

## SOME SOURCES OF ACQUISITION OF COMMUNITY PROPERTY

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In the community property system, which prevails in eight western and southern states, there are two kinds of property, separate and community. Separate property is such property as was possessed at the time of marriage by either spouse or is acquired thereafter by gift, bequest, devise, or descent. Community property is such property as is acquired after marriage which comes from other sources than those just mentioned (omitting a statement regarding the income from separate property).

Naturally the earnings of the spouses constitute the chief source of acquisition of community property, whether the spouse is employed in the service of another for a reward or whether he (or she) operates his own business, or applies his skill and ingenuity in whatever manner, in the creation of wealth. It is conceived that the wife in her way, contributes not necessarily to the wealth, but at least to the well-being of the marital community so that the price of a picture received by a great artist would be as much community as the wages of a day laborer even though the wife may make no contribution thereto. The income from all industry and skill arises presumably from joint efforts and was known in the Spanish law as the matrimonial gains or *bienes gananciales*.

In all the community property states save California, the beneficial interests of the spouses in their acquisitions are equal, and the system thus affords a means of accomplishing the proprietary equality of the spouses such as the common law with the aid of legislatures has not been able to achieve. On divorce the property is under normal circumstances divided equally, and in most states each spouse has capacity equal to that of the other to inherit or dispose of it by will or pass it on by descent. In California<sup>1</sup> proprietary equality is not the primary aim of the law. The husband owns the community property and the wife never acquires a vested interest therein unless she survives the husband or is divorced.

Although community property is acquired chiefly from the industry of the spouses there are, nevertheless, certain sources of acquisition which we may call secondary such as adverse possession, fixtures or improvements, proceeds of life insurance policies, and damages

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<sup>1</sup> See article by the writer, *The Ownership of Community Property* (1921) 35 HARV. L. REV. 47. The Acquisition of Public Lands is discussed in (1921) 9 CALIF. L. REV. 267.

recovered for personal injuries. The first two sources are discussed in this paper.

## ADVERSE POSSESSION

Title to land cannot be acquired against the government by adverse possession.<sup>2</sup> What has been called a preference, however, may be acquired by "squatting" on public land; such preference should be carefully distinguished from an initiated title.<sup>3</sup> Land acquired by the adverse possession of husband and wife is acquired by onerous title and becomes community.<sup>4</sup>

If an adverse possessor, prior to the running of the statute, has some sort of interest as against the true owner, so that a title is initiated by taking possession, then it would seem that the question whether such property, to which title is subsequently perfected by the running of the statute, is community or not, would depend on the question of fact whether or not the adverse possessor was married at the time of taking possession. If no title is then initiated, as against the true owner, the property becomes community if he is married at the time the period of limitation is completed, otherwise not.

Dean Ames said:<sup>5</sup>

"True property or ownership consists of possession coupled with the unlimited right of possession, and when one person is dispossessed

<sup>2</sup> *Lapique v. Morrison* (1915) 29 Calif. App. 136, 154 Pac. 881; *Tiffany, Real Property* (1920 ed.) sec. 510; 35 L. R. A. (N. S.) 729, 747, note. For cases on wrongful occupation of public lands, see cases cited in (1921) 9 CALIF. L. REV. 267, 269, note 13; see also *Votaw v. Pettigrew* (1896) 15 Tex. Civ. App. 87, 38 S. W. 215; *Figures v. Gregg* (1897, Tex. Civ. App.) 39 S. W. 1011; *Webb v. Webb* (1855) 15 Tex. 275; *Hall v. Hall* (1905) 41 Wash. 186, 83 Pac. 108. In *Evans v. Krowinger* (1903) 9 Idaho, 153, 72 Pac. 882, the question is raised but not decided, whether a ferry franchise can be acquired by prescription against the state.

<sup>3</sup> It is difficult to understand Mr. McKay's criticism of the case of *Carratt v. Carratt* (1903) 32 Wash. 517, 73 Pac. 481. During the marriage the husband had received a deed from a grantee of the Northern Pacific Railroad purporting to convey him certain lands which had been granted the railroad by Congress. Under a subsequent forfeiture act the lands were restored to the public domain, but a preference was given to the actual possessors to purchase from the government. The forfeiture occurred after the death of the wife and the husband thereafter exercised his preference and purchased the land. It was held that this was not community property of himself and his deceased wife. This is clearly right as no title had vested prior to her death and there was a mere preference or option to purchase created by the statute. See McKay, *Community Property*, sec. 23.

<sup>4</sup> *Villescas v. Arizona Copper Co.* (1919) 20 Ariz. 268, 179 Pac. 963; *Hurley v. Lockett* (1888) 72 Tex. 262, 12 S. W. 212; *Brown v. Foster Lumber Co.* (1915, Tex. Civ. App.) 178 S. W. 787; *Mitchell v. Schofield* (1911, Tex. Civ. App.) 140 S. W. 254; *Adels v. Joseph* (1912, Tex. Civ. App.) 148 S. W. 1154.

<sup>5</sup> See *The Disseisin of Chattels* (1890) 3 HARV. L. REV. 313, 318; *Lectures on Legal History* (1913) 193, 198.

by another, only the right of possession remains in the former, and the dispossessor has complete ownership except for the outstanding right of possession. When the limitation period has run, the statute forbidding the exercise of the right, virtually annihilates it, and the imperfect title thereupon becomes perfect."<sup>6</sup>

But the original owner is not divested of his interest until the statute has completely run. Livery of seisin required possession, but feoffments are now wholly obsolete.

The necessity of possession to enable the owner to enfeoff and the idea that sound public policy prevented the sale of lawsuits became combined and established the rule that one whose land was in the adverse possession of another could not convey it. The earliest statute directly affecting the matter was "The Bill of Bracery and Buying of Titles," known as the Pretended Title Act.<sup>7</sup>

Adverse possession, the holding without right by one person of the land of another, may arise under various circumstances, and depending on the nature of those circumstances, was called disseisin, or abatement, or intrusion, or discontinuance, or deforcement. The distinction between disseisin and the other forms of wrongful holding has become obsolete and we no longer distinguish even between disseisin, where the possessor knows himself to be on another's land, and that adverse possession which will give title under the statute of limitations.<sup>8</sup>

The significance of seisin and disseisin in the early common law before the Statute of Uses, the rout of seisin, the survivals of it, and the statutory elimination of those survivals from 1800 to 1877, are pointed out in two scholarly articles by Professor Percy Bordwell.<sup>9</sup> These statutes deprived seisin of its theoretical as well as of its practical importance in all cases except two.

"It lost its significance as a special kind of possession and ceased to have any but historical significance save in a few exceptional cases.<sup>10</sup> . . . . It indicated the having of an estate or interest rather than possession. In representations of title it came to be used . . . . to indicate not possession . . . . but . . . . ownership."<sup>11</sup>

The identification of seisin with ownership made in a statement before the Exchequer Chamber by Preston in *Goodwright v. Forester*,<sup>12</sup> was not common law but Preston, says Professor Bordwell.<sup>13</sup>

<sup>6</sup> But see *Brown v. Foster Co.*, *supra* note 4; *Savage v. Wauhop* (1912, Tex. Civ. App.) 143 S. W. 259; *Wingard v. Wingard* (1909) 56 Wash. 289, 105 Pac. 634; *Bishop v. Lusk* (1894) 8 Tex. Civ. App. 30, 27 S. W. 306; *Johnson v. Johnson* (1858) 11 Calif. 200; *Pancoast v. Pancoast* (1881) 57 Calif. 320.

<sup>7</sup> (1540) 32 Hen. VIII, c. 9, sec. 2. See 32 L. R. A. (N. S.) 729, 730, note.

<sup>8</sup> See Costigan, *Conveyance of Lands by One Whose Lands Are in The Adverse Possession of Another* (1906) 19 HARV. L. REV. 267.

<sup>9</sup> *Seisin and Disseisin* (1921) 34 HARV. L. REV. 592 and 717.

<sup>10</sup> *Ibid.* 603.

<sup>11</sup> *Ibid.* 604.

<sup>12</sup> (1809, Exch. Ch.) 1 Taunt. 578.

<sup>13</sup> Bordwell, *op. cit.* 623, 624.

"As soon as there was an operative statute of limitations, however, the essentially provisional nature of the possessory right until the running of the statute must have been manifest and *any doctrine of defeasible title an anomaly*. . . . This failure to distinguish the new adverse possession from the old disseisin is a story in itself. . . ."

Professor Bordwell points out that in only three states, New York, North Carolina, and Maryland, has the rule *seisina facit stipitem* ever had anything like its English place in our law and that descent is traced not from the last one seized but from the last one entitled;<sup>14</sup> that in twenty-six states, lands in the adverse possession of another have been alienable from the first (including all the community property states save Arizona and Washington where the matter has not been dealt with by legislatures or courts) and are now alienable in all but seven states; and that where the non-transferability of land in the adverse possession of another has been a rule of property, the accustomed explanation of it has been the avoidance of maintenance and champerty.<sup>15</sup>

The possession adversely of privately owned land does not differ from the unlawful possession of public land save that in the latter case it cannot alone ripen into title. Where a statute gives the preference to such occupant, to acquire in the lawfully appointed way, it is conceived that his possession is quite like that of the former, there being a difference only in the conditions precedent to the acquisition of title. The interest of an adverse possessor therefore is more nearly comparable to what is sometimes termed an estate on a condition precedent than to one held on a condition subsequent, the former being really no estate at all.<sup>16</sup> "There is actually no estate at all so long as the condition precedent exists as such, but merely the prospect or possibility of an estate." The title which the adverse possessor acquires is not transferred to him from the former owner, but is an entirely new title and so is freed from the covenants for title which bound the former owner.<sup>17</sup>

<sup>14</sup> *Ibid.* 730, 731.

<sup>15</sup> *Ibid.* 735, 736. Professor Henry W. Ballantine seems to have a somewhat different view although he recognizes the point which this paper attempts to make. "As Gibson, C. J., puts it, 'The instant of conception is the instant of birth,' without any period of gestation or maturing of an inchoate title. The idea seems to be that the statute of limitations is a conveyancer like the Statute of Uses, which, when there is a deed by Doe to the use of Roe and his heirs, 'executes the use,' and

"Like a flash of electricity,  
The land's transferred in fee to Roe,  
Nothing at all remains in Doe."

—*Title by Adverse Possession* (1918) 32 HARV. L. REV. 135, 144.

This is believed to be about the situation save that the title of the true owner does not go to the adverse possessor. See also editorial notes in (1907) 20 HARV. L. REV. 563; (1908) 21 HARV. L. REV. 363; (1909) 22 HARV. L. REV. 168; (1904) 2 MICH. L. REV. 314.

<sup>16</sup> 1 Tiffany, *Real Property* (1920 ed.) sec. 75.

<sup>17</sup> 2 *ibid.* sec. 511.

Prior to the running of the statute the adverse possessor may validly transfer whatever interest he has by parol;<sup>18</sup> he has no interest which the true owner must respect nor one protected by law, save as to third persons.

It seems clear then that the adverse possessor is a mere occupant and has no vested interest until the running of the statute, and the decisions in the community property states, though not numerous, save in Texas, so hold. If there is a community when the statutory period is completed the land is community, otherwise not.<sup>19</sup> The nature of the possession claimed to be adverse, begun by a woman who later marries, may be evidenced by subsequent admissions of the husband and she is bound by such admissions because the possession if adverse would have inured to the benefit of the community.<sup>20</sup>

Does adverse possession under color of title make a difference? Color of title is defined by Tiffany as "the taking possession by one who has, in taking possession, acted on the strength of a conveyance or judicial decree purporting to vest the title in him, but which for some reason, fails to do so."<sup>21</sup> Of course if the color of title is such title, though defective, that it could be protected and, relying on which, title could be quieted<sup>22</sup> or the cloud removed, the significant date for the determination of the nature of the property would be the date of the beginning of adverse possession. One does not have an initiated title where the title he has is not protected against all the world. An adverse possessor is like an option-holder prior to the exercise of the option, in that he has no title, till the contingency happens which vests title. Prior to that neither is an equitable owner.

In *Gafford v. Foster*,<sup>23</sup> it was held that possession under a tax deed did not vest a title and though such deed is sufficient as color of title to support an adverse possession under the five year statute,<sup>24</sup> still as the wife died before the title was registered, a community interest did not arise and would not have arisen if the registry had taken place before her death. In Texas a tax deed conveys a defeasible title or estate.<sup>25</sup>

<sup>18</sup> See note in 2 *Corpus Juris*, 256.

<sup>19</sup> Mr. McKay strongly insists that a disseisor or adverse possessor has a title and that the question whether land is community or separate is to be determined by the fact whether or not there was a marriage existing when the adverse possession was begun. The writer has attempted to point out the impropriety of this view as a modern doctrine and especially in all the community property states where the true owner has never been unable to transfer freely his land in the adverse possession of another. See McKay, *op. cit.* chap. VI.

<sup>20</sup> *Texas & N. O. Ry. v. Speights* (1901) 94 Tex. 350, 60 S. W. 659.

<sup>21</sup> 2 Tiffany, *op. cit.* secs. 500, 512. Defective title seems to be more than color of title. See also Ballantine, *Claim of Title by Adverse Possession* (1919) 28 *YALE LAW JOURNAL*, 219; *Collins v. Lynch* (1893) 157 Pa. 246, 27 Atl. 721.

<sup>22</sup> See 5 Pomeroy, *Equity Jurisprudence* (2d ed. 1919) secs. 2157-2165.

<sup>23</sup> (1904) 36 Tex. Civ. App. 56, 81 S. W. 63.

<sup>24</sup> Vernon's Sayles' Texas Civ. Sts. 1914, art. 5674 (old art. 3342).

<sup>25</sup> *Ibid.* art. 7677 (old art. 5225).

No defect in the tax deed is indicated in the *Gafford* case so it is difficult to see why the community interest did not vest. The court cites various cases where a mere preference has been acquired in public lands and a failure to note the distinction between this mere preference and an initiated title may account for the result.

In *Duncan v. Bickford*,<sup>26</sup> the husband by purchase at an administrator's sale, became the grantee in a void deed and so did not have color of title and no community interest vested thereby.

In *Siddall v. Haight*,<sup>27</sup> an attorney was being sued for damages for neglect of professional duty in failing to cause execution to be levied against certain property, alleged to be the community property of one Thompson and his wife. If the property should prove to be the separate property of the wife then the action could not be maintained. The sister of Mrs. Thompson had made a parol gift of the land to the latter by virtue of which she with her husband entered and occupied the land. After the sister's death the latter's administrator brought an action of ejectment against Mrs. Thompson, not joining the husband. Judgment was rendered in favor of the defendant, the court finding that Mrs. Thompson had acquired title by adverse possession. The record of that judgment was offered and admitted as evidence in the *Siddall* case. The former judgment could not be binding on Thompson and his privies being a *res inter alios acta*. The plaintiff made the point that land acquired by the adverse possession of husband and wife must be community property but the court held that the adverse possession originated in a verbal gift to the wife, thus in effect holding that some title was initiated in her. A verbal gift followed by possession and valuable improvements would be a defence against ejectment,<sup>28</sup> but that was not this case. A parol gift of land alone does not give color of title<sup>29</sup> nor

<sup>26</sup> (1892) 83 Tex. 322, 18 S. W. 598.

<sup>27</sup> (1901) 132 Calif. 320, 64 Pac. 410; cf. *Bullock v. Sprowls* (1899, Tex. Civ. App.) 54 S. W. 157; 18 Am. St. Rep. 113, note.

<sup>28</sup> *Seavey v. Drake* (1882) 62 N. H. 393.

<sup>29</sup> *Allen v. Mansfield* (1892) 108 Mo. 343, 18 S. W. 901. See NOTES (1909) 23 HARV. L. REV. 56; (1912) 21 YALE LAW JOURNAL, 618; (1913) 1 CALIF. L. REV. 363; (1908) 6 MICH. L. REV. 707; (1909) 7 *ibid.* 251; (1920) 18 *ibid.* 693; (1921) 19 *ibid.* 645; Ann. Cas. 1912 A, 570. In several of these notes more cautious statements than those of Tiffany are made to the effect that there may be color of title without a writing. It is argued that something else than a writing may serve notice on the grantor as to the extent of land claimed by the adverse possessor.

In *Wills v. Wood, L. & M. Co.* (1915) 29 Calif. App. 97, 154 Pac. 613, it was said that a married woman living with her husband and having no claim in her own right to land, cannot acquire title to it by adverse possession. Possession taken by husband and wife where there is color of title in the wife, would be sufficient for the acquisition of separate property by the wife by adverse possession. See *Madden v. Hall* (1913) 21 Calif. App. 541, 132 Pac. 291, and cases there cited. One case cited from Connecticut [*Clark v. Gilbert* (1872) 39 Conn. 94] seems to have so held where there was an oral gift to the wife. Color of title,

any interest which could be protected against ejectment. There is no difference in that respect between entering under a parol gift and a hostile entering *sans consent*. The point here sought to be made is that title is not initiated by a parol gift though that is followed by the taking of possession, inasmuch as there is nothing to prevent the donor from recalling the gift save the statute of limitations. Therefore the title accrues solely by virtue of the running of the statute. An onerous, therefore, rather than a lucrative title is acquired. Perhaps there is a feeling on the part of the court that a parol gift followed by possession amounts to livery of seisin. This case is contrary to the view that otherwise prevails in California that no title accrues by adverse possession until the statute has run. It is arguable here, however, that the fact that the husband made no claim of an interest in the premises, is evidence of an agreement or understanding between the spouses that the land should become the separate property of the wife, or that while he claimed adversely to the donor, he did not claim as against his wife.

In *Pancoast v. Pancoast*,<sup>30</sup> the husband at the time of marriage was in adverse possession of certain land. After marriage he came to an agreement with the true owners whereby he surrendered a portion of the occupied premises in consideration of a conveyance to him by the owner of the part retained. This land was held to be community. In *Johnson v. Johnson*,<sup>31</sup> before his marriage one Johnson was in possession of certain lots under an unsealed instrument purporting to convey to himself a mule, a dray, and an "interest in the possession of the lots." After marriage he purchased the lots with community funds. He contended, in an action by his divorced wife for partition of the lots, that he was already in possession at the time of marriage under a defective title and that he merely purchased an adverse claim which constituted a cloud on his title. It was held that he had no title prior to marriage. It is quite evident that the purported conveyance under which he claimed was wholly insufficient to create color of title or to be protected in equity, from the true owner.<sup>32</sup>

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however, requires a written instrument. See 2 Reeves, *Real Property* (1909) 1360; 3 Washburn, *Real Property* (6th ed. 1902) sec. 1981. In *Smith's Admr's. v. De la Garza* (1855) 15 Tex. 150, parties claimed title by adverse possession, the right originating in the wife as an heir of the first possessor. Cf. *McGuire v. De Fremery* (1888) 76 Calif. 401, 18 Pac. 410.

<sup>30</sup> (1881) 57 Calif. 320.

<sup>31</sup> (1858) 11 Calif. 200.

<sup>32</sup> The Civil Code of California provides that the owner of land in the adverse possession of another may mortgage it (sec. 2921) and convey it with the same effect as if he were in actual possession (sec. 1047). The Commissioners' note on this section reads: "The reason of the ancient common-law doctrine does not exist here. When livery of seisin was necessary, as it could only be made by the person in possession, it followed as a matter of course that a conveyance by a person out of possession was void. In this state the execution and delivery of a deed without livery of seisin or entry consummates a conveyance, and therefore

## IMPROVEMENTS\*

Improvements on land may be made under the following circumstances:

1. Community funds may be used to improve the separate property (a) of the husband, or (b) of the wife.<sup>33</sup>
2. Separate funds (a) of the wife or (b) of the husband may be used to improve community property.<sup>34</sup>
3. Separate funds (a) of the wife may be used to improve the separate property of the husband and conversely, (b) separate funds of the husband may be used to improve the separate property of the wife.<sup>35</sup>

there is no good reason why the conveyance of land to which the grantor has a rightful claim should not be valid."

In *Coe v. Sloan* (1909) 16 Idaho, 49, 100 Pac. 354, it was held that where the wife on the death of the husband, being the owner of but one-half, purports to convey by deed the entire community interest in the land, her conveyance passes her one-half interest and the purchaser acquires color of title to the interest which passed by descent to the children of deceased. Cf. *Cox v. Tompkinson* (1905) 39 Wash. 70, 80 Pac. 1005; *Schlarb v. Castaing* (1908) 50 Wash. 331, 97 Pac. 289.

\*The term improvements is used and not fixtures. The problem of trade fixtures does not seem to be involved at all.

<sup>33</sup> (a) *Peck v. Brummagin* (1866) 31 Calif. 440; *Carlson v. Carlson* (1909) 10 Calif. App. 300, 101 Pac. 923; *Shaw v. Bernal* (1912) 163 Calif. 262, 124 Pac. 1012; *Larson v. Carter* (1908) 14 Idaho, 511, 94 Pac. 825; *Beneke v. Beneke* (1907) 47 Wash. 178, 91 Pac. 641; *Succession of Burke* (1902) 107 La. 82, 31 So. 391; *Schwartzman v. Cabell* (1898, Tex. Civ. App.) 49 S. W. 113; *Collins v. Bryan* (1905) 40 Tex. Civ. App. 88, 88 S. W. 432; *Brady v. Maddox* (1910, Tex. Civ. App.) 124 S. W. 739; *Rudasill v. Rudasill* (1920, Tex. Civ. App.) 219 S. W. 843; *Barber v. Barber* (1920, Tex. Civ. App.) 223 S. W. 866; *Stoppelberg v. Stoppelberg* (1920, Tex. Civ. App.) 222 S. W. 587; *Potter v. Smith* (1920, Calif. App.) 191 Pac. 1023; *Furrrh v. Winston* (1886) 66 Tex. 521, 1 S. W. 527; *Succession of Bellande* (1899) 41 La. Ann. 491, 6 So. 505; *Neaves v. Griffin* (1904, Tex. Civ. App.) 80 S. W. 420; *Watkins v. Watkins* (1909, Tex. Civ. App.) 119 S. W. 145; *King v. Summerville* (1904, Tex. Civ. App.) 80 S. W. 1050; *Bullock v. Sprowls*, *supra* note 27; *Darden v. Taylor* (1910, Tex. Civ. App.) 126 S. W. 944.

(b) *Succession of Webre* (1897) 49 La. 1491, 22 So. 390; *Sims v. Billington* (1898) 50 La. 968, 24 So. 637; *Gilroy v. Richards* (1901) 26 Tex. Civ. App. 355, 63 S. W. 664; *Hillen v. Williams* (1901) 25 Tex. Civ. App. 268, 60 S. W. 997; *Robinson v. Moore* (1892, Tex. Civ. App.) 20 S. W. 994; *Cervantes v. Cervantes* (1903, Tex. Civ. App.) 76 S. W. 790; *Branch v. Makeig* (1895) 9 Tex. Civ. App. 399, 28 S. W. 1050; *Stoppelberg v. Stoppelberg*, *supra*; *Rice v. Rice* (1858) 20 Tex. 58; *Legg v. Legg* (1904) 34 Wash. 132, 75 Pac. 130; *Succession of Casey* (1912) 130 La. 743, 58 So. 556; *King v. Summerville*, *supra*; *Lombardi v. Lombardi* (1921, Nev.) 195 Pac. 93.

<sup>34</sup> (a) *Burns v. Parker* (1911, Tex. Civ. App.) 137 S. W. 705; (b) *Munchow v. Munchow* (1915) 136 La. 753, 67 So. 819.

<sup>35</sup> (a) *Tison v. Gass* (1907) 46 Tex. Civ. App. 163, 102 S. W. 751; *Parrish v. Williams* (1899, Tex. Civ. App.) 53 S. W. 79; (b) *Maddox v. Summerlin* (1899) 92 Tex. 484, 49 S. W. 1033, 50 S. W. 567; *Schmidt v. Huppman* (1889) 73 Tex. 116, 11 S. W. 175; *Smith v. Smith* (1920, Calif. App.) 191 Pac. 60.



4. Community funds of the second community may be used to improve the property of the first community.<sup>36</sup>

There seems to be no distinction between the use of community and of separate funds to improve the separate estate of the husband save that if the funds used are community, only one-half is recoverable, but in either case a lien is created in favor of the wife and her heirs against the property so improved.<sup>37</sup> Likewise where the wife's separate funds are employed by the husband to improve community property, a lien is created in her favor.<sup>38</sup> Where, however, the wife's separate property is improved by the husband by the use of his own or of community funds, the general rule is that no lien is created so as to affect the title.<sup>39</sup> In the California cases, where the wife's property is so improved, it is generally held that a gift to the wife is to be presumed so that neither a lien nor a claim for reimbursement would arise unless by evidence it were shown that there was no intention to make her a gift.<sup>40</sup> The Texas court holds that there is no presumption of a gift, and that although no lien arises in his favor he does have a claim for reimbursement or an accounting on dissolution of the community.<sup>41</sup>

The natural conclusion as to the ownership of improvements is that they follow the land and belong to the owner of it. This is not always the way in which the matter of ownership has been considered. There are four views:

1. The improvements follow the land and there is no right of reimbursement.<sup>42</sup>

2. The improvements follow the land but there is a charge or lien against the land for the value thereof.<sup>43</sup> This is statutory in Louisiana.

<sup>36</sup> *Clift v. Clift* (1888) 72 Tex. 144, 10 S. W. 338; *Bond v. Hill* (1872) 37 Tex. 626; *In re Mason's Estate* (1917) 95 Wash. 564, 164 Pac. 205.

<sup>37</sup> See *infra* note 43.

<sup>38</sup> See *infra* note 43.

<sup>39</sup> See *infra* note 44.

<sup>40</sup> *Carlson v. Carlson*, *supra* note 33; *Smith v. Smith* (1920, Calif. App.) 191 Pac. 60; *Swain v. Duane* (1874) 48 Calif. 358; cf. *Peck v. Brummagin* (1866) 31 Calif. 440.

<sup>41</sup> *Collins v. Bryan* (1905) 40 Tex. Civ. App. 88, 88 S. W. 432; *Rudasill v. Rudasill* (1920, Tex. Civ. App.) 219 S. W. 843.

<sup>42</sup> *Swain v. Duane*, *supra* note 40; *Smith v. Smith*, *supra* note 40; *Potter v. Smith* (1920, Calif. App.) 191 Pac. 1023; *Peck v. Brummagin*, *supra* note 33; *In re Mason's Estate* (1917) 95 Wash. 564, 164 Pac. 205; *Smith v. Smith* (1859) 12 Calif. 216; *Shaw v. Bernal*, *supra* note 33; *Larson v. Carter*, *supra* note 33.

<sup>43</sup> *Sims v. Billington*, *supra* note 33; *Dillon v. Freville* (1912) 129 La. 1005, 57 So. 316; see Merrick's La. Code, 1912, art. 2408; *Legg v. Legg*, *supra* note 33; *Allen v. Allen* (1908) 101 Tex. 362, 107 S. W. 528; *Darden v. Taylor*, *supra* note 33; *Tison v. Gass* (1907) 46 Tex. Civ. App. 163, 102 S. W. 751; *Robinson v. Moore*, *supra* note 33; *Parrish v. Williams* (1899, Tex. Civ. App.) 53 S. W. 79; *Welder v. Lambert* (1898) 91 Tex. 510, 44 S. W. 281; *Branch v. Makeig*, *supra* note 33; *Furrh v. Winston*, *supra* note 33; *Rice v. Rice*, *supra* note 33; *Schwartzman v. Cabell*, *supra* note 33; *Hillen v. Williams*, *supra* note 33. The Spanish Law permitted a lien, *Rudasill v. Rudasill*, *supra* note 41.

3. The improvements follow the land. There is no charge or lien against the land but there is or may be a personal liability on the part of the owner to reimburse for them.<sup>44</sup>

4. The improvements do not follow the land, but retain the character of the funds employed in their construction.<sup>45</sup>

The difference between the first, second, and third views on the one hand and the fourth on the other cannot be accounted for by assuming that in the latter case the improvements are trade fixtures because trade fixtures are not alluded to at all.

The first view is largely confined to cases where the wife's separate property has been improved and the rule is that such improvements are regarded as a gift in the absence of evidence to show that no gift was intended,<sup>46</sup> though Texas courts hold differently.<sup>47</sup> The improvements "have no operation on the direction of the title";<sup>48</sup> or, "the husband cannot assert his claim in any way, so as to incumber or affect the title of the wife."<sup>49</sup> In Washington it is held that the right of reimbursement is statutory and where there is no statute as in Washington, there can be no recovery.<sup>50</sup>

There is a charge or lien where the community funds or the wife's separate funds are used to improve the husband's land. The Texas court in *Barber v. Barber*,<sup>51</sup> declared that this was the Spanish law, though in another case<sup>52</sup> it was said that a right of reimbursement arose but there was no claim to the property itself. A charge, however, was allowed.

<sup>44</sup> *Carlson v. Carlson*, *supra* note 40; *In re Deschamp's Estate* (1914) 77 Wash. 514, 137 Pac. 1009; *Brady v. Madox* (1910, Tex. Civ. App.) 124 S. W. 739; *Schmidt v. Huppman* (1889) 73 Tex. 116, 11 S. W. 175; *Rudasill v. Rudasill*, *supra* note 41; *Barber v. Barber* (1920, Tex. Civ. App.) 223 S. W. 866; *Bond v. Hill* (1872) 37 Tex. 626; *Munchow v. Munchow*, *supra* note 34; cf. *Watkins v. Watkins*, *supra* note 33. In *Fay v. Ray* (1913), 165 Calif. 469, 132 Pac. 1040, the wife had conveyed a one-half interest in certain two lots, her separate property, being induced so to do by the fraudulent representations of the husband. They were improved partly with community and partly with his separate funds. In an action by the wife to set aside the conveyance and for reconveyance, the relief sought was granted, conditioned on the repayment by the wife of the separate and one-half the community funds so expended. Cf. *Succession of Webre* (1897) 49 La. Ann. 1491, 22 So. 390; *Bullocks v. Sprovels* (1899, Tex. Civ. App.) 54 S. W. 657.

<sup>45</sup> *Maddox v. Summerlin* (1899) 92 Tex. 484, 49 S. W. 1033, 50 S. W. 567; *Collins v. Bryan*, *supra* note 41; *Neaves v. Griffin* (1904, Tex. Civ. App.) 80 S. W. 420; *King v. Summerville* (1904, Tex. Civ. App.) 80 S. W. 1050.

<sup>46</sup> *Smith v. Smith*, *supra* note 42; see notes in 14 Ann. Cas. 1178 and Ann. Cas. 1912 A, 1194.

<sup>47</sup> *Collins v. Bryan*, *supra* note 41.

<sup>48</sup> *Carlson v. Carlson*, *supra* note 33.

<sup>49</sup> *Schmidt v. Huppman*, *supra* note 35.

<sup>50</sup> *In re Mason's Estate*, *supra* note 42.

<sup>51</sup> *Supra* note 44.

<sup>52</sup> *Welder v. Lambert*, *supra* note 43; cf. *Rice v. Rice*, *supra* note 33.

The doctrine that no charge arises against the land improved but that there may be a personal obligation prevails almost exclusively in cases where the wife's separate property has been improved with community or with the husband's separate funds. This is probably because the husband is the manager of the community estate and in Texas particularly he has control also of the wife's estate.

The fourth view prevails only in Texas. It seems wrong from every point of view. The improvements are fixtures and should go with the land to which they are affixed. *Maddox v. Summerlin*<sup>53</sup> and *Collins v. Bryan*<sup>54</sup> were cases where community property had been used by the husband to improve the wife's land and the husband's creditors were allowed to resort to the improvements though it was expressly stated that her title to the land could not be affected. In the latter case the trustee of the estate of the bankrupt husband brought an action to subject such improvements to the claims of creditors. It was found that three hundred dollars had been so expended and there was no showing of fraud. It was held that these improvements constituted community interests and should be placed in the bankrupt's property schedules and sold; and that the costs should be taxed to the wife's interest in the improvements. This amounts to a holding that creditors can demand an accounting between husband and wife<sup>55</sup> which is in conflict with the great weight of Texas authority unless it be thought that holding that the improvements continue to be community property avoids that difficulty.

In general, where there is a lien on the land for the value of the improvements, the land is community or belongs to the husband and the lien is in favor of the wife; where there is a mere personal claim for reimbursement, community or the husband's funds have been used to improve the wife's land; and where the improvements continue community, they are on the wife's land, and to hold that they are community and may be sold provides means for payment of the husband's debts. In one case<sup>56</sup> where the wife expended community funds, in improving her separate lot while acting as administratrix on the death of her husband, it was held that there was no *devastavit* so long as she retained the lot but there was a *devastavit* when she sold it.

In *Clift v. Clift*,<sup>57</sup> the husband, after the death of the first wife, became tenant by the curtesy of her separate land and was in possession of the community land as co-tenant with the children. With community funds of the second community he erected permanent improvements, consisting of a building on the separate land, which building extended

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<sup>53</sup> *Supra* note 45.

<sup>54</sup> *Supra* note 41.

<sup>55</sup> *Blum v. Rogers* (1888) 71 Tex. 668, 9 S. W. 595; *Rudasill v. Rudasill*, *supra* note 41.

<sup>56</sup> *Neaves v. Griffin*, *supra* note 45.

<sup>57</sup> *Supra* note 36.

over upon the community land. It was held that the second community could not recover for the funds so expended on the separate land because improvements erected by a life-tenant are a gratuity to the remainderman but that where land held in co-tenancy is so improved there may be a recovery. A recovery was allowed however in *Bond v. Hill*,<sup>58</sup> where the surviving widow, occupying a homestead as life tenant, married again and the second husband improved the homestead. It has been held that one co-tenant cannot recover against the other for improvements made, apart from the statutory provision to that effect, but the Texas courts hold the other way.<sup>59</sup>

The question as to the measurement of the amount of the reimbursement has been dealt with by the courts and is statutory in Louisiana.<sup>60</sup> In that state the enhanced value of the improved land is the measure<sup>61</sup> and not the cost of the improvements, and the obligation to reimburse is treated as quasi-contractual. There are statements in Texas cases to the effect both that the amount of reimbursement<sup>62</sup> is the enhanced value, and on the other hand that it is the cost of the improvements,<sup>63</sup> or the sum so used. Which measure should be adopted should depend on the circumstances at the time the improvements were made.

Interest was allowed on community funds used to improve the husband's separate estate in Washington, from the time of the application thereof, there being no children and the surviving wife being the sole heir of the community.<sup>64</sup> The theory must be that at the time of the application of the funds, they were potentially the property of the wife as she was destined to become the sole owner of the community property, the profits of separate property being separate there. In Texas where the rents, issues, and profits of separate property of the wife were until recently a part of the community estate, interest was not allowed until the death of the husband though the funds used were the separate funds of the wife, and were used to improve the husband's separate land. A recovery of one-half the principal sum expended was allowed.<sup>65</sup>

<sup>58</sup> *Supra* note 44.

<sup>59</sup> *In re Mason's Estate*, *supra* note 36; *Robinson v. Moore*, *supra* note 43; *Burns v. Parker*, *supra* note 34; *Clift v. Clift*, *supra* note 36.

<sup>60</sup> Merrick's La. Code, 1912, art. 2408.

<sup>61</sup> *Sims v. Billington*, *supra* note 33.

<sup>62</sup> *Gilroy v. Richards*, *supra* note 33; *Branch v. Makeig*, *supra* note 33; *Burns v. Parker*, *supra* note 34; *Hillen v. Williams*, *supra* note 33; *Bond v. Hill*, *supra* note 44.

<sup>63</sup> *Tison v. Gass*, *supra* note 43; *Robinson v. Moore*, *supra* note 33; *Cervantes v. Cervantes* (1903, Tex. Civ. App.) 76 S. W. 790; *Barber v. Barber*, *supra* note 44; *Furrh v. Winston*, *supra* note 33. This is the measure in Washington. *Legg v. Legg*, *supra* note 33. It is observable that in the main where there is a personal liability but no lien, it is for the amount of the enhanced value, but where there is a lien it is generally for the amount of funds expended.

<sup>64</sup> *Legg v. Legg*, *supra* note 33. See note in 86 Am. Dec. 628.

<sup>65</sup> *Parrish v. Williams*, *supra* note 43.

## CONCLUSION

In conclusion it is suggested that mere adverse possession cannot as a modern doctrine be said to initiate any title to property as against the true owner. As against others it may of course be sufficient to sustain an action of ejectment or trespass. Color of title is not defective title. It is rather no title at all, for if some title, though defective, is thus acquired, it is more than color of title. It has significance of course, mainly where the problem is one of constructive possession and is said to give notice of the extent of the claim. Possibly we may say, where there is color of title in one of the spouses, that constructive notice is given of who the claimant is, but that would not be binding upon the spouses nor upon the creditors of either. The general rule in common-law states is that the wife may during coverture acquire separate property by adverse possession where she has color of title. It may also be true that where the spouses enter upon and adversely occupy land under color of title in one of them, that fact may be evidence of an understanding *inter sese* or of their intention that, when the statute of limitations has run, the acquisition shall be separate. Possession, however, under a parol gift to one of them can surely have no such effect.

The ownership of improvements should follow the land to which they are affixed. There is nothing in the community system that should change the ordinary rule for fixtures. It is purely a question of policy depending upon the circumstances whether or not a charge should be declared against the lands so improved. Since the husband is the managing agent it may well be that he should be held to a stricter accountability than the wife. In any event, where no gift was intended, there should be at least a quasi-contractual liability on the owner of the land for the enhancement in value.