two years to five years.<sup>27</sup> In 1824, the statute was changed to allow ten years to the landowner to bring his action, instead of the previous five years.<sup>28</sup> Also enacted in 1824 was a provision that the statute of limitations was not to be construed to defeat the rights of minors, where the statute had not barred that right in the lifetime of the ancestor before the accrual of the right to the minor.<sup>29</sup>

In 1870, all the old statutes of limitation were repealed and a new set enacted.<sup>30</sup> The new statute allowed the landowner twenty years within which to recover his property.<sup>31</sup> Provision was made for the disabilities of infancy, insanity, and imprisonment for a term less than life.<sup>32</sup> Persons so disabled at the time of the accrual of the cause of action were allowed to sue within twenty years, or within ten years after the removal of the disability. In 1873, the general period of limitations was reduced to ten years, and the period of the exception in favor of those disabled reduced to five years.<sup>33</sup> In 1882, the period allowed after the removal of a disability was changed from five years to ten, the general period remaining ten years;<sup>34</sup> these periods of limitation have remained unchanged, and are the law today.

27. 5 STAT. AT LARGE, p. 77 (S. C.).

28. 6 STAT. AT LARGE, p. 238 (S. C.).

29. *Ibid.*

30. 14 STAT. AT LARGE, § 4-96 (S. C. 1870).

31. 14 STAT. AT LARGE, §§ 4-101, 4-102 (S. C. 1870).

32. 14 STAT. AT LARGE, § 4-111 (S. C. 1879).

33. 15 STAT. AT LARGE, p. 491 (S. C.).

34. S. C. CODE CIV. PROC., 1882 Sections 101, 108.

As the most important of the statutes of limitations stands today, it provides that no action shall be brought or defense maintained founded on the title to real estate, unless the party so doing, or his predecessor in title, was seized of the premises within ten years before the commencement of the action.<sup>35</sup>

Anyone under twenty-one years of age, insane, or imprisoned for a term less than life at the time of accrual of the action may sue within ten years of such time; or he may sue within ten years after the removal of such disability; or his successor may sue within ten years after the death of the party so disabled.<sup>36</sup> The fact that the landowner is absent from the state affords him no protection under this statute of limitations.<sup>37</sup> In addition, it is provided that in suits by or against enemy aliens, the period of the continuance of the war shall not be a part of the period limited for the commencing of an action.<sup>38</sup> This last provision is not found in the article of the code dealing specifically with actions for the recovery of real property, but is found rather in the preceding article dealing with the general provisions of the chapter concerning limitations upon civil actions.<sup>39</sup> The writer has discovered no cases in which this section has been construed. Civil actions are divided in this chapter into only two classes: actions for the recovery of real property, and actions other than for the recovery of real property. The general provisions of the chapter must then apply to both types unless expressly provided otherwise, and this particular provision must certainly be applicable to actions for the recovery of real estate as well as to other actions.

The justifications of the statute of limitations is that after the landowner has neglected to guard his rights, in that he has failed to bring an action within an ample period of time after the accrual of the cause of action, he should not be allowed to imperil the claim of another to the property; after such a passage of time, documents may have been lost or destroyed, memories may have become inaccurate and uncertain, and death may have silenced potential witnesses, resulting in the increased possibility of an unjust verdict.<sup>40</sup>

35. CODE OF LAWS OF SOUTH CAROLINA, 1952 Sections 10-124, 10-126.

36. CODE OF LAWS OF SOUTH CAROLINA, 1952 Sec. 10-128.

37. *Maccaw v. Crawley*, 59 S. C. 342, 37 S. E. 934 (1900).

38. CODE OF LAWS OF SOUTH CAROLINA, 1952 Sec. 10-108.

39. CODE OF LAWS OF SOUTH CAROLINA, 1952 Sec. 10-101, *et seq.*

40. 4 TIFFANY, THE LAW OF REAL PROPERTY, Sec. 1134 (3d ed. 1939);  
1 WALSH, COMMENTARIES ON THE LAW OF REAL PROPERTY, Sec. 16 (1947);

Adverse possession under the statute of limitations is based upon a seizin or possession which is tortious from its very inception.<sup>41</sup> Since the adverse possessor's seizin is tortious, he has no valid legal interest in the land until the ten-year period has run. He can convey or devise no interest which is good as against the landowner. One entering into possession under such an attempted conveyance or devise has no interest in the land, and his entry upon the premises is a new and distinct trespass, giving rise to a fresh cause of action on the part of the landowner. The ten-year period then must begin to run anew. Thus an adverse possessor cannot add, or "tack," the period of his possession to that of a previous adverse possessor, even though the possession be continuous, and there be privity between the two.<sup>42</sup> The rule in most states is that periods of possession may be tacked when there is privity between the parties so tacking,<sup>43</sup> but the foregoing is the view followed in this jurisdiction.

The case is considered different when one in adverse possession of land dies and leaves an heir. The heir is considered to be automatically substituted for the ancestor by law without breaking the continuity of possession; it is not a new entry, or another trespass. No new cause of action accrues to the landowner, and the running of the statute is not tolled. Thus adverse possession can be tacked between ancestor and heir in South Carolina.<sup>44</sup>

Under the ten-year statute of limitations, the person entitled to commence an action to recover land must show a disability existing "at the time such title shall descend or accrue" in order to prevent the running of the statute.<sup>45</sup> Once the statute has begun to run, it will not be stopped by the incidence of a subsequent disability.<sup>46</sup>

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BASWELL, THE STATUTES OF LIMITATION AND ADVERSE POSSESSION, Sec. 7 (1889).

41. *Adams v. Adams*, 220 S. C. 131, 66 S. E. 2d 809 (1951); *Ellen v. Ellen*, 16 S. C. 132 (1881).

42. *Terwilliger v. Daniels*, 222 S. C. 191, 72 S. E. 2d 167 (1952); *Adams v. Adams*, 220 S. C. 131, 66 S. E. 2d 809 (1951).

43. 2 C. J. S., *Adverse Possession* Sec. 128 (1950); 1 AM. JUR., *Adverse Possession* Sec. 151 (1940).

44. *Terwilliger v. Daniels*, 220 S. C. 131, 66 S. E. 2d 809 (1951); *Goings v. Mitchell*, 110 S. C. 380, 96 S. E. 612 (1918).

45. CODE OF LAWS OF SOUTH CAROLINA, 1952 Section 10-128.

46. CODE OF LAWS OF SOUTH CAROLINA, 1952 Sec. 10-105; *Cathcart v. Hopkins*, 119 S. C. 190, 112 S. E. 64 (1921); *Milton v. Pace*, 85 S. C. 373, 67 S. E. 458 (1909).

In the early case of *Rose v. Daniel*,<sup>47</sup> 1814, it was held that the statute of limitations could not run against an infant heir, even though the statute had begun to run during the lifetime of the ancestor. This case was overruled in 1818 by the case of *Faysoux v. Prather*, in a three to two decision.<sup>48</sup> In 1821, in the case of *Cook v. Wood*,<sup>49</sup> the Court was divided on the point, and the case was decided on other grounds. In 1824, the legislature passed a bill<sup>50</sup> apparently intended to decide the controversy in favor of the ruling in *Rose v. Daniel*. In *Gibson v. Taylor*,<sup>51</sup> decided in 1826, the Court held that the legislature intended by that provision to settle the law so that when the ancestor, against whom the statute of limitations has already commenced to run, dies and the property passes to a minor heir, the statute would be suspended during the minority of the heir.

This statute of 1824 was repealed in 1870.<sup>52</sup> The law is settled under the present statute to be that the infant heir will not be protected by reason of his infancy, when the statute has already begun to run during the lifetime of the ancestor,<sup>53</sup> although if there is a new trespass while they are still infants, they will not be barred from their right to bring an action on the new trespass until after the removal of their disability.<sup>54</sup>

In the event the ancestor is under a disability at the time his cause of action accrues, and remains so until his death, and the title then passes to his heir, who is under a disability, it is undecided in South Carolina, so far as the writer can discover, whether the statute begins to run at the death of the ancestor, or whether it is prevented from commencing to run until the heir reaches majority. The statute provides that the action must be brought within ten years "after the death of the person entitled who shall die under such disability."<sup>55</sup> From the wording of the statute, it would seem that the period begins to run against the heir at the time of the death of the

47. 3 Brev. 438 (S. C. 1814).

48. 1 Nott and McCord 296 (S. C. 1818).

49. 1 McCord 139 (S. C. 1821).

50. 6 STAT. AT LARGE, p. 238 (S. C. 1824).

51. 3 McCord 451 (S. C. 1826).

52. See note 29 *supra*.

53. *Fraday v. Ivester*, 129 S. C. 536, 125 S. E. 134 (1924); *Fore v. Berry*, 94 S. C. 71, 78 S. E. 706 (1912); *Satcher v. Grice*, 53 S. C. 126, 31 S. E. 3 (1898).

54. *Garrett v. Weinberg*, 48 S. C. 28, 26 S. E. 3 (1896).

55. CODE OF LAWS OF SOUTH CAROLINA, 1952 Sec. 10-108.

ancestor. This is the result reached in the English case of *Doe v. Jesson*, decided in 1805.<sup>56</sup> However, *Eaton v. Sanford*,<sup>57</sup> a Connecticut case decided in 1807, held that no time would begin to run against an heir under a disability; in this case the landowner was allowed to recover although the property had been held adversely for nearly sixty years. *Griswold v. Butler*,<sup>58</sup> a later Connecticut case, ignored this decision and followed *Doe v. Jesson*. The rule laid down in *Doe v. Jesson* has been followed in this country.<sup>59</sup> Even in light of the wording of the S. C. statute,<sup>60</sup> this writer believes the view followed in *Eaton v. Sanford* to be the better view.<sup>61</sup> The land could not be so retained by a succession of owners dying and inheriting under disabilities, because the forty-year statute of limitation<sup>62</sup> would give good title at the end of that time.

If two or more disabilities, such as infancy and insanity, exist in the landowner at the time the cause of action arises, he is protected from the running of the statute until all such disabilities have been removed,<sup>63</sup> there being no reason why the landowner should be in a less favorable position because he had other disabilities than that which becomes the last to be removed.

If the landowner is under one disability, such as infancy, at the time of the trespass, and then falls under another disability, such as coverture, before the removal of the first disability, the statute begins to run at the removal of the first disability.<sup>64</sup> The statute of limitations does not provide for the tacking of disabilities, and in order for the landowner to take advantage of a given disability, that disability must have existed at the time of the accrual of the right of action.<sup>65</sup>

56. 6 East 80, 102 English Reports 1217 (1805); See *Griswold v. Butler*, 3 Conn. 227 (1820); *DeHatre v. Edmunds*, 200 Mo. 246, 98 S. W. 744 (1906); *Field v. Turner*, 56 N. M. 31, 239 P. 2d 723 (1952); *Jackson v. Houston*, 84 Tex. 622, 19 S. W. 799 (1892).

57. 2 Day 523 (Conn. 1807).

58. 3 Conn. 227 (1820).

59. *DeHatre v. Edmunds*, 200 Mo. 246, 98 S. W. 744 (1906); *Field v. Turner*, 56 N. M. 31, 239 P. 2d 723 (1952); *Jackson v. Houston*, 84 Tex. 622, 19 S. W. 799 (1892).

60. CODE OF LAWS OF SOUTH CAROLINA, 1952 § 10-128.

61. See the dissenting opinion in *Griswold v. Butler*, 3 Conn. 227 (1820).

62. CODE OF LAWS OF SOUTH CAROLINA, 1952 § 10-129.

63. CODE OF LAWS OF SOUTH CAROLINA, 1952 Sec. 10-106.

64. CODE OF LAWS OF SOUTH CAROLINA, 1952 Sec. 10-105; *Robertson v. Wurdeman*, 2 Hill 324 (S. C. 1834); *Starke v. Starke*, 3 Rich. 438 (S. C. 1829).

65. CODE OF LAWS OF SOUTH CAROLINA, 1952 Sections 10-105, 10-128.

If, therefore, a cause of action for the possession of land should accrue to the landowner at the age of seventeen, and he should become insane at nineteen, his right of action would be barred when he reached thirty-one, whether still insane or not.

The possession of one cotenant is the possession of all, and the disability of one cotenant will protect the title of the others against the running of the statute of limitations.<sup>66</sup> This rule applies to tenants in common, and to joint tenants as well.<sup>67</sup> An early case held that the statute would be prevented from running by the minority of tenants born after the adverse possession had already begun, where the statute had never commenced to run by reason of the minority of other cotenants.<sup>68</sup> In other words, the successive minorities of cotenants will bar operation of the statute. In this manner, it would appear that an estate in land could be protected perpetually from extinguishment by adverse possession; but, as stated above,<sup>69</sup> cotenancy with a minor does not protect an adult from the presumption of a grant. Whether the infancy of a cotenant born after the statute has commenced to run against the other cotenants will be any protection to either the infant himself or to the other cotenants has apparently not been decided in South Carolina. In most instances this situation would probably be held to come within the rule that the descent of title to an infant heir does not stop the statute once it has commenced to run.

#### FORTY YEAR STATUTE OF LIMITATIONS

So far, this discussion of the acquisition of corporeal interests in land by statutory adverse possession has been mostly concerned with the sections of the code constituting the ten-year statute of limitations. In addition to this statute, South Carolina has a statute<sup>70</sup> providing that "no action shall be commenced in any case" for the recovery of real property against one in adverse possession thereof under a claim by virtue of a written instrument, unless the person so claiming, or those under whom he claims, were in possession within forty years before this action is brought. The statute also

66. *Adams v. Adams*, 220 S. C. 131, 66 S. E. 2d (1951); *Haley v. White*, 216 S. C. 360, 58 S. E. 2d 88 (1950).

67. *Hill v. Sanders*, 4 Rich. 521 (S. C. 1851).

68. *Ibid.*

69. See page 294 *supra*.

70. CODE OF LAWS OF SOUTH CAROLINA, 1952 Sec. 10-129.

provides that the possession, sole or connected, of the defendant shall be deemed valid against the world after the lapse of forty years. This statute is a limitation upon actions, and also expressly gives good title.<sup>71</sup> It is similar to, and must have been adopted in contemplation of the English statute<sup>72</sup> enacted in 1832 which expressly provides that no disabilities, or succession of them, bar the statute. This fact, coupled with the wording "to any case" leads to the conclusion that the intent of the statute<sup>73</sup> is to provide a statute of repose, which will not be allayed by any personal disabilities, such as infancy, etc., on the part of the landowner. If such were not the intent, there would be little purpose in the statute. There would be little difference between its effect and that of the ten-year statute; it does allow tacking,<sup>74</sup> but so does adverse possession by presumption of grant. However, it will not run against a remainderman who is unable to assert his rights because of an intervening life estate, until the life estate falls in and he is entitled to possession.<sup>75</sup>

#### STATUTE OF LIMITATIONS AS TO TAX SALES

By statute,<sup>76</sup> no action can be brought to recover land sold by the sheriff or other proper officer, unless such action is brought within two years from the date of the sale. It has been held that the former landowner is not barred until two years after the date on which purchaser goes into possession under the tax deed.<sup>77</sup> The landowner could not bring an action, in law, until the purchaser entered into possession. "The statute did not intend to bar the taxpayer's right until he had two years within which he could bring his action."<sup>78</sup> The statute does not apply where the tax deed is void on its face,<sup>79</sup> but "all defects, irregularities, informalities, errors and omissions in antecedent proceedings of assessment, taxa-

71. *Sutton v. Clark*, 59 S. C. 440, 38 S. E. 150 (1900).

72. 3 & 4 William IV c. 27, Sections 17 and 18.

73. CODE OF LAWS OF SOUTH CAROLINA, 1952 Sections 10-124, 10-126.

74. CODE OF LAWS OF SOUTH CAROLINA, 1952 Sec. 10-129; *Sutton v. Clark*, 59 S. C. 440, 38 S. E. 150 (1900).

75. *Bolt v. Sullivan*, 173 S. C. 24, 174 S. E. 491 (1934); *Mitchell v. Cleveland*, 76 S. C. 432, 57 S. E. 33 (1906).

76. CODE OF LAWS OF SOUTH CAROLINA, 1952 Sec. 65-2779.

77. *Leysath v. Leysath*, 209 S. C. 342, 40 S. E. 2d 233 (1946); *Glymph v. Smith*, 180 S. C. 382, 185 S. E. 911 (1936).

78. *Gardner v. Reedy*, 62 S. C. 503, 40 S. E. 947 (1902).

79. *Walker v. Williams*, 212 S. C. 32, 46 S. E. 2d 249 (1948); *Leysath v. Leysath*, 209 S. C. 342, 40 S. E. 2d 233 (1946).

tion, and sale, which are not jurisdictional, are cured and foreclosed when the statute has run."<sup>80</sup>

It was held in the leading case of *Jones v. Boykin*<sup>81</sup> that the tax statute under discussion was a pure statute of limitations, barring the remedy, but not the right, and must therefore be affected by the infancy of the landowners. This case was upheld in the decision of *Glynph v. Smith*,<sup>82</sup> and apparently approved in *Haley v. White*.<sup>83</sup> The same reasoning, it would seem, should apply to other types of disability.

There are apparently no cases deciding whether a disability will protect the landowner against the statute<sup>84</sup> providing that an entry upon land is not to be deemed valid as a claim unless an action be brought thereupon within one year after the entry, or against the statute<sup>85</sup> providing that the second action to recover real property must be brought within two years after the termination of the first. The point was raised in the case of *Benbow v. Levi*,<sup>86</sup> but the case was decided upon the ground that two unsuccessful actions had already been brought, rather than upon the question of the lapse of time between these two actions.

#### PREScription

The acquisition of incorporeal hereditaments by adverse user for the prescriptive period is based upon the fiction of a lost grant.<sup>87</sup> The period is twenty years, the same as for the presumption of a grant of corporeal interests. There are three essential elements for the prescription of an easement in this jurisdiction: continued and uninterrupted use for twenty years, the identity of the thing enjoyed, and that the use or enjoyment be adverse or under claim of right.<sup>88</sup> This prescriptive right may arise in the public.<sup>89</sup>

This presumption of a lost grant arises from the acquiescence of the landowner, and it would be unfair to deal harshly with the acquiescence of an infant, who is supposed

80. *Walker v. Williams*, 212 S. C. 32, 46 S. E. 2d 249 (1948).

81. 70 S. C. 309, 49 S. E. 877 (1904).

82. 180 S. C. 382, 185 S. E. 911 (1936).

83. 216 S. C. 360, 58 S. E. 2d 88 (1950).

84. CODE OF LAWS OF SOUTH CAROLINA, 1952 Sec. 10-127.

85. CODE OF LAWS OF SOUTH CAROLINA, 1952 Sec. 10-125.

86. 50 S. C. 120, 27 S. E. 655 (1897).

87. *Blume v. Southern Railway Co.*, 85 S. C. 440, 67 S. E. 546 (1908).

88. *Babb v. Harrison*, 220 S. C. 20, 66 S. E. 2d 457 (1951); *Steele v. Williams*, 204 S. C. 124, 28 S. E. 2d 644 (1944).

89. *Savannah River Lumber Co. v. Bray, Supervisor*, 189 S. C. 237, 200 S. E. 760 (1939).

by law to be either ignorant of his rights, or incapable of enforcing them. Bacon is quoted in *Lamb v. Crosland*<sup>90</sup> as saying "The rights of infants are much favored in law, and regularly their laches shall not prejudice them, upon the presumption that they understand not their rights, and that they are not capable of taking notice of the rules of law so as to apply them to their advantage." In *Lamb v. Crosland* the principle was laid down that no period during the infancy of the landowner can be included in the twenty years necessary for the presumption of a grant, and the law concerning disabilities in relation thereto appears to be the same.

#### EFFECT IN REMAINDER OF ADVERSE POSSESSION AGAINST THE LIFE TENANT

It is well settled that adverse possession against a holder of a legal life estate will not affect the rights of the holder of a legal estate in remainder,<sup>91</sup> or in reversion.<sup>92</sup> The remainderman has no right to sue until the falling in of the life estate and neither the statute of limitations nor the presumption of a grant will commence to run against him until that time.

It is also settled that adverse possession runs against the legal title, and if the trustee is barred, the *cestui que* trust is also barred.<sup>93</sup> The *cestui que* use is not thus barred without ever having had the opportunity to assert his rights, since he may go into equity and force the trustee to protect his interests.

In the case of *Hunter v. Hunter*,<sup>94</sup> decided in 1901, the Court, without discussing the point, held that adverse possession could not run against the trustee, because some of the *cestuis que* trust were infants. However, this case is a dubious authority in light of earlier decisions which held that this fact would not prevent the running of the statute.<sup>95</sup> Further, it was held in *Pope v. Patterson*,<sup>96</sup> a later case decided in 1907,

90. 4 Rich. 536 (S. C. 1851).

91. *Crotwell v. Whitney*, *supra*; *Bolt v. Sullivan*, 173 S. C. 24, 174 S. E. 491 (1934); *Rice v. Bamberg*, 59 S. C. 498, 38 S. E. 209 (1900). Where trust is passive as to both life tenant and remainderman, the same will apply. *Rawls v. Johns*, 54 S. C. 394, 32 S. E. 451 (1899).

92. *Floyd v. Page*, 129 S. C. 301, 124 S. E. 1 (1924).

93. *Wells v. Coursey*, 197 S. C. 483, 15 S. E. 2d 752 (1941); *Moyle v. Campbell*, 126 S. C. 180, 119 S. E. 186 (1923).

94. 63 S. C. 78, 41 S. E. 33 (1902).

95. *Benbow v. Levi*, 50 S. C. 120, 27 S. E. 655 (1897); *Long v. Cason*, 4 Rich. Eq. 60 (S. C. 1851).

96. 78 S. C. 334, 58 S. E. 945 (1907).

that the fact that the *cestui que* trust was under a disability could not keep adverse possession from running against the trustee and barring her interest. That the rule makes no exception for disability was approved in *Wells v. Coursey*,<sup>97</sup> but it is not clear whether there were beneficiaries under disability.

When there is a legal life estate, with a remainder held in trust, neither the trustee nor the equitable remainderman can sue for possession, and adverse possession against the life tenant will not run against them.<sup>98</sup> If the life estate is in trust, but the remainder in fee is a legal estate, free from any trust, it would seem that the remainderman should be in a position no different from that of the remainderman after a legal life estate, and his interest should not be adversely affected until after the termination of such life estate.

Where the trustee holds legal title to both the life estate and remainder, and adverse possession is completed against the life estate, it appears that since the statute actually runs against the legal title, which is altogether held by the trustee, that the title of the trustee is completely barred, and with it both the equitable life estate, and the equitable estate in remainder. This has the effect of barring the interest of the equitable remainderman even though he has never had a right of entry. This rule was first clearly announced in regard to an action to recover real property in *Young v. McNeill*,<sup>99</sup> though it was decided in *Benbow v. Levi*<sup>100</sup> that the remaindermen were barred by the unsuccessful result of the two actions brought by the trustee to recover land before any right had accrued to the said remaindermen. These cases were followed in *Pope v. Patterson*,<sup>101</sup> the next case in which the question arose. The Court in the case of *Breedin v. Moore*,<sup>102</sup> 1909, seemingly disapproved of the result reached in *Young v. McNeill* and *Pope v. Patterson*, but did not pass on this point, deciding the case rather on the ground that the statute of uses had placed the legal title in the life tenant, so that the remaindermen would not be barred. However, when the

97. 197 S. C. 483, 15 S. E. 2d 752 (1941).

98. *Kirton v. Howard*, 137 S. C. 11, 134 S. E. 859 (1926); *Breedin v. Moore*, 82 S. C. 534, 64 S. E. 604 (1909); *Mosely v. Hankinson*, 25 S. C. 519 (1886).

99. 78 S. C. 143, 59 S. E. 986 (1907).

100. 50 S. C. 120, 27 S. E. 655 (1897).

101. 78 S. C. 334, 58 S. E. 945 (1907).

102. 82 S. C. 534, 64 S. E. 604 (1909).

question next came up in *Boney v. Cornwell*,<sup>103</sup> it was clearly decided that the equitable remaindermen would be barred in such a case. The later case of *Moyle v. Campbell*,<sup>104</sup> 1923, also clearly passed on this point, following *Boney v. Cornwell*. *Kirton v. Howard*<sup>105</sup> held that although the trustee had the complete legal title, it was presumed under the facts that he had conveyed a legal life estate to one of the beneficiaries, as was his duty under the trust, and that the adverse holding had been only against the life tenant. *Wells v. Coursey*,<sup>106</sup> 1941, seems to have settled the question in accordance with the rule barring the *cestui que* trust in remainder, adding that such remaindermen would be barred even though under a disability.

Another case in which adverse possession against the life estate barred the remaindermen was the case of *Milton v. Pace*.<sup>107</sup> In that case the trust was for the use of a married woman for life, and then to contingent remaindermen. When the Constitution of 1868 removed the disability of coverture, the statute of uses vested the legal life estate in the woman, and left the remainder in trust. The adverse possession had commenced to run against the trustees two years before the constitution was adopted. The majority of the Court held that the statute commenced to run against the trustee at that time, and that no subsequent event could stop it, and that the remaindermen were barred.

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103. 121 S. C. 256, 113 S. E. 686 (1922).

104. 126 S. C. 180, 119 S. E. 186 (1923).

105. 137 S. C. 11, 134 S. E. 859 (1926).

106. 197 S. C. 483, 115 S. E. 752 (1941).

107. 85 S. C. 373, 67 S. E. 468 (1909).