

NOTES TO DECISIONS

This section codifies the general policies of granting repose and assuring fresh evidence at trial by establishing certain time limits for all civil actions. *Haakanson v. Wakefield Seafoods, Inc.*, 600 P.2d 1087 (Alaska 1979).

Specificity in pleading required. — The defense of the statute of limitations must be specifically pleaded. *Devine v. Cordovado*, 15 Alaska 232, 143 F. Supp. 561 (D. Alaska 1954).

Foreclosure actions. — The portion of Alaska's Code of Civil Procedure which deals with limitation of actions does not contain any provision which specifically establishes a limitation period governing the foreclosure of either legal or equitable mortgages. *Dworkin v. First Nat'l Bank*, 444 P.2d 777 (Alaska 1968).

In the absence of a controlling statute a foreclosure action is subject to the same period of limitations as the underlying debt. *Dworkin v. First Nat'l Bank*, 444 P.2d 777 (Alaska 1968).

Sec. 09.10.020. When action commenced. [Repealed, § 1 ch 27 SLA 1966. For present law, see Civ. R. 3.]

Sec. 09.10.030. Actions to recover real property in 10 years. A person may not bring an action for the recovery of real property, or for the recovery of the possession of it unless the action is commenced within 10 years. An action may not be maintained for the recovery unless it appears that the plaintiff, an ancestor, a predecessor, or the grantor of the plaintiff was seized or possessed of the premises in question within 10 years before the commencement of the action. (§ 1.03 ch 101 SLA 1962)

Revisor's notes. — In 1994, "A person may not" was substituted for "No person may" and "the action is" was inserted after "unless" in the first sentence, and "An action may not" was substituted for "No

In a suit to foreclose a mortgage the six-year period of limitation is controlling and the ten-year period pertaining to actions upon sealed instruments is inapplicable. *Dworkin v. First Nat'l Bank*, 444 P.2d 777 (Alaska 1968).

The six-year statute of limitations (AS 09.10.050), which governs the underlying obligation, is determinative of the period of time in which a party is required to commence an action to foreclose a purported equitable mortgage security. *Dworkin v. First Nat'l Bank*, 444 P.2d 777 (Alaska 1968).

Tort actions. — A tort action must be commenced within two years after the cause of action has accrued. *Silverton v. Marler*, 389 P.2d 3 (Alaska 1964).

Quoted in *Groseth v. Ness*, 421 P.2d 624 (Alaska 1966); *Pedersen v. Zielski*, 822 P.2d 903 (Alaska 1991); *FDIC v. Laidlaw Transit, Inc.*, 21 P.3d 344 (Alaska 2001).

action may" in the second sentence to conform this section to the current style of the Alaska Statutes.

Cross references. — For adverse possession under color of title, see AS 09.45.052.

NOTES TO DECISIONS

- I. General Consideration.
- II. Adverse Possession.
 - A. Generally.
 - B. Actual Possession.
 - C. Notorious Possession.
 - D. Exclusive Possession.
 - E. Continuous Possession.
 - F. Hostile Possession.

I. GENERAL CONSIDERATION.

This section is a statute of repose. *Roberts v. Jaeger*, 5 Alaska 190 (1914).

This section presupposes that there never has been a deed. *Roberts v. Jaeger*, 5 Alaska 190 (1914).

Section may be basis of new title. — While this statute purports only to bar the remedy, it is clear that it can be the basis of a new title, which may be asserted offensively as well as defensively. *Ringstad v. Grannis*, 12 Alaska 190, 171 F.2d 170 (9th Cir. 1948).

This section can be utilized as the basis of a new title. *Ayers v. Day & Night Fuel Co.*, 451 P.2d 579 (Alaska 1969).

This statute not only establishes a time limit within which an action to recover real property must be brought, but also constitutes the method by which a claimant may establish a new title through adverse

possession. *Bentley Family Trust v. Lynx Enters., Inc.*, 658 P.2d 761 (Alaska 1983).

Such as right of way. — While this section purports only to bar a remedy, it may be used as the basis of establishing an easement of right of way across another's land. *Hamerly v. Denton*, 359 P.2d 121 (Alaska 1961).

Possessory right may be protected by action. — In *Noble v. Melchoir*, 5 Alaska 729 (1917), the court said: "The possessory right thus acquired by defendant is a property right, for the protection of which an appropriate action may be maintained by the occupant." *Ringstad v. Grannis*, 12 Alaska 190, 171 F.2d 170 (9th Cir. 1948). See notes under analysis line II, "Adverse Possession".

Applicability of provision requiring possession or seizure within 10 years. — The provision of

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this section that no action may be maintained unless it appears that the plaintiff or his predecessor was seized or possessed of the premises within 10 years is not inapplicable to any party except a plaintiff. *Juneau Indep. Sch. Dist. v. Smith*, 13 Alaska 1, 92 F. Supp. 617 (D. Alaska 1950).

Differences between claim under color of title and one without color. — Essential difference between requirements for claim under color of title and one without such color of title is in the number of years of possession required. In both cases, there must be uninterrupted, adverse and notorious possession, but only seven years is required under AS 09.25.050 (now AS 09.45.052) as opposed to 10 years under this section. *Shilts v. Young*, 567 P.2d 769 (Alaska 1977).

When the land claimed is not the land described in the deed, the doctrine of color of title does not apply and the 10-year period of this section must be met. *Hubbard v. Curtiss*, 684 P.2d 842 (Alaska 1984).

A trust once established is not within the statute of limitations. *Alaska N. Ry. v. Alaska Cent. Ry.*, 5 Alaska 304 (1915).

If defendants were holding land as trustees for the plaintiff or its grantor, the statute would not run, until there was some act of disavowal done by said trustees which showed unequivocally that they were holding adversely to the alleged cestui que trust. *Alaska N. Ry. v. Alaska Cent. Ry.*, 5 Alaska 304 (1915).

Possession of trustee is presumed to be possession of cestui que trust. — See *Alaska N. Ry. v. Alaska Cent. Ry.*, 5 Alaska 304 (1915).

Clear proof of surrender of owner's rights required. — Before a court would be justified in interfering with an owner's enjoyment of his own land, it ought to be satisfied by the clearest kind of proof that the owner has surrendered that absolute *jus disponendi* which the law guarantees to him. *Roberts v. Jaeger*, 5 Alaska 190 (1914).

Statute does not run until plaintiff acquires title. — The statute of limitations begins to run against a grantee under the general land laws of the United States only from the date when he acquires the title, and an occupancy by another prior to that time will not be deemed adverse to the title of such grantee. *Tyee Consol. Mining Co. v. Langstedt*, 136 F. 124 (9th Cir. 1905).

To start the statute of limitations running against a plaintiff, who relied on a townsite trustee's deed, he must have been disseized, and in order to be disseized he must have at some time have been seized of title, either of fee or freehold, and until the issuance of patent to him he was not so seized. *Alaska & N.W.T.T. Co. v. Bernhoffer*, 4 Alaska 99 (1910); *Valentine v. McGrath*, 4 Alaska 102 (1910).

It is the delay, the duration of time after title seized, that raises the bar of the statute; this may not be by relation, else one ought to be barred before time seized. *Valentine v. McGrath*, 4 Alaska 102 (1910).

Running against claimant of mining claim. — The statute of limitations does not begin to run against the claimant of a mining claim before his patent issues. *Tyee Consol. Mining Co. v. Langstedt*, 136 F. 124 (9th Cir. 1905).

The action of an owner on his own land does not start the running of adverse possession. *Karvonen v. Dyer*, 261 F.2d 671 (9th Cir. 1958).

Foreclosure actions. — In the absence of a controlling statute a foreclosure action is subject to the same period of limitations as the underlying debt.

Dworkin v. First Nat'l Bank, 444 P.2d 777 (Alaska 1968).

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The six-year statute of limitations (AS 09.10.050), which governs the underlying obligation, is determinative of the period of time in which a party is required to commence an action to foreclose a purported equitable mortgage security. *Dworkin v. First Nat'l Bank*, 444 P.2d 777 (Alaska 1968).

Inverse condemnation. — Where the plaintiff directed his inverse condemnation claim at the effects of the installation of water and sewer lines on his property, not at the initial installation, and where he could not reasonably have been expected to have known about the interconnection between the lines until he spoke with city employees, his claim was not time barred. *Lane v. City of Kotzebue*, 982 P.2d 1270 (Alaska 1999).

The limitations period did not bar the plaintiff from recovering for inverse condemnation damages caused by glaciation or freezing occurring within the ten years before he filed suit. *Lane v. City of Kotzebue*, 982 P.2d 1270 (Alaska 1999).

Right to trial by jury. — Whether the plaintiff is in possession of the disputed property at the time of the filing of the claim for a prescriptive easement under this section is not determinative of the question of whether the claim is treated as a legal or equitable one, which prevents a party who seizes possession of disputed property from gaining the right to a jury trial. *McGill v. Wahl*, 839 P.2d 393 (Alaska 1992).

Section applicable to inverse condemnations. — The ten-year limitations statute bars inverse condemnation claims for injury occurring more than ten years before the suit was filed. *Fairbanks N. Star Borough v. Lakeview Enters.*, 897 P.2d 47 (Alaska 1995).

Applied in *Swift v. Kniffen*, 706 P.2d 296 (Alaska 1985); *Tenala, Ltd. v. Fowler*, 921 P.2d 1114 (Alaska 1996).

Quoted in *Alaska Nat'l Bank v. Linck*, 559 P.2d 1049 (Alaska 1977); *Ault v. State*, 688 P.2d 951 (Alaska 1984).

Stated in *Walsh v. Emerick*, 611 P.2d 28 (Alaska 1980); *Smith v. Krebs*, 768 P.2d 124 (Alaska 1989).

Cited in *Carter v. Hoblit*, 755 P.2d 1084 (Alaska 1988).

II. ADVERSE POSSESSION.

A. Generally.

Legal title gives constructive possession until ouster by adverse possession. — A legal title gives a right of possession as well as the legal seizin, and possession coextensive with the right, until there is an ouster by adverse possession. *Tyee Consol. Mining Co. v. Langstedt*, 121 F. 709 (9th Cir. 1903), *rev'd* on other grounds, 136 F. 124 (9th Cir. 1905).

Supposition underlying adverse possession. — Adverse possession presupposes the existence of some title or right to possession in another which is adverse

to the one claiming title by adverse possession. *Ayers v. Day & Night Fuel Co.*, 451 P.2d 579 (Alaska 1969).

The good faith of the claimant is not a relevant issue under the ten-year adverse possession statute. *Lott v. Muldoon Rd. Baptist Church, Inc.*, 466 P.2d 815 (Alaska 1970).

Elements required under AS 09.25.050 and this section. — Under both AS 09.25.050 (now AS 09.45.052) applicable when possession is under color of title and this section applicable in other cases, the claimant must satisfy the basic elements of adverse possession in establishing his or her claim. *Bentley Family Trust v. Lynx Enters., Inc.*, 658 P.2d 761 (Alaska 1983).

In order to acquire title by adverse possession, the claimant must prove, by clear and convincing evidence, that for the statutory period his use of the land was continuous, open and notorious, exclusive and hostile to the true owner. *Nome 2000 v. Fagerstrom*, 799 P.2d 304 (Alaska 1990).

Three basic requirements for adverse possession are: (1) the possession must have been continuous and uninterrupted; (2) the possessor must have acted as if he were the owner and not merely one acting with the permission of the owner; and (3) the possession must have been reasonably visible to the record owner. *Shilts v. Young*, 567 P.2d 769 (Alaska 1977).

Possession must be open, notorious, visible, continuous for the statutory period and under a claim of right. *City of Anchorage v. Nesbett*, 530 P.2d 1324 (Alaska 1975).

Purpose of requirements. — The main purpose of nearly all the requirements is essentially the same, that is, to put the record owner on notice of the existence of an adverse claimant. *Peters v. Juneau-Douglas Girl Scout Council*, 519 P.2d 826 (Alaska 1974).

From the standpoint of the true owner, the purpose of the various requirements of adverse possession — that the nonpermissive use be actual, open, notorious, continuous, exclusive and hostile — is to put him on notice of the hostile nature of the possession so that he, the owner, may take steps to vindicate his rights by legal action. *Peters v. Juneau-Douglas Girl Scout Council*, 519 P.2d 826 (Alaska 1974); *Shilts v. Young*, 567 P.2d 769 (Alaska 1977).

When title vests. — Title automatically vests in the adverse possessor at the end of the statutory period. *Hubbard v. Curtiss*, 684 P.2d 842 (Alaska 1984).

Adverse possession gives notice of rights. — Where a person is in visible possession of real property adverse to the world and open and notorious, notice must be taken of his actual rights. A purchaser would be placed upon notice thereby. *Nordling v. Carlson*, 265 F.2d 507 (9th Cir. 1958).

Mere occupation of the premises, even for the statutory period, does not establish title. *Ayers v. Day & Night Fuel Co.*, 451 P.2d 579 (Alaska 1969).

Occupant cannot hold adversely who admits title is in United States. — To constitute adverse possession there must be, among other requisites, an entry under claim of right hostile to the true owner and to the world, and an occupant of land cannot hold adversely while he admits the title to be in the United States. *Tyee Consol. Mining Co. v. Langstedt*, 136 F. 124 (9th Cir. 1905).

Effect of patent on adverse claims. — Since the issuance of a patent has the effect of cutting off, as against the United States and its grantees, all ad-

verse claims based on use or occupancy not initiated pursuant to any statute providing for ultimate title, in the absence of any color of title, adverse possession by the defendant claiming title by such possession must be shown for the period of 10 years prior to the commencement of a proceeding under this section. *Juneau Indep. Sch. Dist. v. Smith*, 13 Alaska 1, 92 F. Supp. 617 (D. Alaska 1950).

When statute of limitations begins to run. — See notes to *Tyee Consol. Mining Co. v. Langstedt*, 136 F. 124 (9th Cir. 1905); *Valentine v. McGrath*, 4 Alaska 102 (1910); and *Alaska & N.W.T.T. Co. v. Bernhoffer*, 4 Alaska 99 (1910), under analysis line I, "General Consideration."

Burden of proof upon adverse possessor. — A party claiming title to real property by adverse possession must bear the burden of proving each element by clear and convincing evidence. *Bentley Family Trust v. Lynx Enters., Inc.*, 658 P.2d 761 (Alaska 1983).

Plaintiff may show adverse possession by his predecessors. — An instruction was error which failed to let the jury consider the adverse possession of plaintiff's predecessors in interest in determining whether plaintiff had acquired title by adverse possession. *Ringstad v. Grannis*, 12 Alaska 190, 171 F.2d 170 (9th Cir. 1948).

Attempts to transfer title not necessary. — It is the transfer of possession, not title, which is the critical element, because a paper transfer is not necessary to connect adverse possessions. The privity required is that there must be a continuous possession by mutual consent, so that the possession of the true owner shall not constructively intervene. *Ringstad v. Grannis*, 12 Alaska 190, 171 F.2d 170 (9th Cir. 1948).

Agreement to transfer possessor's rights. — If successive possessions are connected by any agreement or understanding which has for its object a transfer of the rights of the possessor, and is accompanied by a transfer of possession in fact, it is sufficient to constitute a continuous possession. *Ringstad v. Grannis*, 12 Alaska 190, 171 F.2d 170 (9th Cir. 1948).

Grantee may tack grantor's possession of lands not covered by deed. — It is generally held that if, in connection with the conveyance of lands, there are circumstances showing an intent to transfer to the grantee the possession of other adjacent land occupied by the grantor and not covered by the deed, there is created such a privity that the grantee is permitted to tack the period of the grantor's occupancy to his own in establishing title by adverse possession to the land not mentioned in the deed. *Ringstad v. Grannis*, 12 Alaska 190, 171 F.2d 170 (9th Cir. 1948).

Adverse possessions may be tacked. — That the adverse possession may be by different occupants, where a privity exists between them, is almost universally held. The essential thing is that the continuity of possession is not broken so that the owner's constructive possession will attach and allow him to recover the land. *Ringstad v. Grannis*, 12 Alaska 190, 171 F.2d 170 (9th Cir. 1948).

The adverse possession may be by different occupants, where a privity exists between them. *Penn v. Ivey*, 615 P.2d 1 (Alaska 1980).

Successive adverse possessors may tack their periods of possession together to satisfy the statutory duration requirements, if privity exists between them. *Hubbard v. Curtiss*, 684 P.2d 842 (Alaska 1984).

Adverse possessors could tack the possession of

their predecessors to their own possession where the predecessors took possession of the disputed property in March of 1967 after their mistaken purchase of another parcel from the true owner and the adverse possessors remained in continuous adverse possession until agents for the true owner actually rented the house and the tenant they procured moved into it in June, 1977. *Hubbard v. Curtiss*, 684 P.2d 842 (Alaska 1984).

When privity created. — Privity is created when circumstances surrounding a conveyance of land show that the grantor intended to transfer possession of the land not described in the deed and the grantee does, in fact, take possession of that land. *Hubbard v. Curtiss*, 684 P.2d 842 (Alaska 1984).

Claim by prescription. — The requisites for a claim by prescription are essentially the same as for adverse possession except that a prescriptive claim is limited to certain rights in the land of another such as an easement. *City of Anchorage v. Nesbett*, 530 P.2d 1324 (Alaska 1975).

The elements of a prescriptive easement are essentially the same as the elements of adverse possession, except that adverse possession focuses on possession rather than use. *McDonald v. Harris*, 978 P.2d 81 (Alaska 1999).

To establish a prescriptive right to an easement, the user must have been open, continuous, and adverse, under claim of title or right, and with the knowledge and acquiescence of the owner of the servient estate. *Roberts v. Jaeger*, 5 Alaska 190 (1914).

Use alone for the statutory period, even with the knowledge of the owner, would not establish an easement. *Hamerly v. Denton*, 359 P.2d 121 (Alaska 1961).

A road and bridge used for 20 full years by the public, under conditions creating a prescriptive right, that right becoming vested and determined at the end of 20 years, it was immaterial to decide whether the length of time required in Alaska for a prescriptive right of way is 20 years or 10 years, the latter time being the limitation by this section for bringing an action relating to the possession of real property. *Clark v. Taylor*, 9 Alaska 298 (1938).

The requirements to establish a prescriptive easement are the same as those for making a claim of adverse possession, and the required period of adverse use is ten years. *McGill v. Wahl*, 839 P.2d 393 (Alaska 1992).

This section establishes a time limit during which an action to recover real property may be maintained, constitutes the method by which a claimant may establish title through adverse possession, and constitutes a method for establishing an easement through prescription; thus a party claiming a prescriptive easement need not bring an action as either an action to quiet title, AS 09.45.010, or an ejectment, AS 09.45.630. *McGill v. Wahl*, 839 P.2d 393 (Alaska 1992).

City's use of property by maintaining power line on it. — See *City of Anchorage v. Nesbett*, 530 P.2d 1324 (Alaska 1975).

Adverse possessor prevailed. — Where defendant in ejectment action showed by competent evidence that he entered upon land at a time when he had a right to do so, and under a claim of right, and had ever since been in the actual, exclusive, and continuous possession thereof, holding adversely to the plaintiff and his predecessors in interest during the statutory period, to wit, more than 10 years after the issuance of patent to the plaintiff's predecessor and before the commencement of action, judgment

was for defendant. *Noble v. Melchoir*, 5 Alaska 729 (1917).

Statutory period. — An adverse possession claimant showed that she possessed the property for the statutory period where the Judge found that claimant used the property from 1982 through the summer of 1993 in satisfaction of this section. *Vezey v. Green*, 35 P.3d 14 (Alaska 2001).

B. Actual Possession.

Possession must be actual and continuous. — Where the plaintiff has the better and superior right and title, the defendants' alleged adverse possession could not avail them, unless it was actual and continuous, as constructively the plaintiff is in possession by reason of its superior title and right. *Pacific Coal & Transp. Co. v. Pioneer Mining Co.*, 205 F. 577 (9th Cir. 1913).

Only property actually possessed by the claimant during the whole statutory period may be acquired by adverse possession. *Bentley Family Trust v. Lynx Enters., Inc.*, 658 P.2d 761 (Alaska 1983).

Actual possession defined. — Actual possession means a *pedis possessio* which is definite, positive, and notorious. *Pacific Coal & Transp. Co. v. Pioneer Mining Co.*, 205 F. 577 (9th Cir. 1913).

There cannot be constructive possession in two persons claiming to hold adversely at one and the same time. *Pacific Coal & Transp. Co. v. Pioneer Mining Co.*, 205 F. 577 (9th Cir. 1913).

C. Notorious Possession.

"Notorious" possession. — The requirement that the possession must have been reasonably visible to the record owner is "notorious" possession so that if the owner visits the property, he would be put on notice and be able to assert his rights. *Shilts v. Young*, 567 P.2d 769 (Alaska 1977).

The lack of actual knowledge by any party of an encroachment does not defeat the prerequisite of notoriety where a duly alert and reasonably diligent owner should have known that the encroachment existed. *McDonald v. Harris*, 978 P.2d 81 (Alaska 1999).

Imputed knowledge of adverse possessor's activities. — In determining if an adverse possession is reasonably visible to the true owner, the test is not whether the owner in fact knows of the adverse possessor's activities, but whether the owner can be charged with such knowledge. In addition to imputing such knowledge, courts generally recognize that community repute, as well as physical visibility, is relevant evidence that the true owner has been put on notice. *Bentley Family Trust v. Lynx Enters., Inc.*, 658 P.2d 761 (Alaska 1983).

Character of the land must be considered with reference to the requirement of sufficient notoriety. Hence, the same acts are not required for uninhabited and forested land as for urban lots. *Shilts v. Young*, 567 P.2d 769 (Alaska 1977).

Acts alone may be sufficient to put owner on notice. — Where the user has acted, without permission of the true owner, in a manner inconsistent with the true owner's rights, the acts alone (without any explicit claim of right or intent to dispossess) may be sufficient to put the true owner on notice of the nonpermissive use. *Peters v. Juneau-Douglas Girl Scout Council*, 519 P.2d 826 (Alaska 1974).

Acts held insufficient. — Being on the property at least once a year for a half or full day and walking the

boundary lines hardly would give indication to the owner that there was a hostile claim. *Shilts v. Young*, 567 P.2d 769 (Alaska 1977).

Flying over property in an airplane gives no notice of possession. *Shilts v. Young*, 567 P.2d 769 (Alaska 1977).

Repute as owner, without evidence of possession on the land, is not alone sufficient. *Shilts v. Young*, 567 P.2d 769 (Alaska 1977).

The physical facts of entry and continued possession may themselves evidence an intent to occupy and to hold as of right sufficient in law to support the acquisition of rights by prescription. *Peters v. Juneau-Douglas Girl Scout Council*, 519 P.2d 826 (Alaska 1974).

Payment of taxes is a critical factor although it is only regarded so in connection with a visible physical presence on the land. *Shilts v. Young*, 567 P.2d 769 (Alaska 1977).

Claimants' leasing of property and exclusion of threatening interferences. — Claimants' behavior in leasing the property and excluding others from the land when their interest was threatened satisfied the requirement that an adverse possessor act as if he owns the land rather than as if he is merely on the land with the permission of the true owner. *Bentley Family Trust v. Lynx Enters., Inc.*, 658 P.2d 761 (Alaska 1983).

Evidence sufficient. — In an adverse possession case where the record owners had actual notice, the court did not need to examine the question of constructive notice; it was undisputed that all three owners knew of claimant's presence on the bluff. *Vezev v. Green*, 35 P.3d 14 (Alaska 2001).

D. Exclusive Possession.

Exclusive dominion over property required. — To deprive the record owner of his title, the adverse claimant's acts must "evinced a purpose to exercise exclusive dominion over the property." *Peters v. Juneau-Douglas Girl Scout Council*, 519 P.2d 826 (Alaska 1974).

An owner would have no reason to believe that a person was making a claim of ownership inconsistent with his own if that person's possession was not exclusive, but in participation with the owner or with the general public. *Peters v. Juneau-Douglas Girl Scout Council*, 519 P.2d 826 (Alaska 1974).

Where possession was actual, open, notorious, and continuous, with a claim of ownership, but was not shown to be either exclusive or hostile, the possession was not adverse, and the statute of limitations never began to run. *Tyee Consol. Mining Co. v. Langstedt*, 121 F. 709 (9th Cir. 1903), rev'd on other grounds, 136 F. 124 (9th Cir. 1905).

Requirement similar to others. — The exclusive use requirement is often defined quite similarly to certain of the other requirements of adverse possession. *Peters v. Juneau-Douglas Girl Scout Council*, 519 P.2d 826 (Alaska 1974).

Total exclusivity is not required. — See *Peters v. Juneau-Douglas Girl Scout Council*, 519 P.2d 826 (Alaska 1974).

A claimant's possession need not be absolutely exclusive; it need only be a type of possession which would characterize an owner's use. *Peters v. Juneau-Douglas Girl Scout Council*, 519 P.2d 826 (Alaska 1974).

As long as the party claiming a prescriptive easement was the primary and only consistent user of the

driveway for which the easement was claimed, a third party's occasional use will not defeat the claim for easement rights based upon use of the driveway as a private access. *McDonald v. Harris*, 978 P.2d 81 (Alaska 1999).

Occasional clamdiggers could not destroy the exclusive character of adverse use where such casual intrusions were clearly not considered by the user to interfere or conflict with his own use. In allowing strangers to come on the land to dig clams and in allowing friends, relatives and others occasional use of the land, the user was merely acting as any other hospitable landowner might. *Peters v. Juneau-Douglas Girl Scout Council*, 519 P.2d 826 (Alaska 1974).

Exclusivity shown. — Adverse possessor demonstrated exclusivity when she allowed moderate use of her resources, but ordered uninvited trespassers off the property. *Vezev v. Green*, 35 P.3d 14 (Alaska 2001).

E. Continuous Possession.

Possession must be actual and continuous. — See note under this catchline under analysis line II B, "Actual Possession."

One of the requirements for acquisition of title by adverse possession is that the possession must be continuous for the statutory period in order to prevent the original owner's possession from constructively attaching to the land, thus starting the statute running anew, because the owner must be out of possession for 10 years in order for the statute to be a bar to an action to recover the land. *Ringstad v. Grannis*, 12 Alaska 190, 171 F.2d 170 (9th Cir. 1948).

A showing that use was openly adverse to the owner's interest must be for the full statutory period of ten years. If during that period it is established that the adverse claimant has done something to recognize the owner's title, the continuity of the adverse possession period is interrupted and the ten-year period of limitation does not begin to run again in the adverse claimant's favor until he repudiates the owner's title. *Ayers v. Day & Night Fuel Co.*, 451 P.2d 579 (Alaska 1969).

Summer use of property. — Adverse possession claimant's summer use of property satisfied the continuity requirement, because claimant used the property as an average owner of similar property would. *Vezev v. Green*, 35 P.3d 14 (Alaska 2001).

F. Hostile Possession.

Possession presumed to be with permission. — When one enters into possession or use of another's property, there is a presumption that he does so with the owner's permission and in subordination to his title. *Hamerly v. Denton*, 359 P.2d 121 (Alaska 1961); *Ayers v. Day & Night Fuel Co.*, 451 P.2d 579 (Alaska 1969); *Peters v. Juneau-Douglas Girl Scout Council*, 519 P.2d 826 (Alaska 1974).

This presumption that one who enters into possession or use of another's property does so with the owner's permission is rebutted by the adverse claimant's showing that he was not on the property by permission and establishing that the record title holder could have ejected him from possession throughout the statutory period. *Peters v. Juneau-Douglas Girl Scout Council*, 519 P.2d 826 (Alaska 1974).

Overcoming presumption of permission. — The presumption that one who enters into possession or use of another's property does so with the owner's permission is overcome only by showing that such use

of another's land was not only continuous and uninterrupted, but was openly adverse to the owner's interest, i.e., by proof of a distinct and positive assertion of a right hostile to the owner of the property. *Hamerly v. Denton*, 359 P.2d 121 (Alaska 1961); *Ayers v. Day & Night Fuel Co.*, 451 P.2d 579 (Alaska 1969).

See note to *Tyee Consol. Mining Co. v. Langstedt*, 121 F. 709 (9th Cir. 1903), rev'd on other grounds, 136 F. 124 (9th Cir. 1905), under catchline "Exclusive dominion over property required" under analysis line II D, "Exclusive Possession."

There is no presumption user is hostile. — The adversary character of the holding or enjoyment is one of the tests of the sufficiency of that holding or enjoyment, and there is no more reason for indulging in the presumption that a 10-year simple user of a right of way is hostile than there is for indulging in the presumption that any other simple holding of land for 10 years is hostile to the true owner. *Roberts v. Jaeger*, 5 Alaska 190 (1914).

Acquiescence of owner in hostile acts of possessor. — The whole doctrine of title by adverse possession rests upon the acquiescence of the owner in the hostile acts and claims of the person in possession. *Peters v. Juneau-Douglas Girl Scout Council*, 519 P.2d 826 (Alaska 1974).

The word "hostile" is frequently used as a term of art meaning that the claim is "adverse" or under "claim of right," and that it is not subordinate to the title of the true owner. *City of Anchorage v. Nesbett*, 530 P.2d 1324 (Alaska 1975).

Presumption that use permissive. — A public way may be created by public use of private property for the 10-year prescriptive period. There is a presumption that the use of land by an alleged easement holding was permissive. The state can overcome the presumption of permissive use by showing that such use of another's land was not only continuous and uninterrupted, but was openly adverse to the owner's interest, i.e., by proof of a distinct and positive assertion of a right hostile to the owner of the property. *Weidner v. State, DOT & Pub. Facilities*, 860 P.2d 1205 (Alaska 1993).

The presumption that use of land by an alleged easement holder was permissive does not arise if the roadway in question was not established by the owner of the servient estate for its own use, but was for many years the only means of passage to the dominant estate. *McDonald v. Harris*, 978 P.2d 81 (Alaska 1999).

Negating permissive use. — Negating permissive use involves the concepts of openness and adversity. The openness requirement embodies the principle that a landowner is responsible for knowing the

physical encumbrances on and the boundaries of the owner's land. This responsibility includes any changes in existing uses on the land. In the present case, the state need only show that its continued use of Bay Road over the new route was open, and not that the change, if any, from the old road to the new route was open and obvious to the private landowner. *Weidner v. State, DOT & Pub. Facilities*, 860 P.2d 1205 (Alaska 1993).

Discussion of when use is permissive as opposed to "hostile" or under a "claim of right." See *City of Anchorage v. Nesbett*, 530 P.2d 1324 (Alaska 1975).

The test for determining the existence of the requisite degree of hostility is a fairly objective one. The question is whether or not the claimant acted toward the land as if he owned it. His beliefs as to the true legal ownership of the land, his good faith or bad faith in entering into possession (i.e., whether he claimed a legal right to enter, or avowed himself a wrongdoer), all are irrelevant. *Peters v. Juneau-Douglas Girl Scout Council*, 519 P.2d 826 (Alaska 1974).

The claimant's beliefs as to the true legal ownership of the land, his good faith or bad faith in entering into possession (i.e., whether he claimed a legal right to enter, or avowed himself a wrongdoer), all are irrelevant. The proper determination of whether the required degree of hostility exists is whether the acts of the claimant are the acts of an owner, sufficient to give the record owner notice of the possessor's claim. *Penn v. Ivey*, 615 P.2d 1 (Alaska 1980).

Mistake in deed's description. — Mistake in description on the deed conveyed the true owner did not prevent the possession from being adverse to her. *Hubbard v. Curtiss*, 684 P.2d 842 (Alaska 1984).

Finding of hostility not clearly erroneous. — Although it is clear that the hostility requirement is not satisfied if the adverse claimant had the permission of the record owner to use the property, the trial court's finding of hostility was not clearly erroneous where the only evidence of permissive use before the trial court was the record owner's own testimony and this evidence was directly contradicted by the adverse claimant who testified that such a conversation had never taken place. *Penn v. Ivey*, 615 P.2d 1 (Alaska 1980).

Acquiring record title, after good title acquired by adverse possession. — Adverse possessors did not destroy the adversity of their possession by acquiring record title to the lot because their record title was not good as against previous title based on adverse possession. *Hubbard v. Curtiss*, 684 P.2d 842 (Alaska 1984).

Collateral references. — 51 Am. Jur. 2d, Limitation of Actions, §§ 84-88, 119-122.

54 C.J.S., Limitation of Actions, § 40 et seq., 210.

When statute of limitations or laches commences to run against action to set aside conveyance or transfer in fraud of creditors, 100 ALR2d 1094.

Right of creditor to set aside transfer of property as fraudulent as affected by the fact that his claim is barred by statute of limitations, 14 ALR2d 598.

Owner's surveying of land as entry thereon tolling running of statute of limitations for purposes of adverse possession, 76 ALR3d 1202.

Grazing of livestock, gathering of natural crop, or cutting of timber by record owner as defeating exclusiveness or continuity of possession by one claiming title by adverse possession, 39 ALR4th 1148.

Sec. 09.10.040. Action upon judgment or sealed instrument in 10 years. (a) A person may not bring an action upon a judgment or decree of a court of the United States,