Heirs Property the Problem Pitfalls and Possible Solutions

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NOTES

"HEIRS' PROPERTY"
THE PROBLEM, PITFALLS, AND POSSIBLE SOLUTIONS

I. INTRODUCTION

There is no doubt that one serious impediment to the improvement of housing facilities in South Carolina is the inability of many landholders to establish marketable, fee simple title to the property which they occupy. A major element of this problem is attributable to lands occupied as "heirs' property" or possessed under "heirs' titles", a condition created by the intestate death of successive owners or part owners whose estates are never probated. 1 Despite the fact that a person has occupied land for an extended period of time, if court records do not clearly document ownership in fee, it is virtually impossible for the resident to finance improvements to his property using the land as security. Most lending institutions are reluctant to lend money without positive assurance (usually in the form of an attorney's title certificate) that the mortgagor has clear title to the land. Any person who is financially able to make additions or improvements to his house without a mortgage loan does so at his peril, since any cotenant would have equal rights to occupy a structure on the common lands.2 These heirs have therefore inherited the responsibilities of land ownership, i.e., payment of taxes and making repairs, but few of its benefits, i.e., ability to alienate and mortgage. In essence, they occupy the lands as tenants rather than owners since their chief legal right is possession.

Under present South Carolina law there are remedies available for the occupants of "heirs' property", but they are extremely expensive and risky. Legal procedures which cost in ex-

1. Hereinafter the terms "heirs' property" and "heirs' titles" refer to land which is unclear due to the numerous cotenants who have died intestate without having their estates probated, making it virtually impossible to determine the present owners and their interests.

cess of $1,500 and provide only a possibility of success are of no real benefit to a family in possession of land worth $6,000-$8,000. Many of the occupants are in a low income bracket or are indigent. Public officials are aware of the magnitude of problems created by "heirs' titles" and realize any permanent remedy must be legislative. The State Housing Authority has commissioned a local attorney to draw up appropriate legislation for presentation to the General Assembly.

The purpose of this article is to discuss "heirs' property" in South Carolina in the following manner: First, to define the problem, examine how it originated and speculate on how much property may be affected; second, to explore the remedies afforded under the present statutes and case law; third, to identify the issues which must be considered in drafting legislation to rectify the problem; finally, to suggest a possible legislative and administrative method of allowing the occupants, under certain restrictive conditions, to acquire fee simple titles to the land they occupy.

II. THE PROBLEM

The problems created by "heirs' property" can be illustrated by the following example: In 1916 Abraham Johnson purchased a five-acre tract of land in rural Beaufort County. He had three children, Samuel, John and Doris. Mr. Johnson died in 1935 without having his estate probated. Doris had moved to New York with her husband and three children. John, along with his wife and only child, John Jr., lived with Mr. Johnson in his home located on the five-acre parcel and continued to reside there after his death; Samuel Johnson had not been heard from since he moved to Washington, D.C., in 1930. In 1955 John Johnson and his wife died and John Jr. continued to occupy and farm his grandfather's land. Doris had obtained a divorce, remarried and had two children by her second husband. She died a widow in New York in 1960—without having the estate probated.

When John Jr. investigates the possibility of obtaining a loan to replace or repair his fifty-year-old house, he will discover that he owns a one-third interest in the property. The other two-thirds is owned by Uncle Samuel or his heirs and the children of Aunt Doris. Despite the fact that John and his son farmed and lived on this land for more than 35 years, John Jr. is prevented from borrowing money and mortgaging his land as security.
While this is only a hypothetical case, it is clear that similar situations exist throughout the state, and other cases are even more complicated because they involve many more heirs far removed from the original grantee. The exact scope of the "heirs' property" problem remains unknown, since no study has been conducted, but those familiar with the situation agree it is of enormous magnitude. It is particularly acute in the coastal counties of Georgetown, Charleston and Beaufort, especially in the rural areas, as indicated by estimates that more than half of all black-owned property in those areas is possessed under "heirs' titles". This fact was dramatized in one instance when the Beaufort Naval Air Station was enlarged. Since it was impossible to determine legal ownership of the property, much of the land had to be condemned and the purchase price paid into the court.

This situation is more prevalent in the coastal counties where many freed slaves bought land and remained after the Civil War, but it is by no means confined to these counties. Near Greenwood an entire community settled on land purchased from the South Carolina Land Commission during the 1870's faces the identical problem. No doubt there is land in every county which the occupants are prevented from mortgaging to finance improved housing facilities for their families because of their inability to demonstrate a clear title.

Normally, possession of "heirs' property" is a distinct disadvantage to the landowner, since he is unable to mortgage or sell it; however, it does provide a home for any descendent of the original grantee, since all cotenants are equally entitled to occupy common property. It also assures that the land probably will not be sold through a mortgage foreclosure, since no one tenant in common is able to give a mortgage binding the entire tract. With this fact in mind, some people conceivably may have intentionally not transferred the property before or at death, hoping to

3. C. Blesser, The Promised Land 149-56 (1959). This book is a history of the South Carolina Land Commission from 1869 to 1890. Interestingly, much of the land sold by the Land Commission to freed slaves has become "heirs' property."
5. A cotenant could mortgage his undivided interest in the land, and upon a foreclosure sale the mortgagee could buy the mortgaged interest, thereby becoming a tenant in common with the right of partition. Very few lenders are willing to take an undivided interest as collateral, since the legal fees are so high when selling the collateral upon default.
guarantee each heir a place to live. The land then became family property with subsequent generations able to live there without fear of being ousted. This protection is somewhat illusory since every owner of jointly held real estate can sue for partition or sale and distribution. Allowing the property to pass by inheritance is also shortsighted in that it fails to recognize that most people borrow money to build homes and need the ability to mortgage their land. In all likelihood most of the "heirs' property" was created simply by the lack of awareness by the general public of the need for owners of real estate to prepare wills and the necessity of having intestate estates probated.

III. Present Remedies

After defining "heirs' property" and discussing how it originated, it is now necessary to explore the remedies available under present South Carolina law. The most obvious method, although the least practical one, for a landholder possessing property under an "heirs' title" to obtain fee simple title is by purchasing all the outstanding interests. This involves locating the heirs of the original grantee, obtaining documentation to assure that they have all been accounted for, and having these cotenants convey their portion to one individual. If any heir is a minor or under disability, a court order approving the sale of that interest would be required. Of course, if even one of the tenants in common could not be found or refused to convey his share, this would successfully frustrate acquisition of fee simple title. Needless to say, this alternative is not very feasible, since by the very nature of the problem the heirs are unknown or cannot be located.

A second possible solution, although much more expensive, would require the landholder to institute an action to quiet title, alleging that he had acquired title by adverse possession against his cotenants. The Code allows unknown interest holders to be made parties to the action and to be served by publication.

Proof of possession hostile to the other cotenants, one of the elements of adverse possession,\textsuperscript{13} presents serious problems since each cotenant has a right to occupy the premises and the possession by one tenant is considered possession by all.\textsuperscript{14} Possession by one of the cotenants can become adverse if there is a showing of an ouster.\textsuperscript{15} While it is not necessary that there be an actual physical removal from the land, the actions of the possessor must be of an unequivocal nature and so distinctly hostile to the rights of the other cotenants that the intention to dispossess is clear and unmistakable.\textsuperscript{16} Nevertheless, open, notorious, continuous, hostile and exclusive possession for 20 years gives rise to the presumption of an ouster of a cotenant.\textsuperscript{17} Additional problems, such as the availability of "tacking" to meet the statutory time limit\textsuperscript{18} and the effect of disability of cotenants,\textsuperscript{19} make this alternative a risky and expensive avenue to pursue in attempting to acquire fee simple title. Given the value of the real estate, the legal expenses incurred in this type of litigation, and the possibility of success, a suit to quiet title does not provide a viable solution to the "heirs' title" problem.

If the occupant fails to establish his title by adverse possession, he may ask the court to have the land partitioned.\textsuperscript{20} Despite the fact that the law favors partition in kind,\textsuperscript{21} it is usually not feasible because of the number of shareholders, and the courts normally order the property sold at public auction.\textsuperscript{22} The court can order that the title be vested in one of the cotenants upon payment of a sum of money determined by the partition commis-

\textsuperscript{14} Horne v. Cox, 237 S.C. 41, 115 S.E.2d 513 (1960).
\textsuperscript{16} Wells v. Coursey, 197 S.C. 483, 489, 15 S.E.2d 752, 755 (1941).
\textsuperscript{17} Id. at 490, 15 S.E.2d at 755.
\textsuperscript{19} \textit{See generally} Note, \textit{Effect of Disability of Landowner with Respect to the Acquisition of Adverse Rights by Another by Statutes of Limitations, Presumption of a Grant, and Descriptive Right in South Carolina}, 10 S.C.L.Q. 292 (1958).
\textsuperscript{22} S. C. Code Ann. § 10-2209 (1962).
sioners, but this procedure is rarely utilized and provides no guidelines for deciding which of the parties is entitled to purchase the shares of the other cotenants. The possessor is given no preference at the auction, but if he is high bidder he has to pay into the court the amount of his bid less his interest in the property. The funds for any unknown parties would be held in escrow subject to further order of the court. A suit for partition is expensive as well as risky, since the plaintiff can be outbid at auction and lose all his right to the property to a third party who considers the land merely a commodity to achieve a profit, not a long cherished family possession.

One immediate method to improve the housing conditions of those occupying land without clear title is the utilization of mobile homes, which are considered personal property and financed similar to automobiles. VA and FHA insured loans are available for those who qualify. Since these units usually remain movable, they are not likely to be classified as fixtures, and therefore part of the real estate. Recent decisions have modified the common law maxim that whatever is annexed to the soil becomes part thereof and now intention is a factor to be considered in determination of what constitutes a fixture. But the size of mobile homes necessarily restricts their use to small families and while providing more suitable housing and thereby helping to alleviate one of the disadvantages of "heirs' property", their use may tend to stifle the incentive to achieve a more permanent solution.

IV. SUGGESTIONS AND PITFALLS

The main focus of this article is to examine and critique the factors which should be considered in designing a legislative solution to the dilemma of "heirs' titles". One critical problem is to devise a statute which provides a meaningful remedy to one specific problem, namely, land titles which are clouded due to the intestate death of various cotenants, without altering the general law of partition and adverse possession. Particular care should be taken to insure that any new law does not become a bonanza to

land speculators and developers by providing them with an additional method to acquire land from those who do not wish to sell.  

A. Adverse Possession

In discussing modifications which can be made to the present laws to create a method for those occupying "heirs' property" to acquire fee simple title, the most obvious suggestion is to change the adverse possession statutes to allow a landholder to oust his cotenants simply by exclusive, continuous, and hostile possession for a period of time, perhaps 10 years, provided he had made substantial improvements to the property. To require that the claimant must have made improvements is self-defeating, since one purpose of legislation is to allow claimants to clear their titles so that they can finance major additions and improvements to their homes at reasonable rates by using their land as security. More importantly, a provision of this type could have serious ramifications. It is easy to visualize a farmer, owner of a ten-acre farm, dying intestate with his sole heirs being two children, a son who continues to live on the farm after his father's death and a daughter who lives out of state. Merely by paying taxes and cultivating the land as he did prior to his father's death, the son could successfully acquire his sister's share of the land. This would be true if the children had obtained their interest as heirs at law or devisees under their father's will. The daughter would have no warning of her ouster and would be unable to take any action to protect her interest, short of selling her undivided share, voluntarily partitioning the land, or asking the court to have the land sold and the proceeds divided. A more undesirable situation could arise where a mother acquired fee simple title to her intestate husband's land by adversely possessing against the children. Additionally, to modify the common law to allow cotenants to adversely possess against each other, would mean the ousted tenants would receive no compensation for their interest.

B. Partition

It has been suggested that the statutes relating to partition

27. The partition action has been greatly abused by land developers. By purchasing the interest of one joint owner, the developer is entitled to sue for partition and have the land sold at auction where he is able to buy the entire tract and force any occupants to vacate the land.
be altered to allow individuals who have occupied common property for a determined period of time to purchase the interests of the other cotenants at a private sale rather than at public auction as now provided.\textsuperscript{28} The proceeds from the sale would be paid into the court and distributed to the cotenants according to their legal rights. A procedure of this type would be advantageous by putting fee simple title in the occupants of the land and giving the ousted cotenants a remedy against the proceeds of the sale. But this forced buyout would be expensive since the claimant who owned only a small legal interest in the real estate, would have to pay almost full price for the property, and landholders may not avail themselves of a procedure of this type.

The question would be how many occupants of "heirs' property" who owned a one-third interest and whose immediate family had occupied the land for 20 to 30 years without anyone's questioning their right of exclusive possession would be willing to pay $6,000 plus legal expenses for a $9,000 piece of property merely to clear its title. Assuming that the residents were able to finance the purchase by giving a purchase money mortgage, would ownership in fee be worth the exorbitant cost, especially recognizing the fact that any unclaimed funds would escheat to the state upon termination of the statutory period?\textsuperscript{29} To allow the money to be refunded to the payee after remaining unclaimed would be more equitable but would not reduce the investment necessary to initiate the proceeding.

C. Other Suggestions

While the present adverse possession doctrines and partition actions are evidently the best vehicles to effectuate the goal of removing the clouds from "heirs' titles" and placing the legal title in one individual, alterations to those particular sections of the code must be narrowly constructed so as not to open Pandora's box. Any statute will have to maintain a delicate balance between the desire to provide a speedy and inexpensive method of allowing a long term possessor to acquire fee simple title to the land he occupies, with the necessity of affording procedural due process and fundamental fairness to all who may have a legal interest in the property. Regardless of whether the present statu-

tory provisions are amended to make exceptions for property occupied under “heirs’ titles” or an entirely new procedure is devised solely to rectify the situation, a few questions must be answered. Who will qualify for the special treatment and how will it be limited only to those it is intended to benefit? How will the value of the land and each individual’s portion be determined? How will the affected parties be notified without excessive cost?

1. **Who will qualify?**

Since the point of any legislation should be to benefit those who have occupied and maintained the land for a long period of time, the problem becomes one of drawing the line. Suggestions of a proper stopping point are numerous, from a policy limited to those occupying exclusively for ten years, paying all taxes, and making substantial improvements to the land, to a scheme liberally extending the procedure to anyone occupying land for five years and paying a portion of the ad valorem taxes for three years. Of course drawing the line is a value judgment to be exercised by the General Assembly, but a few factors should be kept in mind.

It is undisputed that the main criterion should be lengthy occupation and maintenance of the property; the question is how long is enough? An extended time period may disqualify many potential petitioners, but a period too short may invite family feuds or even fraud. To reduce the hardship of a lengthy period it could be provided that an individual “tack” the occupancy of his immediate predecessor, provided that he took by devise or inheritance from this predecessor. It would mean a child who continued to occupy the property after the death of its parents, could combine the two periods of time to determine the length of occupancy. With this in mind a period of twenty years continuous residency on the property may be optimum. It would provide the safeguards necessary to insure that the other cotenants were not unreasonably divested of their partial claim to the land without unduly restricting the rights of the occupant.

Serious thought should be given to a requirement that only cotenants could avail themselves of the special treatment. This may present serious problems of proof since in many cases the occupants may be four or five generations removed from the original grantee. No attempt should be made to designate a maximum interest necessary to qualify, because many times the cotenants are so numerous that no one owns a large interest. It may not be
unusual to discover a person occupying the property with only a 1/64 legal interest in the land.

A requirement that taxes be paid by the claimant for a long time may be ill-advised. The recent tax assessment program in Lexington County, led to the discovery that as much as 20% of the real property was not being taxed. There is no reason to believe that similar situations do not exist in other counties, particularly those which do not have a sophisticated assessment plan. Proof that a particular person paid the taxes may be difficult if they were paid in cash and the receipt cannot be located. County treasurers are able to determine whether or not taxes have been paid but not who paid them. While rebuttable presumptions can be drafted which provide that the occupant is assumed to have paid the taxes, opposite evidence to the contrary, each additional qualifying factor devised by the legislature increases the possibility that some residents will not be helped by the statute. If a payment of past taxes is to be a prerequisite, three to five years may be sufficient.

2. How will the value of the property be determined?

The goal of any legislation on "heirs' titles" should be to shift legal title from a large group of people with many fractional interests to a few individuals who would have fee simple title. A fair and equitable manner must be found to compensate those divested of their rights to the land, however minute their interests may be. Determination of the value of real estate can be very expensive and involved, particularly in areas where little surrounding land has been transferred, making it hard to find comparable land as a basis for price. The present system designated to be used in partition actions of five commissioners appointed by the parties and the judge is cumbersome and rarely used.

The easiest solution would be to have tax assessors value the property at its fair market value. (If the recent public dissatisfaction with Charleston County's tax reassessment is an indication, the divested co-tenant would not have to worry about the value being set too low.) Of course, this determination would have to be made subject to challenge by any heir who felt it was too low. Most counties, however, are not blessed with impartial tax asses-

sors to determine the market price of real estate, and therefore private appraisers would have to be employed. If evaluation is to be meaningful and fair, competent professionals should be utilized in spite of cost. Local real estate agents and appraisers are the most qualified. The arbitrary designation by statute of the county treasurer or auditor, who may or may not be qualified to determine land value, is clearly undesirable. Of course, the use of capable public employees should be encouraged to reduce the litigant's expenses.

At common law it was well established that one who improved common property was not entitled to compensation or contribution. The courts modified this rule and allowed a cotenant to recover if (1) he made the improvements under the mistaken impression that he owned the fee, (2) disallowance of his claim would be inequitable, and (3) the allowance would result in no injury to the interest of the other cotenants. But the determination of whether equity demands that the cotenant be compensated is primarily a question for the court. The South Carolina Betterment Statute allows one who in good faith makes improvements on the land of another and is subsequently ejected to recover the value added to the land by his improvements. In Hall v. Boatwright the court decided that the statute did not apply to lands held as a tenancy in common. In determining the interest of a claimant, he should be given credit as a matter of law for the value added to the land as a result of additions he may have made exclusive of ordinary repairs. While the increased value of the property without the improvements may not equal the money expended by the possessor, it would be one equitable method to reimburse the property holder. The other cotenants would have no real reason to object since they would not be deprived of anything to which they were morally entitled. The law should make every effort to reward those who desire to upgrade their land and houses.

3. How will the parties be notified?

One of the considerations of any proceeding is how to notify

35. 58 S.C. 544, 36 S.E. 1001 (1900).
all parties in a manner which comports with due process standards. Normally non-resident and unknown parties can be served by newspaper publication. When service of process is effectuated by publication, the law requires that the following be published in a newspaper printed in the county in which the premises are located at least once a week for three successive weeks: (1) the summons and notice of filing the summons and complaint in the clerk of court’s office; (2) lis pendens, when real estate is possibly owned by unknown parties; (3) in the case of minors and incompetents, order nisi appointing a guardian ad litem and notice of date when the appointment becomes absolute. Some attorneys feel that the order of publication should also be published although the statute does not require it. While publication costs are not exorbitant, there is no reason why the amount of words necessary to qualify as constructive service cannot be reduced. The Supreme Court has recognized that chance alone brings the attention of even a local resident to an advertisement in small print in the back pages of a newspaper, and the odds that non-residents will never read it are extremely large. If the real desire is to notify the parties, and admittedly service by publication is an extremely ineffective method, an abbreviated notice published twice or even once would seem to suffice, if other steps are taken to reinforce this method of notification.

The notice could contain a list of the parties to the action including all known cotenants and common ancestors whose heirs are not known, together with a brief description of the real estate and notice that the petitioner desires to acquire fee simple title to the land and place of filing of the complaint. Describing the land by street number or geographical location such as: “the land known as Abraham Johnson’s property, five acres on River Road about one-half mile south of Bethel A. M. E. Church,” together with a list of the surrounding landowners, is more preferable than

39. Id.
42. The price for such advertisement normally is $1.00 per column inch for the first publication and 50¢ per column inch for each successive publication and as a total should not exceed $50.00.
the lengthy descriptions usually used in deeds. Laymen are baffled by language such as "all that certain piece, parcel, or lot of land, with improvements thereon, situate, lying and being . . . and shown as lot 4 of Block B on a plat recorded in Plat Book 44-G at page 31." A non-legal characterization is much more useful to the layman who is supposed to be notified by reading it.

In addition to the mailing of the summons, complaint, and necessary notices to the last known address of the party, an effective method of alerting the public and thereby possibly any parties to the pending action, is by posting a notice at conspicuous places on the property involved. A sign legible from a nearby street or road, similar to a zoning notice, stating, "Notice: Occupant intends to claim full title to this property" or words of similar import would alert those who saw it to obtain more detailed information from the complaint attached below the sign. While admittedly much of the "heirs' property" involves rural lands, some not even on paved roadways, this would be a relatively simple, inexpensive manner to alert the public that legal action affecting the land had been commenced.

Under well-established principals of law, the court in a proceeding in rem can determine the claims of the parties in the "res" without obtaining personal jurisdiction over the parties. Sufficient notice and opportunity to reply still has to be given to all parties, and this is usually accomplished by personal service. But when service is to be made on a number of parties at a cost of approximately $7.50 per person, the expense can be enormous and the possibility of notifying all known parties by certified mail should be considered. In Mullane v. Central Hanover Bank and Trust Co., the court reiterated that the notice must be of a nature reasonably expected to inform the parties and afford them ample time to make an appearance. But the Court also said:

The Court has not committed itself to any formula achieving a balance between these interests in a particular proceeding or determining when constructive notice may be utilized or what test it must meet. Personal service has not in all circumstances been regarded as indispensable to the process due residents, and it has more often been held unnecessary as to non-residents.

47. Id. at 314.
It may be that under the reasonableness test announced the mailing of the suit papers reinforced by newspaper publication and posting a notice on the property would satisfy due process requirements. As the Court stated in Schroeder v. City of New York,48 "[P]ractical considerations . . . make it impossible to draw a standard set of specifications as to what is constitutionally adequate notice, to be mechanically applied in every situation."49

V. A Possible Solution

The attempt to provide an inexpensive method for those in the possession of small tracts of "heirs' property" to acquire fee simple title to the land they occupy, while at the same time affording all possible claimants with a fundamentally fair procedure, may be impossible. Under the present statutes and any modifications thereof as discussed above, legal costs alone including service by publication, service of process personally on any known parties, real estate appraisal and court costs could easily exceed $300.00 excluding the fee an attorney would charge for handling the matter. With this fact in mind it is suggested that the legislature assist those occupying "heirs' property" by establishing a legal aid office under the direction of the State Housing Authority or Attorney General's office. The sole responsibility of this special office should be to institute suits to have the title to land litigated in an attempt to place fee simple title in those qualified under law. By restricting the office's operation to litigation concerning "heirs' titles", the staff could achieve the degree of expertise and experience necessary to handle the cases efficiently and inexpensively. The function of the state's attorney would not be to represent any particular claimant but merely to have the matter adjudicated to see if any cotenant was entitled to fee simple title. Of course, limitations on income and the size of the property of the claimants would have to be imposed to assure that only the needy and those with small tracts would receive this free service.

The basic question to be asked of such a proposal is why should the state of South Carolina subsidize suits involving title

49. Id. at 212.
to privately owned land? First it is basic human compassion to assist those unable to improve their living conditions by themselves. Second, and probably more politically persuasive, a program of this sort would pay for itself. By freeing property from its legal entanglements, the occupants would be in position to build new homes on the land, thereby helping to stimulate the economy and directly benefiting the construction industry and banking business. With improvements on the land, county tax yields would increase, and the property would be available for residential and commercial development. While the author is not aware of the political practicalities of funding such a program or the availability of federal funds, it seems that the benefits would outweigh any costs. The claimant should be required to pay all costs of the suit. If a cotenant had to purchase another's share, it could be financed by a purchase money mortgage. The only cost to the taxpayer would be for staffing and maintaining the office.

If such a specialized legal aid office is established, the present statutes must be amended to make acquisition of fee simple title more feasible. The author would suggest that the basic format of the partition action50 and suit to quiet title51 be retained, but alterations made to provide that continuous and exclusive possession of common property for a period of 20 years creates a rebuttable presumption of ouster of all cotenants, except those who derived their interest by devise or inheritance from the same source as the claiming cotenant. In computing the 20-year period, the possessor should be allowed to "tack" the occupancy of his immediate predecessor, provided that the claimant received his interest as an heir or devisee of his predecessor. This would mean that a person could utilize possession by his parents in complying with the time requirements and could successfully oust all cotenants except those who were the heirs of his parents, in most cases his siblings. In the hypothetical case posed at the beginning of this article, John Jr. and his father John would have exclusive occupation from 1935 and such possession would be an ouster of all cotenants, except any brothers and sisters John Jr. may have had. The decision to limit the application of adverse possession only to those tenants in common whose interest arose from a source other than that of the possessor, is based on the assump-

tion that any heir who falls into that category would know or should realize that exclusive occupation by a distant relative of commonly owned property is hostile to his interests and should therefore constitute an ouster.

The present statutory scheme provides a method for determining how much land is actually possessed by enunciating certain rules.52 While the number of rules needs to be expanded to cover more situations, particularly for property which is used solely for residential purposes, these statements do provide a guide to how much land can be claimed. Under these provisions there is no reason why part of the "heirs' property" could not be claimed by one person and part by another. Continuous possession should be the key to acquisition of title.

The present sections of the code relating to partition53 should be modified to enable a cotenant in possession of common property to purchase the interest of those tenants in common whose interest he was unable to acquire by adverse possession. The price to be paid for outstanding shares should be determined in an equitable manner, as discussed earlier, and the possessor should be given credit for the land's increase in value as a result of any improvements he made. A procedure of this type would not be creating any new rights, since all cotenants now have the privilege to compel partition.54 The change would merely allow the occupying landholder first chance to buy the land at a fair price, rather than forcing him to bid at public auction.

This article has not discussed the effect of legal disabilities on the running of the time period for adverse possession, because it is felt that the 20-year period is sufficient to divest a minor or incompetent of his share. Since this twenty-year period is for the purpose of justifying an ouster of all cotenants by the people in actual possession for twenty years, no disability should be permitted to bar the running of the statute against cotenants who do not actually reside on the property. Given the possible number of cotenants to "heir's property", it seems likely that there is always at least one cotenant under a disability. Since in South Carolina the disability of one cotenant protects the interest of all cotenants,54.1 the statute would never begin to run. Even if it could be

proven that no cotenant was under a disability at the beginning of the twenty-year period there would still be a problem if it were decided that any period for which a cotenant was under a disability after the beginning of the period could not be counted as part of the period. Because of these problems, if a scheme is designed to facilitate the vesting of all rights in one holder, disability should not be permitted to bar or interrupt the running of the statute. Of course, a guardian ad litem would have to be appointed to represent their interests. But if the legislature or the courts feel that those with disabilities should be protected, a provision should be made to buy their interest in the manner suggested above.

VI. Conclusion

The state of South Carolina has a vital interest in seeing that property within its borders does not become so tied up in legal complications that those who the law actually desires to protect are hurt. Various rules such as the Rule Against Perpetuities and public policy decisions declaring that an unreasonable restraint on alienation is void, have worked to almost eliminate situations where the use and enjoyment of land is intentionally restricted. But most of the "heirs' property" was not created purposely but simply evolved because of ignorance and negligence. This means that the law now allows a person to do inadvertently what it would prohibit him from doing intentionally. By providing legal assistance to those indigents who own property which they cannot fully utilize and altering the laws to allow them to acquire fee simple title, the state would not only be improving the plight of these landholders but would also be assuring that land is available to be used to its full potential. There is as much need for providing good housing for the rural areas as there is in the urban communities, but there is very little chance for upgrading housing if remedial action is not taken to eliminate "heirs' titles." The longer the General Assembly ignores this problem, the worse it will become.

Hugo A. Pearce, III


56. 61 Am. Jur. 2d Perpetuities and Restraints on Alienation § 6 (1972).