ANNOTATION

ADVERSE POSSESSION BASED ON ENCROACHMENT OF BUILDING OR OTHER STRUCTURE

TOTAL CLIENT SERVICE LIBRARY REFERENCES

3 Am Jur 2d, Adverse possession §§ 44–46
1 Am Jur Pl & Pr Forms 1:736, 1:751 et seq.
1 Am Jur Proof of Facts 271, Adverse Possession Proofs 1, 2
ALR Digests, Adverse Possession §§ 3, 25, 26
ALR Quick Index, Adverse Possession.

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TABLE OF JURISDICTIONS REPRESENTED

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I. In general

§ 1. Introduction

[a] Scope

This annotation[1] is concerned with the question whether title by adverse possesion, or easement by adverse possession, may be based on the fact that a building or structure[2] encroaches upon adjoining property, and it collects all the cases wherein the above question was presented for determination.

For purposes of this annotation, the term "encroachment" has been construed to include actual encroachments, such as the foundation of a building extending beyond the property line, as well as overhanging structures, such as leaning walls, eaves, roofs, fire escapes, or stairways.

Attention is called to the fact that this annotation discusses statutes only insofar as they are reflected in reported cases within the scope of the annotation. The reader is advised always to consult the most recent statutes of his jurisdiction.

[b] Related matters

Loss of easement by adverse possession or nonuser. 1 ALR 884, 66 ALR 1099, 98 ALR 1291.

Implied easement upon severance of tract where building is near or encroaches upon the dividing line. 9 ALR 488, 41 ALR 1210, 53 ALR 910.

Right of property owner to enjoin projection from building over street or alley. 55 ALR 911.

Easement by prescription for use of land near boundary line. 58 ALR 1037 (cases in foregoing annotation which are in point for the present one are repeated herein).

Establishment of boundary line by oral agreement or acquiescence. 69 ALR 1430, 113 ALR 421.

Adverse possession due to ignorance or mistake as to boundaries. 97 ALR 14 (cases in the foregoing annotation which are in point for the present annotation are repeated herein).

Fence as a factor in fixing location of boundary line. 170 ALR 1144 (comment note).

Tacking as applied to prescriptive easements. 171 ALR 1278.

Loss of private easement by nonuser or adverse possession. 25 ALR2d 1265.

Rights derived from use by adjoining owners for driveway, or other common purpose, of strip of land lying over and along their boundary. 27 ALR2d 332.

Adverse possession involving ignorance or mistake as to boundaries—modern views. 80 ALR2d 1171.

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1. This annotation supersedes the one in 49 ALR 1015.

2. This annotation does not include cases involving party walls (see Am Jur, Party Walls (1st ed §§ 5 et seq.)). It also excludes cases wherein the encroaching structure was a fence, retaining wall, etc. (see 3 Am Jur 2d, Adverse Possession §§ 22–24).

§ 2. Summary

[a] Generally

It is generally agreed that in order to establish title by adverse possession, it must be shown that the possession was actual, open, visible, notorious, continuous, and hostile,[3] and the solution of the question whether adverse possession can be established, although there has been a mistake in or ignorance of boundary lines, is controlled by whether possession under such circumstances, all other factors being present, can be considered hostile. With respect to "hostile" possession, there is again general agreement that the term "hostile" does not mean that there must be ill will or malevolence, but only that the one in possession of land claims the exclusive right thereto.[4]

In a number of cases within the scope of this annotation, it has been expressly stated that the intention of a landowner who encroaches on land beyond his true boundary line through ignorance or mistake is the controlling factor in determining whether his possession beyond the true line was adverse.[5] In these cases, it has been held that where a landowner, through ignorance, inadvertence, or mistake, occupies a building or structure encroaching upon adjoining property under the belief that the building or structure lies within his true boundary, but intending to occupy and claim up to his true boundary only, and not intending to claim title to the extent to which his occupation extends, if it should be ascertained that the line observed by him is on his neighbor's land, his possession of the land beneath the encroaching building or structure is not adverse.[6]

Courts, in applying the general principles governing acquisition of title by adverse possession,[7] are in substantial agreement that possession of adjoining land by way of encroaching building foundations on the property of another may be sufficient to give rise to title by adverse possession to that part of the adjoining property encroached upon where the other necessary elements, such as hostility, continuity, etc., are shown.[8] On occasion, it has been stated that the encroaching building or structure must be of a substantial nature so as to place the adjoining landowner on notice that an adverse claim is being made on his property.[9]

Decisions are not in complete harmony, however, with respect to acquiring title to adjoining property by adverse possession where the encroaching structure is a leaning or tipping wall,[10] projecting eaves or roofs,[11] or fire escapes or stairways.[12]

The law in regard to the acquisition of easements by prescription presents an analogy to the acquisition of title to land by adverse possession.[13] Accordingly, the authorities generally,[14] as well as the cases within this annotation,[15] indicate that the use essential to establishment of an easement by prescription must be open, notorious, adverse, hostile, and uninterrupted.

While an encroaching structure may be deemed to be no basis on which to found a claim of adverse possession,[16] it has been generally held that easements to adjoining property may be based on adverse use upon the expiration of the

3. See 3 Am Jur 2d, Adverse Possession § 3.
4. See 3 Am Jur 2d, Adverse Possession § 34.
5. § 3[c], infra.
6. § 3[c], infra.
7. See 3 Am Jur 2d, Adverse Possession § 3.
8. §§ 3[a], 4, infra.
9. § 3[d], infra.
10. § 5, infra.
11. § 6, infra.
12. § 7, infra.
13. See Am Jur, Easements (Rev ed §§ 66, 75).
14. See Am Jur, Easements (Rev ed §§ 74 et seq.).
15. §§ 3[b], 8–11, infra.
16. §§ 5[b], 6[b], 7, infra.

prescriptive period where the encroaching structure was maintained with the necessary elements of hostility, continuity, etc., even though the encroachment might be deemed to be no ouster of possession.[17]

[b] Practice pointers

The question whether title by adverse possession or easement by adverse possession may be based upon encroachment of a building or similar structure may arise in any type of action relating to or involving real property rights or interests therein and it may be raised by plaintiff as the basis of his cause of action or by defendant as the basis of his defense. The claim that land or its use had been acquired by an effective adverse possession may, for instance, be the issue[18] in an action of ejectment,[19] an action to quiet title,[20] an action to establish a boundary line,[1] an action to recover possession of real estate,[2] an action to recover compensation for the use of land,[3] an action to compel the removal of a claimed encroachment,[4] an action to abate a nuisance,[5] a bill for mandatory injunction directing the removal of the encroaching building,[6] an action to restrain defendant from interfering with the repair of an encroaching building,[7] or an action against a municipality to restrain enforcement of an order requiring the owner of the structure to remove an encroachment.[8]

Regardless of the type of action or proceeding involved, the party relying on a title by adverse possession has, in accordance with the general rule that the burden of proof rests on him who has the affirmative of an issue, the burden of proving all the facts necessary to establish such a title,[9] and must show that the possession was actual, open, notorious, hostile, under claim of right, continuous, and exclusive.[10] However, in some jurisdictions at least, the view has been taken that while a party relying upon adverse possession has the burden of proof, where the burden has been met by a showing of continuous, hostile possession of the land for more than the statutory period, the burden of proof shifts to the other party. And there is also authority for the view that where actual possession for the statutory period in a claim to title is shown, the burden of showing that such possession was not adverse is upon the party claiming the statute inoperative.[11]

It is important to keep in mind that the law of adverse possession varies greatly from jurisdiction to jurisdiction, primarily because the statutory provisions are differently worded, but also because the terms "adverse" and "pos-

17. §§ 6[b], 7–11, infra.

18. The enumeration is illustrative, not exhaustive.

19. See for instance Mobile & G. R. Co. v Rutherford (1913) 184 Ala 204, 63 So 1003, infra § 4[a], ovrld Earnest v Fite (1924) 211 Ala 363, 100 So 637.

20. Lougee v Shuhart (1905) 127 Iowa 173, 102 NW 1125, infra § 4[a].

1. Romans v Nadler (1944) 217 Minn 174, 14 NW2d 482, infra § 9.

2. Wacha v Brown (1889) 78 Iowa 432, 43 NW 269, infra § 4[b].

3. Crapo v Cameron (1883) 61 Iowa 447, 16 NW 523, infra § 4[a].

4. Edie v Coleman (1940) 235 Mo App 1289, 141 SW2d 238, cert quashed State ex rel. Edie v Shain, 348 Mo 119, 152 SW 2d 174, infra § 4[a].

5. Kafka v Bozio (1923) 191 Cal 746, 218 P 753, 29 ALR 833, infra § 5[b].

6. Belotti v Bickhardt (1920) 228 NY 296, 127 NE 239, infra § 4[a].

7. De Rosa v Spaziani (1955, Sup) 142 NYS2d 839, infra § 4[a].

8. Engleman v Kalamazoo (1925) 229 Mich 603, 201 NW 880.

9. As to burden of proof generally, see 3 Am Jur 2d, Adverse Possession § 248.

For proof of adverse possession, see 1 Am Jur Proof of Facts 271, Adverse Possession, Proofs 1–4.

10. As to the elements and requisites generally, see 3 Am Jur 2d, Adverse Possession §§ 6 et seq.

11. Content v Dalton (1937) 121 NJ Eq 391, 190 A 328, affd 122 NJ Eq 425, 194 A 286, 112 ALR 1031.

session" have received different interpretations by different courts.[12]

§ 3. General rules

[a] Rule that title by adverse possession may be based on encroachment

With respect to building foundations which encroach upon adjoining lands, all the cases within the scope of this annotation either hold or recognize that possession of adjoining land by way of encroaching building foundations on the property of another may be sufficient to give rise to title by adverse possession to that part of the adjoining property encroached upon where the other necessary elements, such as hostility, continuity, etc., are shown.[13]

Courts are not in agreement, however, as to whether title by adverse possession may be based on overhanging structures, such as leaning or tipping walls, eaves, or roofs, some holding that title may be obtained upon expiration of the statutory period,[14] while others hold to the contrary.[15]

[b] Rule that easement by adverse use may be based on encroachment

While decisions are not in harmony as to whether encroachments of structures may serve as a basis for title by adverse possession to that portion of the adjoining property encroached upon,[16] there appears to be substantial agreement that easements to the adjoining property may be obtained upon the expiration of the prescriptive period where the necessary elements of hostility, continuity, etc., are present,[17] even though such encroachment may be deemed to be no ouster of possession.[18]

[c] View that occupant must intend to claim adversely

Where a building or structure encroaches upon adjoining property through ignorance or mistake, the courts in the following cases expressly stated that the intention of the encroaching landowner was the controlling factor in determining whether his possession beyond the true line was adverse.

Ala—See Mobile & G. R. Co. v Rutherford (1913) 184 Ala 204, 63 So 1003, infra § 4[a], ovrld Earnest v Fite (1924) 211 Ala 363, 100 So 637.

Cal—Janke v McMahon (1913) 21 Cal App 781, 133 P 21 (no adverse possession as to land encroached upon by back porch, because of absence of intent to claim adversely).

Iowa—Wacha v Brown (1889) 78 Iowa 432, 43 NW 269, infra § 4[b].

Kan—Winn v Abeles (1886) 35 Kan 85, 10 P 443, infra § 4[b]; Boese v Crane (1958) 182 Kan 777, 324 P2d 188, infra.

Mich—Red Jacket v Pinton (1901) 126 Mich 194, 85 NW 567 (no adverse possession as to land encroached upon by foundation of building in absence of intent to claim adversely).

Minn—Seymour, S. & Co. v Carli (1883) 31 Minn 81, 16 NW 495, infra § 4[a].

Mo—Koch v Gordon (1910) 231 Mo 645, 133 SW 609, infra § 4[a].

NJ—Myers v Folkman (1916) 89 NJL 390, 99 A 97 (no adverse possession as to land encroached upon by foundation of building in absence of intent to claim adversely).

NY—Roulston v Stewart (1899) 40 App Div 200, 57 NYS 1061; Eggler v New York Cent. R. Co. (1923) 207 App Div 120, 201 NYS 619, both infra § 4[a].

Tenn—Kirkman v Brown (1894) 93 Tenn 476, 27 SW 709 (no adverse possession as to land encroached upon by foundation of building in absence of intent to claim adversely); Fuller v Jack-

12. See Taylor, Titles to Land by Adverse Possession, 20 Iowa L Rev 551, 738 (1935).
13. § 4, infra.
14. §§ 5[a], 6[a], 7, infra.
15. §§ 5[b], 6[b], 7, infra.
16. § 3[a], supra.
17. §§ 8–11, infra.
18. §§ 6[b], 7, infra.

son (1901, Tenn) 62 SW 274 (no adverse possession as to land encroached upon by foundation of building in absence of intent to claim adversely).

Va—Davis v Owen (1907) 107 Va 283, 58 SE 581, 13 LRA NS 728, infra.

Stating that the test as to whether or not the possession of real estate beyond the true boundary line will be held adverse is the intention with which the party takes and holds possession, that intention to claim adversely may be manifested either by words or acts, or both, and that the intent with which the occupant has held possession is to be determined from all the surrounding circumstances and especially from the acts of the possessor, the court in Boese v Crane (1958) 182 Kan 777, 324 P2d 188, in an action in ejectment wherein plaintiffs sought to eject defendants from a small tract of land occupied by the defendants' garage, held that the defendants had obtained title by adverse possession to that part of the adjoining lot occupied by their garage, where it appeared that the defendants asserted ownership over the garage by paying taxes on it, insuring it against loss or damage, and keeping it in repair.

In Davis v Owen (1907) 107 Va 283, 58 SE 581, 13 LRA NS 728, wherein it was held that a person who permitted the erection of a building partly on his land was not estopped from asserting his rights when he learned for the first time of the encroachment after the running of the statutory period relative to adverse possession, the court stated that an encroachment on neighboring property, through mistake, by one in the erection of his building, was not such possession as would ripen into title by lapse of time, because the encroachment had its origin in a mistake, and not a claim of right from the beginning.

[d] View that encroaching structure must be of substantial nature

In the following case, it was expressly stated that, in order to acquire title by adverse possession to a strip of adjoining property by reason of an encroaching building, the building must be of a substantial and permanent nature sufficient to call the attention of the owner of record to the fact that an encroachment upon his property is taking place.

Thus, in Morgan v Jenson (1921) 47 ND 137, 181 NW 89, the court held that the defendant had not acquired title to any part of an adjoining property because he had not been in possession of the property for a sufficient number of years, saying that certain buildings on the defendant's property, which might properly be designated as "shacks" (a coalshed, a storeroom, etc.), and which projected a few inches upon adjoining property, would not serve to place the adjoining property owner on notice that the defendant was claiming adversely to the property occupied by the "shacks," since such buildings were not of substantial and permanent nature sufficient to call the attention of the owner of the record title to the fact that an encroachment was taking place upon his property.

See also Crapo v Cameron (1883) 61 Iowa 447, 16 NW 523, infra § 4[a], wherein the court, in holding that adverse possession of an adjoining strip of land could be based on the fact that the foundation was mistakenly placed beyond the boundary line, stressed the fact that the encroaching building was a "substantial and permanent brick building."

II. Encroachment as basis for title by adverse possession

§ 4. Foundation of structure encroaching upon adjacent property

[a] Adverse possession

In the following cases, possession of land by way of occupancy through construction of a building foundation which

encroaches[18] on the property of another has been held sufficient to give rise to title by adverse possession on the ground that all the other necessary elements, such as hostility, continuity, etc., were shown.[1]

Ala—See Mobile & G. R. Co. v Rutherford (1913) 184 Ala 204, 63 So 1003, ovrld Earnest v Fite (1924) 211 Ala 363, 100 So 637, infra; Smith v Harbaugh (1927) 216 Ala 202, 112 So 914.

Ark—Wilson v Hunter (1894) 59 Ark 626, 28 SW 419, infra; Carter v Roberson (1949) 214 Ark 750, 217 SW2d 846 (garage encroached 6 feet and 11 inches).

Cal—Harvey v Berry (1927) 201 Cal 74, 255 P 509 (strip of land about 3 feet wide encroached upon by house); Sorensen v Costa (1948) 32 Cal 2d 453, 196 P2d 900 (house encroaching on adjoining property for some 75 feet owing to mistake in title description).

Wagner v Meinzer (1918) 38 Cal App 670, 177 P 293, later app 53 Cal App 773, 200 P 838 (strip of land 8 feet wide and 100 feet in depth covered by house); Gallentine v Hickey (1920) 46 Cal App 411, 189 P 308 (building extending 1.67 feet across boundary line).

Del—O'Daniel v Bakers' Union of Wilmington (1873) 9 Del (4 Houst) 488 (foundation extending some 18 inches beyond property line).

DC—Neale v Lee (1890) 8 Mackey 5, infra; Rudolph v Peters (1910) 35 App DC 438 (house encroaching some 6 to 7 feet on adjoining lot).

Ga—Shiels v Roberts (1879) 64 Ga 370; Waxelbaum v Gunn (1920) 150 Ga 408, 104 SE 216 (building extending 2 feet over line).

Idaho—Bayhouse v Urquides (1909) 17 Idaho 286, 105 P 1066 (house extending 4 feet over property line).

Ill—Hellman v Roe (1916) 275 Ill 158, 113 NE 989 (house encroaching on strip of land 2⅝ inches wide at one end and 4½ inches wide at the other end).

Ind—Rennert v Shirk (1904) 163 Ind 542, 72 NE 546 (house extending 26 inches beyond boundary line).

Iowa—Crapo v Cameron (1883) 61 Iowa 447, 16 NW 523, infra; Klinker v Schmidt (1901) 114 Iowa 695, 87 NW 661 (series of buildings encroaching on adjoining property some 16 feet); O'Callaghan v Whisenand (1903) 119 Iowa 566, 93 NW 579, infra; Lougee v Shuhart (1905) 127 Iowa 173, 102 NW 1125, infra.

Kan—Boese v Crane (1958) 182 Kan 777, 324 P2d 188, supra § 3[c] (garage encroaching upon adjoining property).

Ky—Rains v Louisville & N. R. Co. (1934) 254 Ky 794, 72 SW2d 482 (house encroaching some 25 feet upon adjoining property); Scoville v Burns (1948) 306 Ky 315, 207 SW2d 756 (wall of brick building extending over on the adjoining lot approximately 11 inches); Martin v Kane (1951, Ky) 245 SW2d 177 (house extending a couple of feet over boundary line onto adjoining property).

Md—Hiss v McCabe (1876) 45 Md 77.

Mass—Proprietors of Locks & Canals v Nashua & L. R. Co. (1870) 104 Mass (recognizing rule); La Chance v Rubashe (1938) 301 Mass 488, 17 NE2d 685 (strip of land 3.3 feet wide on one end and 15.04 feet wide at the other inclosed by fence and partially covered by hencoop).

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19. Although the extent of encroachment apparently has no bearing on the question of adverse possession, a parenthetical notation appears after a number of the following citations indicating, where possible, the extent of the encroachment. In a number of cases, however, the opinion does not disclose the exact measurements, but merely states that the building extended beyond the property line.

1. A number of cases in § 4[b], infra, apparently would support the same proposition, although in these cases it was held that the possession in question did not ripen into title because of the absence of some necessary element of adverse possession.

Minn—Seymour, S. & Co. v Carli (1883) 31 Minn 81, 16 NW 495, infra; Ramsey v Glenny (1891) 45 Minn 401, 48 NW 322, infra; Romans v Nadler (1944) 217 Minn 174, 14 NW2d 482, infra § 6[b] (foundation of garage encroaching upon adjoining property).

Mo—Hamilton v West (1876) 63 Mo 93; Handlan v McManus (1890) 100 Mo 124, 13 SW 207; Milligan v Fritts (1910) 226 Mo 189, 125 SW 1101 (court finding that defendant intended to possess property to extent of building notwithstanding that it protruded over true boundary line, which was not known to defendant); Koch v Gordon (1910) 231 Mo 645, 133 SW 609, infra; Gloyd v Franck (1913) 248 Mo 468, 154 SW 744 (recognizing rule); Diers v Peterson (1921) 290 Mo 249, 234 SW 792 (building extending about one foot over property line); Sands v Clark (1923, Mo) 250 SW 58 (barn 14 inches beyond property line); McDaniels v Cutburth (1925, Mo) 270 SW 353, infra.

Edie v Coleman (1940) 235 Mo App 1289, 141 SW2d 238, cert quashed State ex rel. Edie v Shain, 348 Mo 119, 152 SW2d 174, infra.

Mont—Shinors v Joslin (1919) 56 Mont 10, 180 P 574, infra § 6[a] (coal-shed encroaching 2 to 8 inches).

Neb—Mentzer v Dolen (1964) 178 Neb 42, 131 NW2d 671 (garage encroaching 2 feet).

NY—Belotti v Bickhardt (1920) 228 NY 296, 127 NE 239, infra.

Pearsall v Westcott (1898) 30 App Div 99, 51 NYS 663, infra; Stillwell v Boyer (1899) 36 App Div 424, 55 NYS 358, affd 165 NY 621, 59 NE 1131, infra; Roulston v Stewart (1899) 40 App Div 200, 57 NYS 1061, infra; Re New York (1902) 73 App Div 394, 77 NYS 31 (building encroaching 2 feet on street which had not been dedicated); Eggler v New York Cent. R. Co. (1923) 207 App Div 120, 201 NYS 619, infra; Smith v Egan (1929) 225 App Div 586, 233 NYS 582 (recognizing rule; shed encroaching on adjoining property); Lewis v Idones (1952) 280 App Div 980, 116 NYS2d 382 (building 60 feet in length encroaching from 6½ inches to 9½ on adjoining property).

De Rosa v Spaziani (1955, Sup) 142 NYS2d 839, infra.

Okla—Johnson v Whelan (1940) 186 Okla 511, 98 P2d 1103, infra, ovrlg White v Saling (1939) 185 Okla 46, 89 P2d 754; Kelly v Choate (1943) 192 Okla 397, 136 P2d 885 (recognizing rule; small building, exact encroachments not given in opinion); Moore v Chapman (1959, Okla) 344 P2d 1100 (building encroaching 6.75 feet on adjoining lot); Whytock v Green (1963, Okla) 383 P2d 628 (garage and driveway 140 feet in length, encroaching 3 feet 9½ inches on the south end and 2 feet 6 inches at the north end).

Pa—Brown v M'Kinney (1840) 9 Watts 565 (recogizing rule); Thompson v Kauffelt (1885) 110 Pa 209, 1 A 267 (house encroaching upon adjoining property varying distances up to 25 feet).

Barnes v Buchinsky (1937) 32 Luzerne Leg Reg R 220 (porch encroaching 2 inches upon adjoining property).

Wis—Menzner v Tracy (1945) 247 Wis 245, 19 NW2d 257, motion for reh den 247 Wis 252a, 19 NW2d 869 (barn extending 2.5 feet at one corner and 5 feet at other corner onto adjoining property); Burkhardt v Smith (1962) 17 Wis 2d 132, 115 NW2d 540 (cottage encroaching some 13 feet on the north side and 5 feet on south side).

In Mobile & G. R. Co. v Rutherford (1913) 184 Ala 204, 63 So 1003, ovrld Earnest v Fite (1924) 211 Ala 363, 100 So 637, an action for ejectment, it was held that the jury could find that one who purchased a lot on which there was a building projecting a few feet over the boundary line onto land held by a railroad as a right of way could acquire title by adverse possession to the strip covered by the building notwith-

standing that he went into possession under a deed fixing the railroad right of way as the boundary line, the court saying that his paper title did not work an estoppel which would prevent him from claiming adversely if he intended to claim title for the requisite period of time to the strip of land covered by the building regardless of the line of the railroad right of way. However, in Earnest v Fite (Ala) supra, the court noted that under the controlling statute adverse possession could only be effected by recordation of a deed or other color of title purporting to convey title, or by paying taxes, or derivation of title by descent.

Where a coterminous owner built a house upon his own lot but extended his building over the boundary line about 20 inches and there was evidence that he claimed adversely and had been in open, notorious, and adverse possession for the statutory period, the court in Wilson v Hunter (1894) 59 Ark 626, 28 SW 419, an action of ejectment, held that the owner acquired title by adverse possession to the strip encroached upon.

Where a purchaser of a lot procured a survey for the purpose of ascertaining the boundary of his propriety, and thereafter built a house on the lot, claiming the line on which one wall was built to be its true boundary, the court in Neale v Lee (1890, Dist Col) 8 Mackey 5, held that the purchaser, after the expiration of the statutory period, acquired title by adverse possession to an 8-inch strip of land located on the adjacent lot, where facts subsequently disclosed that the house extended beyond the purchaser's true boundary by the 8 inches. In thus holding, the court stated that the purchaser's possession was necessarily hostile to the owner of the adjoining lot, and that the latter was at once put to his action and the statute of limitations began to run.

Where a landowner, through mistake as to the true boundary, caused a building to be constructed on his property in such a manner that a wall of the building was almost entirely upon the adjoining lot, and it appeared that the adjoining landowner, and his successors, paid "wall rent" to him for many years for the use of the common wall in the belief that the wall was entirely situated on his property, the court in Crapo v Cameron (1883) 61 Iowa 447, 16 NW 523, an action by the landowner's executor to recover compensation for one-half of the alleged wall in common, and for one-half of the ground upon which it rested, held that the landowner had the right by prescription, after the lapse of the statutory period, to one-half of the ground upon which the wall in question rested, saying that where a party erected, upon a lot to which he claimed title, a substantial and permanent brick building which he claimed on through its entire extent, the circumstances attending his act amounted to a claim of title to the land upon which the building was erected, at least to the center of the wall.

Where a building encroached upon adjoining property 1¾ inches at one end and 3⅜ inches at the other, the court in O'Callaghan v Whisenand (1903) 119 Iowa 566, 93 NW 579, an action for possession of land, held that the building owner acquired title to that part of the adjoining lot occupied by his building.

Where the owner of two adjoining lots divided them into three lots, each having equal frontage, and erected three buildings thereon, and conveyed the middle house and lot, describing it in the deed "as the east '18½ feet of lot three and the west 18½ feet of lot four,' " and the owner, while conveying the property, pointed out to the purchaser the west line of the property as being along the line of the areaway into which opened the cellar windows of the house standing on the lot, and the purchaser, and in turn his successors, claimed without material contradiction that they had ever since held and occupied under claim of right, the court

in Lougee v Shuhart (1905) 127 Iowa 173, 102 NW 1125, an action to quiet title, held that the purchaser, and in turn his successors, had acquired title to the entire frontage as described in his deed notwithstanding the fact that the house projected over the lines as described in the deed, saying that since all parties concerned supposed and believed that the deed conveyed all the land covered by the house and for more than 10 years had acted in strict harmony with that understanding, it would be grossly inequitable to permit the grantor or a subsequent purchaser of the adjoining tract to now reap any advantage from the mistake.

Under the rule that the holding by one of two adjoining owners of actual possession of land beyond the boundary of his own lot under a claim of title thereto, through a mistake as to the location of the boundary line, is, for the purpose of a statute in reference to the time of bringing actions to recover real property, deemed adverse to the true owner and a disseisin, the court in Seymour, S. & Co. v Carli (1883) 31 Minn 81, 16 NW 495, held that one who through mistake erected a dwelling partly upon an adjoining lot, and who remained in actual possession of his house and the land occupied by it for the statutory period, obtained title to such portion of the adjoining lot as was covered by his house. As to the plaintiff's contention that a distinction was implied between the terms "seise" and "possess" used in the statute, and that although the person who wrongfully directed the encroachment was in naked possession of a part of the adjoining owner's lot under a claim of title to his own, the adjoining owner still remained seised, the court stated that there could be but one actual seisin, and this necessarily included possession; hence an actual possession in hostility to the true owner worked a disseisin, and if the disseisor was suffered to remain continually in possession for the statutory period, the remedy of the former was extinguished. The court went on to say that the intention to assert an adverse claim to the disputed tract was manifested by the act of improving and occupying it under an apparent claim.

And in Ramsey v Glenny (1891) 45 Minn 401, 48 NW 322, an action in ejectment in which judgment was entered for defendants in the trial court upon the ground that the premises had been held by the defendants and their grantors adversely to the plaintiff for a period of more than 20 years prior to the commencement of the action, the plaintiff contended that because the person who erected the building entered into actual possession of the adjoining lot through mistake, without any intent to do so, and because he had held possession without realizing that that part of the wall had been built over the line, such possession could not be accompanied with any intent to claim adversely, and hence was at no time hostile to the true owner. But the court, stating that this case could not be distinguished from Seymour, S. & Co. v Carli (1883) 31 Minn 81, 16 NW 495, supra, held that the defendant acquired title to the strip of land covered by his encroaching building notwithstanding the fact that the building was erected over the line under a mistake as to its location.

Where there was no actual dispute over the boundary line between adjoining lots, and defendant encroached upon the land adjoining him by erecting the wall of his building on the adjacent property in ignorance of the true line, the court in Edie v Coleman (1940) 235 Mo App 1289, 141 SW2d 238, cert quashed State ex rel. Edie v Shain, 348 Mo 119, 152 SW2d 174, held that the defendant acquired title to the land upon which his building encroached on expiration of the statutory period, notwithstanding the fact that he had no intention of taking what did not belong to him, where evidence disclosed that his possession was with the intention of holding and

claiming all of the land covered by the encroachment.

In Koch v Gordon (1910) 231 Mo 645, 133 SW 609, an action of ejectment, the defendant's grandfather acquired title to a lot by conveyance of two separate parts thereof, taking one portion for the defendant and the other for himself. On the part purchased for the defendant, he then erected a building, one wall of which extended 13 inches onto the other part, which he later sold without discovery of the mistake. The defendant remained in open and visible possession of the house and land, exercising acts of ownership over it without question of his title or right to possession for more than 20 years, and the court held that he acquired title by adverse possession to the adjoining strip covered by his house, notwithstanding that it was erected over the line by mistake and that the grandfather was not aware of the mistake when he sold the other part.

In McDaniels v Cutburth (1925, Mo) 270 SW 353, a suit in ejectment to recover possession of a strip of land approximately 15 feet wide, it appeared that the defendants' store had stood on the strip of land in question for 20 years or more, and that defendants had placed thereon, since their ownership, an annex to the building, a barn, and a concrete cellar, which plaintiff, the adjoining landowner, conceded was done without serious objection on his part. The court held that the defendants had acquired title to the land occupied by the building, saying that the making of permanent improvements on land, as by building permanent structures upon it, was to be regarded as a most significant act of adverse possession because such an occupancy was of a character well calculated to inform the owner both of the fact of possession and that the intrusion was not intended as a mere temporary trespass.

Where a building had been in existence for some 60 years, and the foundation of the building encroached on adjoining property some 6½ to 8½ inches for a distance of 40 feet, and the upper part of the wall leaned over the adjoining property an additional 8½ inches, the court held in De Rosa v Spaziani (1955, Sup) 142 NYS2d 839, an action by the owner of the building to restrain the adjoining property owner from interfering with the repair of the wall, that the plaintiff acquired title by adverse possession to the strip of land covered by the building foundation as well as the additional strip over which the wall leaned, saying that the occupation was not only hostile in its inception but continued so year after year and that the defendant, by failing to assert his legal title despite these unequivocal acts, was deemed to have acquiesced in the adverse ownership of the land encroached upon.

Where the wall of a building was so constructed that it projected about 4 inches over onto the land of an adjoining lot, and the owner of the building remained in possession for more than 20 years without his possession ever having been questioned or disturbed, the court in Pearsall v Westcott (1898) 30 App Div 99, 51 NYS 663, applying the rule that "where there has been a practical location of the dividing line between the land of adjoining owners, and a long acquiescence therein, the line so established will not be disturbed," held that the owner of the building acquired title to the strip of land upon which his wall projected.

Where there was proof to the effect that the defendant's predecessor in title had built a house upon the land in controversy more than 20 years before the commencement of the action, and that the same had been openly occupied and used by him and his successors in title ever since without question on the part of anyone until the suit was begun, it was held in Stillwell v Boyer (1899) 36 App Div 424, 55 NYS 358, affd 165 NY 621, 59 NE 1131, that there was sufficient evidence to take the issue of adverse possession to the jury, and the

court accordingly affirmed the trial court's determination that the defendant had acquired title to the strip of land in question by adverse possession.

In Roulston v Stewart (1899) 40 App Div 200, 57 NYS 1061, an action to compel the defendant to remove his building from land belonging to the plaintiff, it appeared that the defendant, in erecting a building on his own lot, mistakenly projected the foundation of his wall about 1½ feet upon the adjoining lot, and the court held that the defendant acquired title in fee simple to the land encroached upon by adverse possession where it appeared that he had been in possession for more than the statutory period. In thus holding, the court stated that where a grantee, in taking possession under his deed, goes unintentionally and by mistake beyond his proper boundaries, and enters upon, and actually occupies and improves, land not included in the deed, claiming and supposing it to be his, this occupation is deemed to be adverse, within the meaning of the statute of limitations, and if continued for 20 years, will bar the right of the true owner.

Where a building encroached upon an adjoining lot by some 14 feet and the purchaser entered upon the premises as he found them, and used them as he would have done had the legal title rested in him, his possession and use being open, notorious and visible, continuous and uniform, peaceable, uninterrupted and exclusive, and adverse to the interest of the adjoining owner for a period in excess of the statutory period, the court in Eggler v New York Cent. R. Co. (1923) 207 App Div 120, 201 NYS 619, held that the purchaser, and in turn his devisees, acquired title to the land occupied by the building beyond the true boundary of his lot notwithstanding he might have entered upon mistake as to the location of the real boundary line and actually had no hostile intent to claim the land of others. In thus holding, the court stated that the rule that possession was presumed to be in subordination to the true title had no application, as that applied where the original entry was by license, lease, or permission of some sort, and was really a presumption that, as the first occupation was by permission, the same character of occupation continued until the contrary might appear.

Where a building encroached on an adjoining lot some 12 feet for a distance of 51 feet, and the present building owner contended that his possession, when tacked onto that of his grantors and their testator, justified his claim of title by adverse possession to the property encroached upon by the building, the court in Belotti v Bickhardt (1920) 228 NY 296, 127 NE 239, an action for recovery of land, for damages, and for a mandatory injunction directing the removal of the encroaching building, held that the present building owner had acquired title to the disputed strip of land on which his building encroached where the evidence clearly showed the intent to convey and hold the whole building, erected partly on the lot conveyed and partly on the premises then belonging to the adjoining property owner's predecessors, and there was evidence that the adverse possession of the present building owner and his predecessors of the building so far as it was erected on the adjoining lot was clear and continuous.

Where defendant's garage encroached about 3 feet upon plaintiff's adjoining lot, and the plaintiff sought to oust the defendant and quiet title to the disputed strip of property, the court in Johnson v Whelan (1940) 186 Okla 511, 98 P2d 1103, held that the defendant had acquired title to that portion of the plaintiff's adjoining property occupied by his garage, saying that where the owner of a town lot, in ignorance of the true boundary between his lot and the adjoining lot of another party, and under the mistaken belief that it is his property, encroaches on a portion of the

adjoining lot and erects a part of a structure thereon, and occupies such portion of said lot and maintains such structure thereon, openly, peacefully, and exclusively for more than 15 years, he acquires title to such portion of the adjoining lot by prescription, sufficient against all. In thus holding, the court expressly overruled White v Saling (1939) 185 Okla 46, 89 P2d 754, wherein a contrary doctrine was announced.

[b] No adverse possession

In the following cases, it was held that possession of land by way of occupancy through construction of a building foundation encroaching[2] on the property of another did not ripen into title by adverse possession because some of the necessary elements of adverse possession, such as hostility, continuity of possession, etc., were absent.[3]

Ark—Elledge v Chafton (1955) 224 Ark 438, 274 SW2d 349 (shed encroaching upon adjoining property; predecessor in title not claiming adversely; present owner not in possession for sufficient period of time).

Cal—Janke v McMahon (1913) 21 Cal App 781, 133 P 21 (absence of intention to claim adversely; back porch of house encroaching on adjoining property some 2½ feet).

Fla—Holley v May (1954, Fla) 75 So 2d 696, infra.

Iowa—Wacha v Brown (1889) 78 Iowa 432, 43 NW 269, infra; Greer v Powell (1893) 89 Iowa 740, 56 NW 440 (court simply stating that defendant's possession was not adverse); Kennedy v Oleson (1960) 251 Iowa 418, 100 NW2d 894 (garage; no adverse claim and 10-year period had not run).

Kan—Winn v Abeles (1886) 35 Kan 85, 10 P 443, infra.

La—Barker v Houssiere-Latreille Oil Co. (1925) 160 La 52, 106 So 672 (no evidence of possession for statutory period).

Anding v Smith (1939, La App) 189 So 362 (statutory period not satisfied).

Mich—Red Jacket v Pinton (1901) 126 Mich 194, 85 NW 567 (absence of intention to claim adversely).

NJ—Munger v Curley (1904, NJ Ch) 57 A 306, infra; Myers v Folkman (1916) 89 NJL 390, 99 A 97 (absence of intention to claim adversely).

NY—Timmerman v Cohn (1912) 204 NY 614, 97 NE 589, infra.

Miller v Platt (1856) 12 NY Super Ct (5 Duer) 272, infra.

ND—Morgan v Jenson (1920) 47 ND 137, 181 NW 89, supra § 3[d] (encroaching structure not of sufficient nature to place adjacent owner on notice); Jamestown v Miemietz (1959, ND) 95 NW2d 897, infra.

RI—Bochterle v Saunders (1913) 36 RI 39, 88 A 803 (building extending 18 inches over boundary line; absence of occupancy for statutory period).

SC—Solen Corp. v Robertson (1927) 142 SC 56, 140 SE 236 (shed extending over sidewalk of street; failure to establish adverse possession for statutory period).

Tenn—Kirkman v Brown (1894) 93 Tenn 476, 27 SW 709 (absence of intention to claim adversely); Fuller v Jackson (1901, Tenn) 62 SW 274 (absence of possession for statutory period).

Va—Davis v Owen (1907) 107 Va 283, 58 SE 581, 13 LRA NS 728, supra § 3[c] (absence of intention to claim adversely).

Where a building encroached upon an adjoining lot, and the owner thereof had not complied with a statute which required a return for taxation, by proper legal description, of property adversely possessed, the court in Holley v May (1954, Fla) 75 So 2d 696, held that the

2. Where possible, a notation has been added to a case citation indicating the extent of the particular encroachment.

3. A parenthetical expression appears after most cases indicating the particular element of adverse possession deemed to be missing.

owner of the encroaching building had not obtained title to that part of the land upon which the building extended by adverse possession, and that the plaintiff, the adjacent landowner, was the owner of the land upon which defendant's building encroached.

In Wacha v Brown (1889) 78 Iowa 432, 43 NW 269, an action to recover possession of real estate, it appeared that the foundation of the defendant's dwelling extended 18 to 21 inches beyond his property line, and the court held that he had not acquired title by adverse possession to the strip so occupied by his dwelling, saying that the defendant's belief that he was on his own lot precluded a claim of adverse possession.

In Winn v Abeles (1886) 35 Kan 85, 10 P 443, plaintiff tenant sought recovery against his landlord for the collapse of the leased building, which had been constructed to encroach on the adjoining property. The issue was whether, as a result of adverse possession, the building was entitled to occupy all the land on which it stood or whether the neighbor was entitled to excavate the actual boundary of his lot, so as to justify the landlord in authorizing a party-wall construction without the tenant's consent. Facts disclosed that neither property owner was aware of the encroachment, that there was no agreement between the property owners that the line to which the building extended should be taken as the true line, and that the landlord made no claim to any portion of the adjacent lot and asserted that he did not own or claim the narrow strip upon which the building had inadvertently been placed. The court, in holding that the landlord was not liable in damages to his tenant, stated that possession alone was not sufficient to confer title, that possession must be hostile as against the true owner, and that the landlord had not acquired the narrow strip of land by adverse possession in that one of the essential requisites to obtaining title through the statute of limitations was wanting, that is, the intention of the landlord to claim the land exclusively and as his own.

In Munger v Curley (1904, NJ Ch) 57 A 306, it was held that continuous possession of a house for the statutory period did not give title by adverse possession to that portion of an adjoining lot upon which a part of the wall of the house was placed, where it appeared that the portion of the wall projecting upon the adjoining property was built and located by virtue of a friendly arrangement between the person erecting the house and the owner of the adjoining property, who desired a more ornamental wall facing his property than the owner of the building had erected. The fact, said the court, that these events took place before the present owners acquired title did not alter the situation in that they had no knowledge thereof, since this merely showed that they were not acquainted with the facts.

In Miller v Platt (1856), 12 NY Super Ct (5 Duer) 272, it was held that title by adverse possession could not be acquired to a narrow strip of land of an adjoining lot lying between a building erected thereon and the true boundary line by reason of the fact that the wall of the defendant's building extended underground the whole width of the strip to the foundation of the building on the adjoining lot, receding to the true boundary line at the surface, and extending again to the wall of the adjoining building 7 feet from the ground, where the space was exclusively, although not continuously, used by the occupants of the adjoining building, being inclosed by a gate erected and maintained by them.

In Timmermann v Cohn (1912) 204 NY 614, 97 NE 589, a lot owner erected a brick building encroaching upon the adjoining property of his wife, forming a triangular gore therein; subsequently the wife sold her property, following the description given in her deed, in which deed the husband joined; the husband

occupied the building erected by him until his death 30 years later, when the premises were conveyed, under a description which coincided with the walls of the building, to a purchaser who gave a mortgage on the property following the description in his deed. It was held, on motion by a purchaser on the foreclosure of the mortgaged premises to be relieved from the sale upon the ground that the title to the premises was not marketable, that inasmuch as there was nothing in the evidence to sustain a conclusion that the walls were partition walls throughout, the purchaser should not be compelled to take title, as the validity of his title depended upon oral testimony. The lower court had reached the conclusion that the mortgagor obtained good title to the premises described in the deed, by reason of adverse possession and occupancy of the gore, but the Court of Appeals said: "It is quite possible that neither party understood or knew that the walls of the building encroached upon the lands of [the wife], and it is true that upwards of twenty years have elapsed since the son obtained his deed, but we have no evidence here bearing upon the question, other than the situation of the gore back from the street inclosed in the walls of the building and only accessible through the building itself; but the son is alive, still the record owner of the premises in controversy, and he, while conceding that the walls were constructed in 1875, refuses to quitclaim his interest therein. We, therefore, are of the opinion that the determination of the validity of the title is dependent upon oral testimony, that is not free from doubt and that, under the circumstances, we should not compel the purchaser to take the title."

In Jamestown v Miemietz (1959, ND) 95 NW2d 897, an action by a city to abate a public nuisance and compel the defendants to remove an obstruction from a public street in the city, the court, in applying the general rule that a municipality cannot be divested of the title of its streets held in trust for public use by adverse possession for the prescriptive period,[4] held that the defendants had not acquired title to a strip of land proximately 34½ feet wide when such land was occupied by a building which extended beyond their property line.

§ 5. Base of wall properly located, but sides leaning over adjacent property

[a] Adverse possession

In the following cases, in which it appeared that the foundation of a building was properly located within the limits of the property line, but the walls inclined or leaned over the adjoining property, the courts have held that possession of land by way of occupancy through a wall leaning over the property of another is sufficient to give rise to title by adverse possession to that part of the adjoining property over which the wall extended where the other necessary elements, such as hostility, continuity, etc., were shown.

Where a wall of a building slanted over its property line in a manner described as a "Leaning Tower of Pisa effect" and the building had been in existence for more than 60 years and there was no evidence that the original position of the building had changed in any manner since its construction, the court in Five Twelve Locust, Inc. v Mednikow (1954, Mo) 270 SW2d 770, denying plaintiff's petition for a mandatory injunction to compel the defendants to remove the intrusion below the surface and the overhang, held that the defendants had acquired, by adverse possession, title to that part of the adjoining property encroached upon by their building, saying that, from all the evidence, it must be inferred that the original builder claimed all of the land and the

4. See 3 Am Jur 2d, Adverse Possession §§ 207, 208.

space above the land which the wall occupied when it was constructed, and that it would be absurd to infer that any subsequent owner of the building ever claimed any less than title to the whole of the building, the land upon which it was situate, and the space it occupied above the land. As to the plaintiff's contention that the defendants' possession was not open and notorious in that the visible ground level encroachment was only ⅛ of an inch at one point and hidden at another, and the overhang was not ascertainable without a survey or by climbing to the roof of their building, the court stated that the plaintiff overlooked the important and controlling fact that the defendants' building actually and physically occupied the ground and space here in question for a period of 60 years and that its width and height were, of course, openly visible to whosoever viewed its front.

See De Rosa v Spaziani (1955, Sup) 142 NYS2d 839, supra § 4[a], wherein it appeared that a wall of a building leaned over adjoining property some 8½ inches in addition to the foundation of the building encroaching some 6½ to 8½ inches and the court held that the building owner acquired title by adverse possession to the strip of land covered by the building foundation as well as the additional strip over which the wall leaned.

See also Baxter v Girard Trust Co. (1927) 288 Pa 256, 135 A 620, 49 ALR 1011, infra § 5[b] (recognizing rule).

[b] No adverse possession

In the following case, it was held that the mere tipping of a wall of a building so as to encroach upon the airspace above the adjoining lot would not interrupt the continuity of possession of the owner of such lot so as to bring it within the provisions of the statute of limitations governing adverse possession.

In Kafka v Bozio (1923) 191 Cal 746, 218 P 753, 29 ALR 833, an action to abate a nuisance and for damages, it appeared that a foundation of a wall was placed on the defendant's land but the upper portions of the wall leaned over the plaintiffs' lot so that the upper portions encroached about 2 inches upon the adjoining lot. The court held that the plaintiffs' cause of action was not barred by the provisions of a statute governing adverse possession, because the plaintiffs had at all times been seised and in possession of the premises, subject only to the encroachment of defendant's building into the airspace above a small portion thereof, saying that this was not legally sufficient to interrupt the continuity of plaintiffs' possession.

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On the other hand, the court in Baxter v Girard Trust Co. (1927) 288 Pa 256, 135 A 620, 49 ALR 1011, recognized that title to land by adverse possession could be based upon the fact that the wall of a building belonging to the one claiming adverse possession leaned over the portion claimed by adverse possession, but denied the plaintiff's claim that he acquired title to a strip of land located on the adjoining lot because the wall of his building leaned over the claimed portion, since the evidence did not establish with sufficient certainty that the building had leaned for the full statutory period over a definite portion of the land claimed. In thus holding, the court stated that where the amount of land claimed was so small, the rule of location of line is exacting and possession for the statutory period must be definitely shown.

§ 6. Roof or eaves of structure projecting over adjacent property

[a] Adverse possession

In the following cases, in which it appeared that the foundation of a building was properly located within the limits of the property line but so near the property line that the eaves or roof of the building encroached upon the airspace above the adjoining lot, the courts have held that possession of land by way

of occupancy through the encroaching eaves or roof was sufficient to give rise to title by adverse possession to that part of the adjoining property over which the eaves or roof extended where the other necessary elements, such as hostility, continuity, etc., were shown.

Iowa—Atkins v Pfaffe (1907) 136 Iowa 728, 114 NW 187.

Mass—Thacker v Guardenier (1844) 48 Mass (7 Met) 484 (eaves of shed extending 8 inches at one end and 5 or 6 inches at other for distance of 19 feet); Smith v Smith (1872) 110 Mass 302 (stating rule that projecting eaves over adjoining land is wrongful act on part of defendant which, if continued for 20 years, might give him a title to the land by adverse occupation).

But see the Massachusetts cases in § 6[b], infra, which reach a contrary conclusion.

Minn—Weeks v Upton (1906) 99 Minn 410, 109 NW 828, infra.

Mont—Shinors v Joslin (1919) 56 Mont 10, 180 P 574.

Neb—Mentzer v Dolen (1964) 178 Neb 42, 131 NW2d 671 (eaves of house encroaching 2 feet).

NJ—Scarcella v Ascolese (1944) 135 NJ Eq 283, 38 A2d 194, infra.

Pa—Barnes v Buchinsky (1937) 32 Luzerne Leg Reg R 220.

Wash—Erickson v Murlin (1905) 39 Wash 43, 80 P 853.

Where an old barn was supposedly erected along a true boundary line separating adjoining lots, but in fact projected onto the adjoining lot, and, upon the objection of the adjacent owner that the eaves dripped upon his land, the barn was removed and a new barn erected a sufficient distance from what was supposed to be the boundary line so that the eaves came in line with the line formerly occupied by the old barn, the court in Weeks v Upton (1906) 99 Minn 410, 109 NW 828, held that the owner of the barn obtained title by adverse possession to a strip of land under the eaves of the new barn though that strip was within the calls of the deed of the adjacent owner, and though both parties believed that the true boundary line between the lots was at the point where the old barn stood, the court saying that the fact that both parties were mistaken as to the true boundary line did not change the nature of the possession.

Where, in an action of ejectment, facts disclosed that the defendant had erected a coalshed, fence, and residence along the boundary line between her lot and an adjoining lot in such a manner that the roof of the residence projected over the adjoining lot in the general shape of a triangle with a base of 4½ inches and a length of 18.7 feet, and the wall of the coalshed encroached on the plaintiff's property from 2 to 8 inches for approximately 67 feet, the court in Shinors v Joslin (1919) 56 Mont 10, 180 P 574, affirming a judgment for the defendant, held that there was evidence justifying the jury's finding that the defendant and her predecessors had maintained the areas in controversy and had thus been in possession of them adversely under claim of title for more than the statutory period.

Where a building leaned over an adjoining lot so that the roof extended approximately 1.73 feet over the borderline while its base extended 0.95 feet onto the adjoining lot, the court in Scarcella v Ascolese (1944) 135 NJ Eq 283, 38 A2d 194, held that one who remains in continuous, open, and exclusive possession of a building of a permanent nature, which projects over the boundary line, during the statutory period of time in which actions to recover possession of real property may be maintained, acquires title by adverse possession to that portion of the adjoining property covered by the structure.

In the following cases, in which it appeared that the foundation of a building was properly located within the limits of the property line but so near the

property line that the eaves or roof of the building encroached upon the airspace above the adjoining lot, the courts held that the question whether possession of land by way of occupancy through the encroaching eaves or roof was sufficient to give rise to title by adverse possession to that part of the adjoining property over which the eaves or roof extended was necessarily one for the trier of facts.

Where eaves of a house extended beyond the property line and for more than 20 years water was allowed to fall from the eaves upon the adjoining property, the court in Carbrey v Willis (1863) 89 Mass (7 Allen) 364, an action to recover damages for the breach of covenants of warranty and encumbrances in a deed conveying land by metes and bounds, reversed the trial court's ruling that, as a matter of law, the projection of the eaves of the house over the adjoining property, having continued over 20 years, was an adverse occupation of the land under the eaves which had matured into a right, and ordered a new trial, saying that it was a fact for the jury to determine whether the owner of the house thereby acquired a title by adverse possession or an easement by prescription in the land under the eaves.

And in Bloch v Pfaff (1869) 101 Mass 535, it was stated that the question whether the owner of property acquires by adverse occupation to the exterior limit of eaves of his house which extend beyond his property line is one for the jury, as is the question whether an easement has been obtained.

[b] No adverse possession

In the following cases, it was held recognized that the projection of the eaves or roof of a building over adjoining property could not serve as a basis for a claim of title by adverse possession to that part of the adjoining property lying beneath the eaves or roof.

Mass—Randall v Sanderson (1872) 111 Mass 114; Keats v Hugo (1874) 115 Mass 204.

But see Thacker v Guardenier (1844) 48 Mass (7 Met) 484; Smith v Smith (1872) 110 Mass 302.

Minn—Romans v Nadler (1944) 217 Minn 174, 14 NW2d 482, infra § 9.

Okla—Myers v Oklahoma City Federal Sav. & Loan Asso. (1946) 198 Okla 32, 174 P2d 371.

The view has been taken that the fact that the eaves or gutter of a house project over the line of an adjoining lot will not afford a basis of a claim for title to the soil; at least, that is inferable from the decision in Randall v Sanderson (1872) 111 Mass 114, where it was held that the fact that an adjoining owner's eaves or gutter projected over what the defendants were claiming as their line would not have prevented the defendants from claiming title to the soil of which they had had exclusive, adverse, and uninterrupted possession, although it might be that the projection of the eaves for a statutory period gained an easement by prescription.

And in Keats v Hugo (1874) 115 Mass 204, an action of tort for obstructing the passage of light and air to plaintiff's dwelling house and a bill in equity for an injunction to prevent the building of a wall which would allegedly obstruct the windows of the same dwelling house, the court stated that the fact that the eaves and cornices of the plaintiffs' house projected over their property line gave them no title to the land, and no right to prevent the defendant, the adjoining landowner, from erecting any building upon it.

See, however, the following Massachusetts cases wherein a contrary determination was made: Thacker v Guardenier (1844) 48 Mass (7 Met) 484, and Smith v Smith (1872) 110 Mass 302.

In Myers v Oklahoma City Federal Sav. & Loan Asso. (1946) 198 Okla 32, 174 P2d 371, it was held that the construction of a building with eaves projecting over adjacent land owned by

another person and maintenance thereof, without color of title, for 15 years would not ripen into a title by prescription in the owner of the building to that part of the adjacent land lying beneath the eaves of the building. The court stated that any claim of title by prescription based upon a mere projection of the eaves of the building over a part of the adjoining lot, though it did extend over a period of 15 years, was limited to the right exercised and enjoyed, and since no right was acquired, other than an easement, as to the eaves, this gave no title to the land under the eaves.

§ 7. Other structures projecting over adjacent property

In Norwalk Heating & Lighting Co. v Vernam (1903) 75 Conn 662, 55 A 168, an action to remove a structure which projected over plaintiff's property, the court, in affirming a judgment for the plaintiff, stated that the possession and occupancy of the projecting structure had no effect on the ownership of the soil beneath. The court went on to state, however, that had the defendant maintained the projecting structure for 15 years under a claim of right, such possession would have ripened into a perpetual easement.

Where evidence disclosed that an original stairway between two-story buildings was in open and constant use by the defendant and her predecessors in title from 1909 to 1952, and it encroached a maximum of 4½ inches onto plaintiffs' adjoining property, the court in Thomas v Mrkonich (1956) 247 Minn 481, 78 NW2d 386, held that the evidence was sufficient to sustain the trial court's finding that the defendant acquired title by adverse possession to the space occupied by a second stairway constructed to replace the original, where the second did not extend beyond the 4½ inches of plaintiffs' property previously occupied.

III. Encroachment as basis for easement by adverse use

§ 8. Foundation of structure encroaching upon adjacent property

In the following cases wherein it appeared that the foundation of a building encroached upon adjoining property, it was held that possession was sufficient to give rise to an easement by adverse use where the other necessary elements, such as hostility, continuity, etc., were shown.

Where the owner of adjacent lots constructed a house on one of them and thereafter caused an extension to be added to the house in such a manner that the extension encroached on the adjoining lot some 7 feet, the court in Fronckowiak v Platek (1912) 152 App Div 301, 136 NYS 522, held that a subsequent purchaser of the lot on which the extension was placed bought subject to an easement of subsequent owners of the first lot, where the occupancy, during the lifetime of the first owner, of the two lots for over 20 years had been open, notorious, and continuous. In thus holding, the court stated that the occupancy ripened by adverse use into a definite easement.

In Malouf v Fischer (1945) 108 Utah 355, 159 P2d 881, an action to quiet title to a strip of land encroached upon by the foundation of a building located on the adjoining lot, the court held that the building owner acquired an easement over the strip of land belonging to the adjoining property owner and occupied by the wall of his building and that this easement would continue so long as the building remained standing in its present location.

§ 9. Roof or eaves of structure projecting over adjacent property

In the following cases, in which it appeared that the foundation of a building was properly located within the limits of the property line but so near the property line that the eaves or roof of the building encroached upon the airspace

above the adjoining lot, the courts either held or recognized that possession of land by way of such occupancy was sufficient to give rise to an easement by adverse use to that part of the adjoining property over which the eaves or roof extended where the other necessary elements, such as hostility, continuity, etc., were shown.

Fla—J. C. Vereen & Sons, Inc. v Houser (1936) 123 Fla 641, 167 So 45 (stating rule that prescriptive easement might be obtained for overhanging eaves of house, but refusing to apply rule in absence of prescriptive period).

Ill—Ariola v Nigro (1959) 16 Ill 2d 46, 156 NE2d 536.

La—Vincent v Michel (1834) 7 La 52.

Mass—Carbrey v Willis (1863) 89 Mass (7 Allen) 364, supra § 6[a]; Bloch v Pfaff (1869) 101 Mass 535; Randall v Sanderson (1872) 111 Mass 114, supra § 6[b]; Matthys v First Swedish Baptist Church (1916) 223 Mass 544, 112 NE 228.

Minn—Romans v Nadler (1944) 217 Minn 174, 14 NW2d 482.

Where gutters and downspouts of a roof drainage system projected some 6 inches over the boundary line and evidence disclosed that the system had existed in open view uninterruptedly from 1925 to 1948, the court in Ariola v Nigro (1959) 16 Ill 2d 46, 156 NE2d 536, a petition for mandatory injunction to compel defendants to remove such portion of their building as destroyed plaintiffs' easement for rain gutters and downspouts, held that the plaintiffs had acquired an easement by adverse possession for the maintenance of their gutters along the wall.

In Romans v Nadler (1944) 217 Minn 174, 14 NW2d 482, an action to establish a boundary line between adjoining lots, it appeared that a garage encroached upon the adjoining lot and the court held that the garage owner acquired title by adverse possession to that part of the adjoining lot occupied by the garage, where the facts disclosed that such possession satisfied the elements required of adverse possession. The facts also disclosed that the eaves of the house, as well as the eaves and gutter of the garage, projected over the adjoining lot, and as to the projected eaves the court held that the owner of the house and the garage could not claim title by adverse possession to that part of the adjacent property on which the eaves dripped, but that the projections were of such character as to satisfy the rules of adverse user and the house and garage owner acquired by prescription an easement in the adjoining land to have the eaves and gutters project and to have the gutters drip.

§ 10. Foundation of building properly located, but upper portion of structure encroaching upon adjoining property

In the following cases, in which it appeared that the foundation of a building was properly located within the limits of the property line but an upper portion of the building was extended in such a manner as to encroach on the airspace of the adjoining property, the courts held that possession of land by way of such occupancy was sufficient to give rise to an easement by adverse use to that part of the adjoining property encroached upon where the other necessary elements, such as hostility, continuity, etc., were shown.

In Ottavia v Savarese (1959) 338 Mass 330, 155 NE2d 432, 2 ALR3d 997, a bill in equity for a mandatory injunction to require the removal of certain supporting beams encroaching upon the plaintiff's property and for damages, it appeared that a light shaft between the plaintiff's and defendant's buildings was situated entirely on the defendant's land, and that sometime prior to 1927 the defendant's predecessors in title built a

room in the light shaft by roofing over the first story between the buildings and inserting four beams into the wall of what is now the plaintiff's building. In 1955, the defendant added a second story to the top of the room in the light shaft and inserted additional beams into the plaintiff's wall, which plaintiff objected to a few months later. The court held that, as to the original room, the defendant acquired a prescriptive right to the wall of the plaintiff's building for a height of one story where the four beams were placed, saying that although the fact that the beams were in the plaintiff's wall and the details of the construction may not have been known to the plaintiff, the fact that the roof of the room rested against and was in some manner supported by her wall was obvious and must have been known to her, and thus was open, notorious, and in derogation of her rights. With respect to the defendant's contention that the prescriptive right should not be limited to the first floor only, but extended to the entire wall, the court held that the defendant was not entitled to a prescriptive right to the whole where there was nothing to indicate any use by the defendant, prior to 1954, of any parts of the four-story brick wall other than in connection with the supports for the original room, and that the limited use of the wall made by the defendant did not entitle her to prescriptive rights to the whole.

In Waidlich v Farmers Bank of Mercersburg (1957, DC Pa) 149 F Supp 741, an action by property owners against an adjoining property owner alleging an encroachment by defendant on plaintiffs' property and seeking damages and an injunction restraining further encroachment, it appeared that the foundation and the first floor of the defendant's building were properly located within the property limits but that the second floor extended beyond the property line and was attached to the plaintiffs' building, leaving a covered passageway underneath the second floor. It further appeared that the second floor had been attached to the adjacent building for some 7 years, its existence having been open, adverse, uninterrupted, exclusive, visible, without interference, and without asking leave. The court, applying Pennsylvania law, entered judgment for the defendant, saying that the right of the defendant to keep and to maintain the second story of its building across the alleyway and to have the second story attached to the plaintiffs' building had been established by adverse use by the defendant and its predecessor in title for a period of more than 21 years prior to the bringing of this action, and this use could not now be interferred with by the plaintiffs.

And see Norwalk Heating & Lighting Co. v Vernam (1903) 75 Conn 662, 55 A 168, supra § 7, wherein the court recognized that a structure projecting over adjoining property could be made the basis of a claim for an easement by adverse use.

§ 11. Other structures projecting over adjacent property

In the following cases, it was held that possession of land by way of an overhanging fire escape or an encroaching stairway was sufficient to give rise to an easement by adverse use to that part of the adjoining property over which the fire escape or stairway projected where the other necessary elements, such as hostility, continuity, etc., were shown.

In Poulos v F. H. Hill Co. (1948) 401 Ill 204, 81 NE2d 854, it appeared that a fire escape, which was anchored to the side of a building, extended from the top of the building to within 20 feet of the ground, and the sides of the fire escape projected about 2½ feet over the adjoining lot. Facts also disclosed that a hinged stepladder was located at the lower end of the fire escape, thus providing a means of descent from

the lower end of the fire escape to the ground in case of emergency. The trial court entered a decree granting the defendant an easement to that portion of plaintiff's property over which the fire escape projected, but denied the defendant's claim that he also had acquired a right to the space below the fire escape which would permit the lowering thereof. The appellate court held that the trial court correctly ruled that the defendant acquired an easement by adverse use to the space encroached upon by the fire escape, but that it erred in denying the defendant's claim as to that part beneath the fire escape, saying that the defendant had a prescriptive right to the fire escape and to that portion of the ground immediately below the fire escape where the hinged ladder would descend.

In Engleman v Kalamazoo (1925) 229 Mich 603, 201 NW 880, an action by a property owner against the city to restrain enforcement of an order requiring him to remove a stairway from a street to his basement, it appeared that the stairway encroached on the adjoining sidewalk some 5.67 feet. It also appeared that the stairway had been in use for some 37 years prior to the city's order of removal. The court held that the period of 37 years was sufficient for the plaintiff to acquire the easement claimed, where the permanent character of the stairway was of brick, stone, and iron, all in full view of the public, and its use in connection with the operation of the building was ample notice to the public authorities that plaintiff and his vendor were claiming rights therein.

D. E. EVINS.