#23.1

ure. Under these circumstances, the lot was not devoted to a public use. The inevitable result was that, as regards adverse possession, the city held the lot subject to the same legal consequences as would have ensued if an individual had been its owner. City of Chicago v Middlebrooke, supra. Nor is there any decisive significance to the
Headnote 8 fact that the lot was acquired by the city in performing its governmental duty of collecting taxes. The controlling factor is the use to which the realty was put after its acquisition. We do not accept the reasoning of courts of other jurisdictions which appear to take a contrary view. See Anglo California National Bank v Leland, 9 Cal2d 347, 353, 70 P2d 937; Sasse v King County, 196 Wash 242, 249, 82 P2d 536.

Whether possession is adverse in character is a question of fact. Padula v Padula, 138 Conn
Headnote 9 102, 110, 82 A2d 362. Since the court found all the essential elements of an adverse possession, and since title by that method was legally possible as against the city, the court was correct in its judgment.

There is no merit to the claim that the court erred in entering a mandatory injunction requir-
Headnote 10 ing the plaintiff to supply lateral support to the defendant's land.

There is no error.

In this opinion the other judges concurred.

ANNOTATION

Acquisition by adverse possession or use of public property held by municipal corporation or other governmental unit otherwise than for streets, alleys, parks, or common

[ALR Digests, Adverse Possession § 49.]

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I. Introduction

§ 1. Scope and related questions.

This annotation includes all political units from the federal and state sovereignties on down through municipalities, counties, and minor political subdivisions. By the same token it is intended to cover cases involving acquisition of title in fee simple and also acquisition of rights in the nature of an easement, in other words, of an interest less than a fee. As a matter of fact, however, most of the cases herein apparently involved acquisition of title by adverse possession for the period prescribed for the bringing of actions for the recovery of real property. It does not, except perhaps in an incidental way in connection with the major problem herein discussed, purport to discuss the various elements and requisites essential to constitute adverse possession. The main purpose of the annotation, of course, is to consider, assuming the existence of all the elements and requisites that would otherwise have made adverse possession or user applicable in the case of individuals, whether title by adverse possession, or acquisition of an interest less than a title in fee, can be acquired as against the political units mentioned above.

Matters as to laches, estoppel, acquiescence, or abandonment are not within the scope of the annotation.

In many jurisdictions, statutes affect the question under annotation. These are dealt with only to the extent that they have been construed or considered in reported decisions, and no attempt has been made to show the present status of the statutory law of any state.

Annotations on matters of related interest are listed in the footnote.[1]

1. Adverse possession of common, 9 ALR 1373.

Estoppel of municipality to open or use street, 171 ALR 94.

Tax sales or forfeitures by or to governmental units as interrupting adverse possession, 50 ALR2d 600. (This annotation, as expressly stated in the scope section, presupposes that the period of adverse possession had commenced prior to the forfeiture, and excludes situations where the adverse

§ 2. Summary.

It will be observed that the rule as stated in § 3 to the effect that public lands of the United States cannot be obtained by adverse possession or prescription in the absence of express statutory permission has, in addition to cases in which the federal sovereignty was a party litigant, been applied in numerous cases in which the United States was not directly interested as a party, as for example, where public lands of the United States have been patented to an individual by the federal government, and the other litigant, an individual, claims to have acquired title to the land by adverse possession pending the maturity of the patent, and while the legal title, at least, was in the United States, a claim which, as shown by illustrative cases in § 4, has been consistently denied in view of the well-established rule enunciated in § 3 that no possession, however protracted, will confer title to property comprising part of the public domain.

The principle that state statutes of limitation are not binding on the federal government so as to permit acquisition of its lands by adverse possession or prescription has been specifically applied in a number of cases concerning tidelands (§ 5), islands (§ 6), accreted land (§ 7), forest lands (§ 8), lands reserved for school purposes (§ 9), swamplands (§ 10), and Indian lands held in trust by the United States (§ 11).

Nor can an easement be acquired as against lands held by the United States, as is illustrated by cases set out in § 12.

✦

With respect to states, the great preponderance of authority is to the effect that, absent legislation so permitting, title to lands held by the state in any capacity cannot be obtained by adverse possession or prescription (see § 13), as the state cannot be bound by the defaults or negligence of her officers or agents. This rule has been specifically applied in numerous cases concerning lands patented or granted by the state and in which an attempt was made to set up adverse possession prior to the patent and while title was, of course, still in the state (§ 14), it being pointed out by more than one decision in that section that the application of any other rule would be to advance the absurdity that the state could have a perfect title to land without the power of transferring a good title thereto, and that as the people cannot attend to their rights except through their officers they should not suffer by the lapse of time or through the negligence of those officers. To be noted, as a matter of incidental interest in so far as this annotation is concerned, is the rule in some jurisdictions, perhaps a minority, that after the survey and prior to the issuance of a patent, the prospective patentee may have such an equitable title in certain circumstances as will permit adverse possession to run against him. See § 14.

The rule that title by adverse possession or prescription cannot be acquired as against the state has also been applied as to other types of land owned by the state, such as islands or the beds of rivers, particularly navigable rivers, and lake beds (§ 15); tidelands (although in a few comparatively early decisions a contrary view was announced; see § 16); oyster beds (§ 17); lands donated by the United States to the state for public school purposes, or otherwise acquired and held by the state for such purpose, or for university or college purposes (§ 18); swamplands granted by Congress to a state (although in California a contrary view has been expressed where such lands have not been dedicated to any public use) for

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entry occurred after or contemporaneously with the forfeiture.)

Statute of limitations as applicable to action by municipality or other political subdivision in absence of specific provision in that regard, 113 ALR 376, which does not include generally cases turning upon the question whether a title to municipal or other public property may be obtained by adverse possession or prescription.

Encroachment of fence on highway as affecting title or rights of public, 6 ALR 1210.

swampland cases, see § 19; accretions to riparian lands owned by a state (§ 20); lands granted to the state in aid of railroad construction, or other land used by the state in aid of other internal improvements (§ 21); railroads or railroad rights of way (§ 22); canal lands (§ 23); lands in a forest preserve (§ 24); public squares (§ 25); lands forfeited to the state for nonpayment of taxes (§ 26), although a contrary view was stated in a California case; lands escheated to the state (§ 27); and land purchased by the state (§ 28).

As noted in § 29 it has been held in California that public land of the state not reserved for public use, as distinguished from a proprietary holding, may be acquired by adverse possession.

At various times statutes have been enacted, not necessarily in effect at the present time, which have been construed under various circumstances as limiting the time within which the state may sue to recover state lands entered by individuals or corporations. Cases construing such statutes will be found in § 31[a]. And statutes of this nature have been construed in some cases as precluding recovery by the state of lands held by it for school or university purposes and in the possession of one holding adversely to the state § 31[b]. On the other hand, as noted in § 31[b], it has been held that such a statute is not to be construed as limiting the time within which the state may bring actions for the recovery of its school lands. As further noted in § 31[c] there is contrariety of opinion as to the applicability of such statutes to actions for the recovery of tidelands. Such a statute has been held inapplicable to canal lands held by the state, as indicated in § 31[d].

Constitutional or statutory provisions in some jurisdictions have expressly or by necessary implication exempted the state from the operation of statutes of limitation, and thus preclude acquisition of title by adverse possession or prescription as against the public lands of the state; the question sometimes arises whether such a statute should be given a prospective or retrospective operation. See for discussion of these matters, § 32.

Some constitutional or statutory provisions expressly provide for the inalienability of the lands owned by the state, and such provisions have been construed, quite naturally, as preventing the acquisition of same by adverse possession. See in this connection cases discussed in § 33.

The general rule that no one can, at least as to property of the state devoted to public use, acquire such a right or easement therein as will impair public rights in such property, has been specifically applied in illustrative cases set out in § 30. For example, see § 30[b] where the rule was applied with respect to dams in rivers and other bodies of water and the conclusion reached that such installations should not be allowed where they interfere with public rights of navigation, or fail to provide for suitable fishways thereover; conversely, there is authority to the effect that an easement may be acquired by prescription to maintain a dam where no interference with navigation results. Nor can prescriptive rights be acquired in state canal property, § 30[c]. Neither, according to cases set out in § 30[d], can rights of way be established over lands of the state. And, as shown in § 30[e], one cannot acquire by lapse of time a right to pollute a stream.

✦

As indicated in § 34, the great weight of authority subscribes to the view that, except for statutory modification, property of a municipality reserved for or dedicated to public use is not subject to the ordinary rules of adverse possession or prescription such as would apply as against the property of an individual, the courts reasoning that the principles preventing adverse possession from developing into title when the property is held by the state for public use should also apply when the land is held by a municipality for public use. This principle has been exemplified in cases of municipally owned school lands and property (§ 35); river lands and rights in waters of streams (§ 36); tidelands

[§ 2]

(§ 37); a fire engine lot (§ 38); property utilized in connection with a drainage project (§ 39); land essential to give access to a waterway (§ 40); and public buildings (§ 41).

Conversely, in the absence of statutory modifications, title to municipally owned property which is held in a proprietary capacity and is alienable, as distinguished from property held for public use, is subject to acquisition by adverse possession or prescription (§ 42), this rule having been applied to vacant lots owned by the city, not devoted to public use, and alienable (§ 42); pueblo lands or house lots; city lots acquired by the city under a tax lien foreclosure; and wild lands never used or intended to be used for any public purpose (§ 43).

There is some little authority, as noted in § 44, that property of a municipality, even though intended for public use, may be lost by reason of the operation of general limitation statutes, particularly where the property is held for purely local, as distinguished from statewide, use.

Apparently in order to forestall litigation, statutes have been enacted in some jurisdictions which seem to exempt municipally owned land, whether used for public purposes or not, from the operation of statutes generally limiting the time within which actions for the recovery of real estate may be brought. See in this connection, for cases in which such statutes have been construed, § 45[a], in which, for example, are cases in which a public wharf, land acquired for the purpose of constructing a public sewer, property acquired by a city under tax foreclosure, etc., have been held exempt from the operation of limitation statutes. In some instances, as shown in § 45[a], constitutional or statutory provisions expressly rendering property used for public purposes inalienable have effected a similar result.

There is lack of unanimity as to whether under particular statutes property held by a city under a tax deed can be acquired by adverse possession. See § 45[b].

A statute or constitutional provision exempting property of the state or "people" from the operation of statutes limiting the time within which an action for the recovery of real property can be maintained has been held not applicable to municipal corporations. See § 45[c].

Legislation expressly making the state subject to limitation statutes with respect to the time within which actions for the recovery of land may be brought has been construed as also including municipal corporations. See § 45[d].

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The majority of cases hold or approve the view that, counties being agencies of the state to enforce rights in which the state sovereignty has an interest, such of their property as is used for public purposes cannot be lost to them by adverse possession or prescription. See for cases adhering to this view § 46. Exemplifications of this rule are set out in § 47, and include school lands, land and property occupied by a hospital, a room in a county courthouse or other public building. On the other hand, land not used by the county for public purposes may be acquired by adverse possession or prescription, as is pointed out in § 47, where illustrative cases are given involving property such as swamplands, lands alienable by the county and the proceeds of which it can use for a lawful purpose, a portion of a larger tract all of which was purchased for jail purposes, but which portion was not used for such purpose, as well as land donated to a county for courthouse purposes but never used as such. This latter type of case, it would seem, might inferentially support the general rule that land of a county devoted to public purposes cannot be acquired by adverse possession or prescription.

A few jurisdictions, in not very recent decisions, apparently took the view that property of a county, even if dedicated to public uses, may be lost by adverse possession. See for discussion of this view § 48.

In some instances the courts have

merely applied and given effect to statutes expressly exempting from acquisition by adverse possession lands granted to counties for educational purposes. And, of course, a grant of land for school purposes has been held one for a public use within the meaning of a statute exempting from the operation of limitation statutes land appropriated to a public use. But statutes of the last-mentioned type have been held not to apply to swamplands owned by a county, and the same may be lost by adverse possession. And a statute expressly enumerating varieties of county land that cannot be acquired by adverse possession has been construed as impliedly excluding from its benefits other kinds of land owned by the county. For a detailed discussion of statutory and constitutional provisions, see § 49.

It has been held, as shown in § 50, that an easement cannot be acquired as against property of the county used for a public purpose.

As in the case of cities, it has been ruled that property which a town holds in a governmental capacity cannot be acquired by adverse possession or prescription. However, in some cases, as will be observed from § 51, a distinction has been made, in so far as exemption from limitation statutes is concerned, between rights and uses in which the public has an interest in common with the people of a town, and rights or uses which the inhabitants of a local district enjoy exclusively, the exemption not applying in the latter instance.

A state may validly limit the time within which an action may be brought by a town for the recovery of its lands, thus making possible the acquisition of title to such land by adverse possession for the length of time prescribed by the limitation statute. See § 53.

It has been held that a political subdivision such as a town is comprehended within the term "persons" as used in a limitation statute, notwithstanding the applicability of the maxim "nullum tempus occurrit regi" to states. See in this connection § 53.

Lands of an irrigation district have been held not subject to adverse possession, at least as long as the land in question was used for the purpose for which the district was organized; in fact, in at least one jurisdiction legislation has been enacted precluding the acquisition of title by prescription against such districts. See § 54.

In Louisiana it has been held that acquisitive prescription will run against a levee district even though it is considered an agency of the state performing public service. See § 55.

And it has been held that title by adverse possession may be acquired against a governmental agency such as a drainage district, notwithstanding the fact that limitations do not run against the state itself. See § 56.

There is some contrariety of opinion as to whether lands of a school district may be acquired by adverse possession or prescription. One line of authorities, as shown in § 57, holds that such districts are agencies of the state and enjoy the same immunity as the state, against which adverse possession cannot be acquired. But in other jurisdictions such immunity has been denied under the doctrine that limitation statutes operate against a city, county, or school district in the absence of legislation providing otherwise, or under the doctrine, followed in Illinois, to the effect that although municipalities or minor political subdivisions are not subject to limitation laws in respect to streets and public highways, property of theirs acquired for a mere local use may be acquired by adverse possession, and the people of the state have no interest in common with the inhabitants of a school district in a schoolhouse, the use and right being confined to the particular local district.

As pointed out in § 57 the question whether lands of a school district may be acquired by adverse possession is sometimes governed by statutes. And in this connection it may be pointed out that a statute specifically exempting "any town, city or county" from

the operation of limitation statutes and the consequent acquisition of their property by adverse possession does not prevent the acquisition of property of a school district. Generally as to the construction of statutes bearing on the acquisition of property of a school district by adverse possession or prescription, see § 57.

II. United States

A. Acquisition of title against, generally

§ 3. Public lands of United States, generally.

Since the United States is not subject to the jurisdiction of a state, the state is without power to prescribe the time within which the United States shall assert its rights in order to preserve them, and it must be regarded as settled that state statutes of limitation do not apply to the federal government; consequently, no title to public lands of the United States can be acquired by adverse possession or prescription during the time the United States holds title thereto, unless, of course, as is sometimes the case,[2] the United States consents to be bound by a limitation statute.

United States.—Lindsey v Miller (1832) 6 Pet 666, 8 L ed 538; Jourdan v Barrett (1846) 4 How 169, 11 L ed 924; Gibson v Chouteau (1872) 13 Wall 92, 20 L ed 534; Oaksmith v Johnston (Doe ex dem. Oaksmith v Johnston) (1876) 92 US 343, 23 L ed 682; Morrow v Whitney (1877) 95 US 551, 24 L ed 456; Simmons v Ogle (1882) 105 US 271, 26 L ed 1087; Sparks v Pierce (1885) 115 US 408, 29 L ed 428; Redfield v Parks (1889) 132 US 239, 33 L ed 327, 10 S Ct 83; Crespin v United States (1897) 168 US 208, 42 L ed 438, 18 S Ct 53; Northern P. R. Co. v Slaght (1907) 205 US 122, 51 L ed 738, 27 S Ct 442, affg 39 Wash 576, 81 P 1062; Northern P. R. Co. v McComas (1916) 250 US 387, 63 L ed 1049, 39 S Ct 546, revg judgments rendered in 82 Or 639, 161 P 562, 162 P 862; Marine R. & Coal Co. v United States (1921) 257 US 47, 66 L ed 124, 42 S Ct 32, affg 49 App DC 285, 265 F 437; United States v California (1947) 332 US 19, 91 L ed 1889, 67 S Ct 1658, reh den 332 US 787, 92 L ed 370, 68 S Ct 37, supp op 332 US 804, 92 L ed 382, 68 S Ct 20; Godkin v Cohn (1897, CA7th Wis) 80 F 458; Tyee Consol. Min. Co. v Langstedt (1905, CA9th Alaska) 136 F 124; Jackson v United States (1932, CA9th Cal) 56 F2d 340; Stull v United States (1932, CA8th Neb) 61 F2d 826; United States v Stewart (1941, CA9th Cal) 121 F2d 705, revd on other grounds 316 US 354, 86 L ed 1529, 62 S Ct 1154; United States v Turner (1949, CA5th Ala) 175 F2d 644, cert den 338 US 851, 94 L ed 521, 70 S Ct 92, revg United States v Property on Pinto Island (DC) 74 F Supp 92; Lewis v Moore (1952, CA10th Okla) 199 F2d 745; Drew v Valentine (1883, CC Fla) 18 F 712; Tegarden v Le Marchel (1904, CC Ark) 129 F 487; Harvey v Holles (1908, CC Iowa) 160 F 531; Reed v St. Paul, M. & M. R. Co. (1915, DC Wash) 234 F 123; United States v Eldredge (1940, DC Mont) 33 F Supp 337; Pavell v Berwick (1943, DC La) 48 F Supp 246; Goltra v United States (1951) 119 Ct Cl 217, 96 F Supp 618; United States v Burnette (1952, DC NC) 103 F Supp 645.

Alabama.—Wright v Swan (1837) 6 Port 84; Iverson v Dubose (1855) 27 Ala 418; Dillingham v Brown (1862) 38 Ala 311; Farley v Smith (1863) 39 Ala 38; Jones v Walker (1872) 47 Ala 175; Wagnon v Fairbanks (1894) 105 Ala 527, 17 So 20; Wiggins v Kirby (1894) 106 Ala 262, 17 So 354; Stephens v Moore (1896) 116 Ala 397, 22 So 542; Adler v Prestwood (1898) 122

2. Where the United States, upon the cession of Puerto Rico to it by Spain, continued all laws in force, for a time, which had theretofore been in force in Puerto Rico, including a section of the Spanish Civil Code providing for acquisition of prescriptive title to land by possession for 10 years, the United States sanctioned acquisition of a prescriptive title against it during such period. Porto Rico v Fortuna Estates (1922, CA1st Puerto Rico) 279 F 500, cert den 259 US 587, 66 L ed 1077, 42 S Ct 590.

Ala 367, 24 So 999; Ledbetter v Borland (1900) 128 Ala 418, 29 So 579; Williams Invest. Co. v Pugh (1902) 137 Ala 346, 34 So 377; Frick v Harper (1908) 155 Ala 231, 46 So 453; Price v Dennis (1909) 159 Ala 625, 49 So 248; Swift v Doe (1909) 162 Ala 147, 50 So 123; Nelson v Weekley (1915) 195 Ala 1, 70 So 661; Nance v Walker (1917) 199 Ala 218, 74 So 339; Stein v England (1918) 202 Ala 297, 80 So 362; Reichert v Jerome H. Sheip, Inc. (1921) 206 Ala 648, 91 So 618.

Alaska.—Sutter v Heckman (1900) 1 Alaska 81; Lewis v Johnson (1902) 1 Alaska 529; Raby v Hill (1948, DC) 11 Alaska 600.

Arizona.—Crittenden Cattle Co. v Ainsa (1912) 14 Ariz 306, 127 P 733.

Arkansas.—Nichols v Council (1888) 51 Ark 26, 9 SW 305, 14 Am St Rep 20.

California.—Doran v Central Pacific R. Co. (1864) 24 Cal 245; Gardiner v Miller (1874) 47 Cal 570; Nessler v Bigelow (1882) 60 Cal 98; Packard v Moss (1885) 68 Cal 123, 8 P 818; Anzar v Miller (1891) 90 Cal 342, 27 P 299; McTarnahan v Pike (1891) 91 Cal 540, 27 P 784; Jatunn v Smith (1892) 95 Cal 154, 30 P 200; Howard v Oroville School Dist. (1913) 22 Cal App 544, 135 P 689; Lapique v Morrison (1915) 29 Cal App 136, 154 P 881; Strother v Pacific Gas & Electric Co. (1949) 94 Cal App2d 525, 211 P2d 624.

Colorado.—Prieshof v Baum (1934) 94 Colo 324, 29 P2d 1032.

Idaho.—Hemphill v Moy (1917) 31 Idaho 66, 169 P 288; Kirk v Schultz (1941) 63 Idaho 278, 119 P2d 266.

Illinois.—Cook v Foster (1845) 7 Ill 652; Spellman v Curtenius (1851) 12 Ill 409; Wilkinson v Watts (1923) 309 Ill 607, 141 NE 383.

Iowa.—Iowa R. Land Co. v Adkins (1874) 38 Iowa 351; Sater v Meadows (1886) 68 Iowa 507, 27 NW 481; Twining v Burlington (1886) 68 Iowa 284, 27 NW 243 (United States was not a party to, or asserting title in, this case); Durham v Hussman (1893) 88 Iowa 29, 55 NW 11, affd 165 US 144, 41 L ed 664, 17 S Ct 253; Young v Charnquist (1901) 114 Iowa 116, 86 NW 205; Schlosser v Hemphill (1902) 118 Iowa 452, 90 NW 842, error dismd 198 US 173, 49 L ed 1000, 25 S Ct 654; Carr v Moore (1903) 119 Iowa 152, 93 NW 52, 97 Am St Rep 292.

Kansas.—McGannon v Straightlege (1884) 32 Kan 524, 4 P 1042; Janes v Wilkinson (1895) 2 Kan App 361, 42 P 735.

Louisiana. — Sanchez v Gonzales (1822) 11 Mart 207; Kittridge v Dugas (1844, La) 6 Rob 482; Pepper v Dunlap (1844, La) 9 Rob 283, error dismd (US) 5 How 51, 12 L ed 46; Villey v Jarreau (1883) 35 La Ann 542; Perkins v Vincent (1895) 47 La Ann 579, 17 So 126; Riggio v McNeely (1914) 135 La 391, 65 So 552; New Orleans v Salmen Brick & Lumber Co. (1914) 135 La 828, 66 So 237; Welch v Forest Lumber Co. (1922) 151 La 960, 92 So 400; Cocke v Spangler (1925) 159 La 409, 105 So 413; Evans v Jackson (1928) 165 La 737, 116 So 168, cert den 278 US 662, 73 L ed 569, 49 S Ct 10; New Orleans v Ricca (1950) 217 La 413, 46 So2d 505.

Maine. — United States v Burrill (1910) 107 Me 382, 78 A 568, Ann Cas 1912D 512.

Minnesota.—Baker v Berg (1917) 138 Minn 109, 164 NW 588, cert den 246 US 661, 62 L ed 927, 38 S Ct 332.

Mississippi.—Bates v Aven (1883) 60 Miss 955; Rabb v Washington County Supers. (1885) 62 Miss 589; Willoughby v Caston (1916) 111 Miss 688, 72 So 129.

Missouri.—Lajoye v Primm (1834) 3 Mo 529; Shepley v Cowan (1873) 52 Mo 559, affd 91 US 330, 23 L ed 424; McIlhinney v Ficke (1875) 61 Mo 329; Smith v Madison (1878) 67 Mo 694; Hammond v Johnston (1887) 93 Mo 198, 6 SW 83, error dismd 142 US 73, 35 L ed 941, 12 S Ct 141; Cummings v Powell (1888) 97 Mo 524, 10 SW 819; Smith v McCorkle (1891) 105 Mo 135, 16 SW 602; Marshall v Hill (1912) 246 Mo 1, 151 SW 131; Hamilton v Badgett (1922) 293 Mo 324, 240 SW 214 (adverse possession of public lands of state and United States involved).

Montana.—Bode v Rollwitz (1921) 60 Mont 481, 199 P 688; Northern P. R. Co. v Smith (1921) 62 Mont 108,

203 P 503; Northern P. R. Co. v Cash (1928) 67 Mont 585, 216 P 782.

Nebraska.—Topping v Cohn (1904) 71 Neb 559, 99 NW 372; Kimes v Libby (1910) 87 Neb 113, 126 NW 869.

Nevada.—Vansickle v Haines (1872) 7 Nev 249; Treadway v Wilder (1877) 12 Nev 108; South End Min. Co. v Tinney (1894) 22 Nev 221, 38 P 401.

New Mexico.—Christmas v Cowden (1940) 44 NM 517, 105 P2d 484.

Ohio.—Wallace v Miner (1834) 6 Ohio 366, affd on reh 7 Ohio pt 1, p 249; Duke v Thompson (1847) 16 Ohio 34; Wood v Ferguson (1857) 7 Ohio St 288; Ohio State University v Satterfield (1886) 2 Ohio CC 86, 1 Ohio CD 377.

Oklahoma. — Patterson v Carter (1921) 83 Okla 70, 200 P 855; McLish v White (1924) 97 Okla 150, 223 P 348; Tobley v Dekinder (1925) 110 Okla 63, 237 P 617.

Puerto Rico.—United States v Benito (1902) 1 Puerto Rico F 267.

Texas.—Kimbro v Hamilton (1866) 28 Tex 560; Paschal v Dangerfield (1872) 37 Tex 273.

Utah.—Steele v Boley (1890) 7 Utah 64, 24 P 755, overruling on other grounds Steele v Boley (1889) 6 Utah 308, 22 P 311; Utah Copper Co. v Eckman (1915) 47 Utah 165, 152 P 178; Hanks v Lee (1920) 57 Utah 537, 195 P 302; Peterson v Johnson (1934) 84 Utah 89, 34 P2d 697.

Washington.—Delacey v Commercial Trust Co. (1909) 51 Wash 542, 99 P 574, 130 Am St Rep 1112; Schmitz v Klee (1918) 103 Wash 9, 173 P 1026.

Wisconsin.—Whitney v Gunderson (1872) 31 Wis 359; Knight v Leary (1882) 54 Wis 459, 11 NW 600; Lemieux v Agate Land Co. (1927) 193 Wis 462, 214 NW 454, cert den 275 US 523, 72 L ed 405, 48 S Ct 22.

Wyoming. — Porter v Carstensen (1929) 40 Wyo 156, 274 P 1072.

No possession, however protracted, will confer title to the occupant, as against the government of the United States, to any part of the public domain. Pepper v Dunlap (1844, La) 9 Rob 283, error dismd (US) 5 How 51, 12 L ed 46.

The public domain is not subject to prescription by any length of time. Sanchez v Gonzales (1822, La) 11 Mart 207.

In Ohio State University v Satterfield (1886) 2 Ohio CC 86, 1 Ohio CD 377, an action in ejectment, it was ruled that while the United States held title to land which it subsequently ceded to the state of Ohio, which subsequently transferred it to plaintiff, the statute of limitations did not run against the general government and the state even though defendant and those under whom he claimed had had possession of the land for 92 years.

And in New Orleans v Ricca (1950) 217 La 413, 46 So2d 505, a suit by the city to compel defendant to accept a prescriptive title based on the city's actual possession of the property as owner for a period of more than 30 years, where there was no evidence to show that the property was ever owned or severed from either the state or federal government, and where the court, in view of the fact that it could not determine from the record, as made up, whether or not the city had a good title to the property, remanded the case in order that the parties might have an opportunity to offer additional evidence in the case, it was said by the court that no possession however protracted can confer on an occupant title to any property that stands in the name of the state or United States.

One may not acquire title to any part of the public domain by inclosing the same within his fence or by adverse possession. Peterson v Johnson (1934) 84 Utah 89, 34 P2d 697.

The statute of limitations cannot be put in motion by one against the government, either in such person's own behalf or in behalf of those whose occupancy of the land is dependent upon his entry. Delacey v Commercial Trust Co. (1909) 51 Wash 542, 99 P 574, 130 Am St Rep 1112.

So, where plaintiff relied upon a community interest in the land in question, and upon the statute of limitations, her husband, since deceased, having entered upon the property in

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1886 with the intention of claiming it under the homestead laws of the United States, while, on the other hand, a railroad company claimed the land by virtue of an original grant by the United States to such company, and the latter sued plaintiff's husband in ejectment and procured a judgment in its favor, the court applied the rule that one contesting for government land cannot gain the advantage of the statute over his adversary while the contest or litigation in aid of his title is pending. Delacey v Commercial Trust Co. (Wash) supra.

In Stull v United States (1932, CA 8th Neb) 61 F2d 826, a suit by the United States to quiet title to certain lands, the court stated that at the outset it must be borne in mind that no title can be acquired by adverse possession against the United States itself, and that the burden devolved upon the defendant to prove such possession in him or his predecessors in title for a period of 10 years prior to June 21, 1912, when the title of the government accrued.

There can be no entry on unsold public lands of the United States which will create a title adverse to the government. Wright v Swan (1837, Ala) 6 Port 84.

In Crespin v United States (1897) 168 US 208, 42 L ed 438, 18 S Ct 53, it was held that adverse possession since the acquisition of the territory by the United States from Mexico, however exclusive or notorious, could not be regarded as an element of perfect title to Mexican land which could be confirmed by the court of private land claims, even if there could be in any case a right, as against the Mexican or Spanish government, to a grant by prescription or adverse possession.

In Lewis v Moore (1952, CA10th Okla) 199 F2d 745, it was held that when the Secretary of the Interior determined that an Indian ward no longer required the protection afforded through the holding by the United States of the title to certain lots in trust for the ward, and which were restricted against alienation by the latter, and exempted from taxation, and where it appeared that the United States subsequently conveyed the lots to her, free from any restrictions against alienation, individuals could not assert the Oklahoma statute of limitations[3] in an action brought by the ward to quiet the title to the lots, and include in computing the period of limitations the time during which the United States held the property in trust. The court said that to hold the state statute of limitations applicable, under the circumstances referred to above, would be to frustrate the policy of the United States, and would wholly set aside the purpose of the United States to convey a title by patent to the ward which inured to her benefit. The court in Lewis v Moore (F) supra, referred to as closely analogous decisions those in Gibson v Chouteau (1872, US) 13 Wall 92, 20 L ed 534, and Redfield v Parks (1889) 132 US 239, 33 L ed 327, 10 S Ct 83, in which it was held that the period during which a patentee of public lands held the equitable title to such lands prior to the issuance of patents could not be included in computing the period of limitation under a state statute of limitations, set up as a bar to an action to quiet title brought by the patentee or his grantee, for the reason that such an application of the state statute of limitations would interfere with the paramount power of the United States effectively to make disposition of the public lands. For a more detailed discussion of the application of the statute with respect to land granted by the United States to an individual pending the issuance of the patent see § 4.

And in Spellman v Curtenius (1851) 12 Ill 409, where plaintiff gave in evidence a certificate of the register of the land office, showing an entry by one Bogardus in 1837, and plaintiff traced title by regular chain of conveyances from Bogardus to himself,

3. The statute provided that occupancy of real property for the period prescribed in the statute sufficient to bar an action for the recovery of the property would confer a title denominated as a title by prescription.

while, on the other hand, defendants sought to set up an outstanding title in their landlord, derived from a sale of the premises in question by the state for the tax of 1843, the court held that defendants could not rely upon a possession of 20 years, because the record showed the land was not purchased of the United States until 1837; till then, therefore, the statute would not begin to run, and since that time 20 years had not elapsed.

Occupation of the public lands can never be adverse to the government so as to defeat or affect in any way the title subsequently conferred by its grant or patent. Morrow v Whitney (1877) 95 US 551, 24 L ed 456.

Mere occupancy of the public lands and improvements thereon give no vested right therein as against the United States, and consequently not against any purchaser from the United States. Sparks v Pierce (1885) 115 US 408, 29 L ed 428.

Mere possession of land, though open, exclusive, and uninterrupted for 20 years, creates no impediment to a recovery by the government (United States) and, of course, none to a recovery by one who, within that period, receives its conveyance. Oaksmith v Johnston (Doe ex dem. Oaksmith v. Johnston) (1876) 92 US 343, 23 L ed 682.

The statute of limitations begins to run against the 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. Min. Co. v Langstedt (1905, CA9th Alaska) 136 F 124.

§ 4. Lands granted by United States to individuals.

Many of the cases cited in § 3 as adhering to or supporting the rule that adverse possession or prescription will not run while the United States has title to the land in question involved actions or suits in which the United States was not a party, the actions or suits being between individuals, one of which was claiming by adverse possession or prescription against the other with respect to lands granted to the latter by the United States. So, although the rights of parties other than the United States or political subdivisions or units are of no particular concern in so far as the subject of this annotation is concerned, it is necessary to refer to, or particularize the facts in, some of those cases in which the action was between individuals, to illustrate the application of the general rule stated in § 3. And in this connection it may be noted that in the majority of those cases it was held that title does not pass out of the United States until it has issued a patent to its grantee, and while the United States holds title, pending the issue of the patent, adverse possession or prescription cannot run so as to be available during such period against the grantee to whom the patent was subsequently issued. Cases illustrating this view are referred to, or set out, below.

Thus, in Lindsey v Miller (1832, US) 6 Pet 666, 8 L ed 538, where defendants requested the court to instruct the jury that their uninterrupted possession of the land in question for more than 21 years under an entry and survey in 1783 was a bar to the recovery of the land by plaintiff, who held it under a patent from the United States bearing date of December 1, 1824, and that this possession under the entry and survey ought to protect them against the title of the plaintiff, the court, in holding that the possession of defendants did not bar plaintiff's action, said: "That the possession of the defendants does not bar the plaintiff's action, is a point too clear to admit of much controversy. It is a well settled principle that the statute of limitations does not run against a State. If a contrary rule were sanctioned, it would only be necessary for intruders upon the public lands to maintain their possessions until the statute of limitations shall run, and then they would become invested with the title against the government, and all persons claiming under it. In this way the public domain would soon be appropriated by

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adventurers. Indeed, it would be utterly impracticable, by the use of any power within the reach of the government, to prevent this result. It is only necessary, therefore, to state the case, in order to show the wisdom and propriety of the rule that the statute never operates against the government."

Again, in Gibson v Chouteau (1872, US) 13 Wall 92, 20 L ed 534, where the occupation of land derived from the United States before the issue of their patent, for the period prescribed by the statutes of limitation of a state for the commencement of an action for the recovery of real estate, was held not to bar an action of ejectment for the possession of such land founded upon the legal title subsequently conveyed by the patent, the court said: "The same principle which forbids any state legislation interfering with the power of Congress to dispose of the public property of the United States, also forbids any legislation depriving the grantees of the United States of the possession and enjoyment of the property granted by reason of any delay in the transfer of the title after the initiation of proceedings for its acquisition. The consummation of the title is not a matter which the grantees can control, but one which rests entirely with the government. With the legal title, when transferred, goes the right to possess and enjoy the land, and it would amount to a denial of the power of disposal in Congress if these benefits, which should follow upon the acquisition of that title, could be forfeited because they were not asserted before that title was issued."

The United States government continues to be the owner of legal title to its lands until it issues a patent to such lands, and during such period one cannot claim title by adverse possession, as such a claim never runs against the government to defeat its title, no matter how distinct or hostile it may be; he who enters upon the public domain and occupies and claims title, without the license of the government, by patent or otherwise, is a mere trespasser. Wagnon v Fairbanks (1894) 105 Ala 527, 17 So 20.

Prior to the issuing of patents to public lands of the United States there can be no adverse possession, for such would be the asserting of a claim of right against the sovereign. Lemieux v Agate Land Co. (1927) 193 Wis 462, 214 NW 454, cert den 275 US 523, 72 L ed 405, 48 S Ct 22.

So, in Treadway v Wilder (1877) 12 Nev 108, involving land which had been patented by the United States to plaintiff, and which defendant claimed to have acquired title to by adverse possession under a state statute allowing persons to acquire title by adverse possession for 5 years preceding the bringing of an action for the recovery of the property, the court held that even though it conceded that plaintiff could have maintained an action of ejectment immediately after proof and payment to the federal government, nevertheless, the "legal title" remained in the government until the date of the patent to plaintiff, and the statute of limitations did not commence to run until that date.

In Utah Copper Co. v Eckman (1915) 47 Utah 165, 152 P 178, where plaintiff traced his title to a certain mining lode to its original source—that is, back to the United States, which issued a patent May 21, 1907—and plaintiff's action of ejectment herein, in which defendant, who claimed that he and his predecessors in title had been in possession of the property in question since 1900, sought to establish title exclusively by 7 years' adverse possession, was commenced in 1911, it was held that defendant could not sustain his title, inasmuch as his possession could have been adverse only from and after May 21, 1907, when the patent was issued, which would give defendant only 4 years' adverse possession when the action was commenced in 1911, instead of the 7 years' actual adverse possession required by the Utah statutes. The court quoted from Gibson v Chouteau (1872, US) 13 Wall 103, 20 L ed 537: "But neither in a separate suit in a federal court nor in an answer to an action of ejectment in

a state court can the mere occupation of the demanded premises by plaintiffs or defendants for the period prescribed by the statute of limitations of the state be held to constitute a sufficient equity in their favor to control the legal title subsequently conveyed to others by the patent of the United States, without trenching upon the power of Congress in the disposition of the public lands. That power cannot be defeated or obstructed by any occupation of the premises before the issue of the patent, under state legislation, in whatever form or tribunals such occupation be asserted."

The court in Utah Copper Co. v Eckman (Utah) supra, said that defendant did not bring himself within the doctrine that one claiming title to land under adverse possession for the statutory period as against all persons, but recognizing the superior title of the United States government, and seeking in good faith to acquire that title, may assert such adverse possession as against any person claiming to be the owner under a prior grant from the government, inasmuch as he did not seek to acquire title herein from the United States upon a bona fide claim other than that of adverse possession, his claim of title to the property in question being hostile to the title of the United States to the extent that he desired to avail himself of his alleged possession while the title remained in the government of the United States, which he could not do, according to all of the decisions.

Although a patent from the United States issues to the same person who enters the land, and although a statute of Missouri allows the holder of the entry to get possession by ejectment, as soon as his entry is made, and although the limitation statute of Missouri begins to run from the date of the right of entry, yet, since the legal title remains in the United States after the entry and up to the date of the patent, the Missouri statute of limitations has no effect as a bar before the issue of patent, because it interferes with the primary disposal of the soil. McIlhinney v Ficke (1875) 61 Mo 329.

And in Gardiner v Miller (1874) 47 Cal 570, where a Mexican grant of 1841 to plaintiff's predecessor in title was imperfect until after a survey by the United States to segregate and perfect such predecessor's interest, which survey was finally determined in the federal courts in June, 1865, and patent issued to such predecessor in 1866, it was held that the right of plaintiff, whose title was derived from the above-mentioned predecessor, to maintain an action of ejectment against defendant, who had been in continuous occupancy of the lot in question since 1858, and who relied solely upon the defense of the statute of limitations, was not barred as claimed by defendant, in 1868, by the lapse of a period of 5 years from the passage of an act in 1863 providing that no action for the recovery of real property should be maintained, unless it appear that the plaintiff, his ancestor, predecessor or grantor was seised or possessed of the premises in question within 5 years before the commencement of the action, the court applying the rule that state statutes of limitation are not binding upon the rights of the United States, and that the five-year statute in question had no application to the title of the patentee (plaintiff's predecessor) anterior to the issuance of the patent.

A state statute of limitations for the recovery of real property does not begin to run in favor of a railway company as against a settler under the homestead laws of the United States until patent has issued. Northern P. R. Co. v Slaght (1907) 205 US 122, 51 L ed 738, 27 S Ct 442, affg 39 Wash 576, 81 P 1062 (stating that the decisions of the United States Supreme Court on this question were controlling).

In Knight v Leary (1882) 54 Wis 459, 11 NW 600, it was held that defendant could not successfully assert title by adverse possession founded upon a deed from the government to his alleged predecessors in title where it appeared that the government did not grant to such predecessors the land in question, inasmuch as the en-

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try and certificate of location in the land office, and the patent issued by the United States, showed that the entry did not cover the particular land in dispute, but other land instead. The court applied the rule that no adverse possession is operative against the government.

And in Welch v Forest Lumber Co. (1922) 151 La 960, 92 So 400, it was held that the prescription of 10 years, acquirendi causa, pleaded by defendant and prescribed by the Civil Code, was not applicable, because the government had not so divested itself of title that prescription could run, because, although a final certificate of homestead entry had issued to the ancestor of plaintiff before the adverse possession relied on by defendant to sustain the plea of prescription had commenced, such certificate had been prematurely and erroneously issued, because at the time of the entry and the issuance of the certificate there was an outstanding patent to the land, and so long as that patent was outstanding the government could not properly issue a patent on the final certificate. The court said that to recognize that prescription runs in such an instance as the present would be to permit the state laws to interfere with the federal government in the sale and disposition of its lands.

In Marshall v Hill (1912) 246 Mo 1, 151 SW 131, where patent was issued by the United States to plaintiffs' predecessor in title on March 21, 1898, containing the statement that it was "issued in lieu of one dated August 30, 1872, in which the description of the land was erroneous, the record of which has been cancelled," the court affirmed the contention of plaintiffs that by the issue of the patent of March 21, 1898, the legal title to these lands, then first emanating from the government, inured in equity to them, and that the primary object of this proceeding was to ripen that equity into a legal title, and that the state statute of limitations had no bearing upon the rights of the parties until the issue of the patent which divested the title of the United States. The court said that it was not necessary to speculate as to whether or not there might be cases in which the statute of limitations would take hold upon the right of possession emanating from the government while it retained a naked legal title, the court in this connection stating or approving the rule that as to the government there is no statute of limitations, and that in Gibson v Chouteau (1872, US) 13 Wall 92, 20 L ed 534, it was held that the statute leaves the right of entry upon the legal title, subsequently acquired by the patent, wholly unaffected by adverse possession, and that such possession by either the plaintiffs or defendants will not control the legal title.

And in Wood v Ferguson (1857) 7 Ohio St 288, where the United States issued a patent to a person who had died at the time of its issuance, and which by reason of the nonexistence of the patentee was a nullity, but the United States revitalized the patent by enacting legislation to the effect that where patents were issued to a dead person, the title to the land therein designated should inure to and become vested in the heirs, devisees, or assignees of such deceased patentee as if the patent had issued to the deceased during his lifetime, it was held that the patent thus vitalized by the act of Congress could not be held to relate back and take effect from the time of its date of issue, in such manner as to subject the land designated in it to the operation of the statute of limitations after the date of the patent and before the passage of the act of Congress, as well as afterward.

In Northern P. R. Co. v McComas (1919) 250 US 387, 63 L ed 1049, 39 S Ct 546, revg judgments in 82 Or 639, 161 P 562, 162 P 862, the court said that as to three tracts of public land erroneously patented to a railroad company the latter had no title, legal or equitable, prior to the issue of the patents, and up to that time the title was in the United States, and of course no prescriptive right was acquired against it under the local statute. Furthermore, the court observed that

the title received through those patents was turned back to the United States before the trial, and this operated to restore the three tracts to their prior status as public lands. The title under those patents—and it was merely the naked legal title—did not remain in the railroad company for anything like the period named in the local statute, if that was material.

In Willoughby v Caston (1916) 111 Miss 688, 72 So 129, where defendant averred the existence of title by adverse possession for more than 10 years as against plaintiff, to whom a patent to the land was issued by the state in 1905, it was held that defendant did not acquire title by adverse possession, for the reason that the statute of limitations could not be invoked by him in aid of his title, inasmuch as, although the land was donated to the state under the Swamp and Overflowed Land Act of 1850, and the land was selected by the state, and listed in what was known as list No. 29, this list was not approved by the Secretary of the Interior until December 31, 1900, nor his approval to certify, so as to authorize issuance of the patent, until February, 1901. With reference to the statute of limitations, the court stated that it would not run against the United States, and that the true rule was that the statute did not ordinarily begin to run until the sovereign power has conveyed the title by proper patent, and that under the facts of the present case the statute did not begin to run until the title passed to the state by the proper approval of the selection by the Secretary of the Interior.

In Perkins v Vincent (1895) 47 La Ann 579, 17 So 126, an action to have plaintiffs decreed the owners of certain land, to which defendants put up a plea of prescription, it was held that the land must be deemed to have formed part of the public domain at least until it was ascertained by a public survey and the issue of a patent or an equivalent confirmation of the claimant's title by act of Congress referring to the survey, and that until such survey the land was imprescriptible, and hence no prescription in respect to such land could run against the claimant or his heirs.

And in Schlosser v Hemphill (1902) 118 Iowa 452, 90 NW 842, error dismd 198 US 173, 49 L ed 1000, 25 S Ct 654, involving claims to land founded, in so far as defendants were concerned, upon conveyances from a county, under a patent issued to the state under a swampland grant of 1850, and based upon a resurvey in 1898, and as to which plaintiff rested his claim of title upon adverse possession, stating that he and his grantors had been in possession, claiming title thereto, for much more than 10 years prior to the beginning of this action, and that the statute of limitations would run against the county, the court held that the legal title to such lands remained in the United States until a patent was issued by the latter to the state, and that, furthermore, the swampland act did not operate to convey any land unsurveyed at the date of its passage, and that a survey into legal subdivisions was a necessary prerequisite to the passing of title from the government, and that so long as title remained in the United States the statute of limitations would not run.

There can be no adverse possession as against the United States or its subsequent patentee for the period during which the United States holds the legal and equitable title of the land by reason of a reservation of it for military purposes, inasmuch as there can be no such thing as adverse possession against the government. Whitney v Gunderson (1872) 31 Wis 359.

In Nance v Walker (1917) 199 Ala 218, 74 So 339, it was held that although plaintiff proved, through mesne conveyances from various individuals, a prior possession under color of title of the land sued for, nevertheless, as the title was in the government during that time and never passed out of it until the issuance of a patent to defendant, plaintiff had no paper title, and did not acquire title by adverse possession.

In Wilkinson v Watts (1923) 309 Ill 607, 141 NE 383, where it was conceded

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that adverse possession would not run against the United States government, the court said that even if it was assumed that a certain person had been in actual possession of the land in question since 1883, his possession could not be adverse until a patent issued from the United States government to plaintiff's grantor in 1891, there being no one prior to that date against whom the statute relating to adverse possession could begin to run.

Numerous other cases support the rule above illustrated that title remains in the United States until issuance of a patent, thus precluding the operation of a local statute of limitations and acquisition of title by adverse possession or prescription as against a grantee of the United States until such issuance.

United States.—Simmons v Ogle (1882) 105 US 271, 26 L ed 1087; Redfield v Parks (1889) 132 US 239, 33 L ed 327, 10 S Ct 83; Tyee Consol. Min. Co. v Langstedt (1905, CA9th Alaska) 136 F 124; Tegarden v Le Marchel (1904, CC Ark) 129 F 487.

Alabama.—Iverson v Dubose (1855) 27 Ala 418; Farley v Smith (1863) 39 Ala 38; Wiggins v Kirby (1894) 106 Ala 262, 17 So 354; Stephens v Moore (1896) 116 Ala 397, 22 So 542; Williams Invest. Co. v Pugh (1902) 137 Ala 346, 34 So 377; Frick v Harper (1908) 155 Ala 231, 46 So 453 (United States land); Swift v Doe (1909) 162 Ala 147, 50 So 123; Reichert v Jerome H. Sheip, Inc. (1921) 206 Ala 648, 91 So 618. Compare with other Alabama cases, Stein v England (1918) 202 Ala 297, 80 So 362, and Boone v Gulf, F. & A. R. Co. (1918) 201 Ala 560, 78 So 956, set out infra.

Alaska.—Raby v Hill (1918, DC) 11 Alaska 600.

Arizona. — Crittenden Cattle Co. v Ainsa (1912) 14 Ariz 306, 127 P 733.

California. — Nessler v Bigelow (1882) 60 Cal 98; Anzar v Miller (1891) 90 Cal 312, 27 P 299; Howard v Oroville School Dist. (1913) 22 Cal App 544, 135 P 689.

Colorado.—Prieshof v Baum (1931) 94 Colo 324, 29 P2d 1032.

Kansas.—Janes v Wilkinson (1895) 2 Kan App 361, 42 P 735.

Kentucky.—Chiles v Calk (1817) 7 Ky (4 Bibb) 554 (holding that prior to the date of a patent issued by the commonwealth another's adverse possession anterior to the date of the patent could not operate to toll either the right of the commonwealth or of the patentee); Robinson v Neal (1827) 21 Ky (5 TB Mon) 213 (holding that since 20 years had not elapsed from the emanation of the patent from the commonwealth to one under whom plaintiff claimed, defendants in possession could not avail themselves of the bar of 20 years as fixed by the statutes); Campbell v Thomas (1848) 48 Ky (9 B Mon) 82 (holding that previous possession of the land by an occupant did not affect to any extent the title which plaintiff derived by grant or patent from the commonwealth, plaintiff's title being complete and perfect when he obtained it, and not being prejudiced by the previous possession, which formed no part of the bar against his claim and could not be relied upon for that purpose); Hartley v Hartley (1860) 60 Ky (3 Met) 56 (holding that appellant who claimed that he had been in adverse possession of the land for more than 20 years before the commencement of appellee's action could not avail himself of this possession anterior to the date of appellee's patents from the commonwealth); Taylor v Combs (1899) 20 Ky LR 1828, 50 SW 64 (holding that the defense of adverse possession of certain land and a building for 15 years failed because the patents issued to the grantor of plaintiffs had issued within 15 years before the suit was brought, and as time does not run against the state, plaintiffs were not barred by limitation, because the rights of their grantor did not accrue until the patents were issued).

Louisiana. — Riggio v McNeely (1914) 135 La 391, 65 So 552.

Minnesota. — Baker v Berg (1917) 138 Minn 109, 164 NW 588, cert den 246 US 661, 62 L ed 927, 38 S Ct 332.

Missouri.—Smith v Madison (1878)

67 Mo 694; Smith v McCorkle (1891) 105 Mo 135, 16 SW 602.

Nevada. — South End Min. Co. v Tinney (1894) 22 Nev 221, 38 P 401.

New Mexico.—Christmas v Cowden (1940) 44 NM 517, 105 P2d 484.

Ohio.—Wallace v Miner (1834) 6 Ohio 366, aff'd on reh 7 Ohio pt 1, p 249; Duke v Thompson (1847) 16 Ohio 34.

Utah.—Steele v Boley (1890) 7 Utah 64, 24 P 755, overruling on this point Steele v Boley (1889) 6 Utah 308, 22 P 311.

However, in Sater v Meadows (1886) 68 Iowa 507, 27 NW 481, the court said that even if plaintiff's possession originated while the title was in the government, its adverse character attached and became operative from the time the land was patented to a railroad company by the United States.

Some cases somewhat incidentally, or by inference, at least, support the view that adverse possession or prescription does not operate against the United States, by holding, or intimating strongly, that limitation statutes may operate as against a grantee of the United States if he has an equitable title, even though legal title may still remain in the United States; the natural inference, of course, being that the statute does not operate while the whole title is in the government. (No attempt is here made to present an exhaustive collection of such cases.)

In Kimbro v Hamilton (1866) 28 Tex 560, it was held that the statute of limitations would not commence running against the plaintiff until the legal title was vested in him by the patent, or the equitable title of the location and survey of the land by virtue of a genuine certificate, it clearly appearing that title was in the government until vested in the plaintiff.

The statute of limitations will not run in favor of an occupant of land the title to which is in the United States as against the entryman, until the latter's right to a patent has been completed by the performance on his part of every act entitling him to that conveyance. Kimes v Libby (1910) 87 Neb 113, 126 NW 869.

If the statute can run at all before patent from the United States issues, it will be only in a case where the right to the patent has been completed by the performance of every act going to the foundation of the right. Nichols v Council (1888) 51 Ark 26, 9 SW 305, 14 Am St Rep 20.

The title to public lands remains in the United States government until the United States issues a patent to such lands, and up until such time title thereto cannot be acquired by adverse possession. Stein v England (1918) 202 Ala 297, 80 So 362. The court stated that the case of Boone v Gulf, F. & A. R. Co. (1918) 201 Ala 560, 78 So 956, in no wise conflicted with the conclusion here reached, as what was said in the Boone Case had reference to that class of cases where the complete equitable title had passed out of the United States, and the issuance of the patent remained but a ministerial act. The court in the Stein Case said that the complete equitable title in that case did not pass from the United States until the patentees were entitled to demand the patent as a matter of right. Compare Alabama cases cited earlier in this section.

Until lands derived from the general government are paid for by one making application for a patent, the legal and equitable title remains in the government, and the lands are not subject to taxation as against such applicant, and no title thereto can be acquired by one holding a tax deed, and while the legal and equitable title thus remains in the United States the statute of limitations does not run in favor of one in possession under the invalid tax deed. Durham v Hussman (1893) 88 Iowa 29, 55 NW 11, aff'd 165 US 144, 41 L ed 664, 17 S Ct 253.

And in McTarnahan v Pike (1891) 91 Cal 540, 27 P 784, an action in ejectment to recover placer mineral lands, it was held that for the mere purpose of proving title by prescription, defendants alleged adverse possession prior to entry by plaintiff, and pay-

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ment by plaintiff for lands purchased by him from the federal government counted for nothing, inasmuch as the statute of limitations does not run against the government.

Since title to land within an indemnity strip mentioned in the grant by the United States to a railroad company did not vest in the latter until its selection was made and approved by the United States, and since up to that time the land was public land, subject to disposition by the Congress as it saw fit, and until such disposition the land could not be acquired by adverse possession, it was altogether immaterial, where the government did not part with its title until it approved the selection of the land in controversy in 1904, what the predecessor in possession of defendant (who in the present action of ejectment by the railroad company was claiming by adverse possession of himself and predecessors in possession) may have done with the land prior to that date, as nothing they could have done would have set the statute of limitations in motion. Northern P. R. Co. v Cash (1923) 67 Mont 585, 216 P 782.

Also, in Young v Charnquist (1901) 114 Iowa 116, 86 NW 205, where plaintiff claimed certain land under an act of Congress known as the "railroad land grant" of 1856, accepted by the state and transferred to a railroad company, which in turn conveyed its interest in the land to plaintiff in 1892, after certification of the land to the state for the railroad company had been approved in November, 1891, by the Secretary of the Interior, while, on the other hand, defendant claimed to have originally acquired title under the State Swamp Land Act granting swamp and overflowed lands to the respective counties wherein situated, although it appeared in fact that such lands were subsequently determined not to be swamplands, and in the case at bar defendant pleaded that he had been in adverse possession for more than 10 years, the court pointed out that up to 1891 the legal title was in the United States, and that it was well established that the statute of limitations was of no avail against the general government.

In Northern P. R. Co. v Smith (1921) 62 Mont 108, 203 P 503, the court held that a Montana statute providing for the acquisition of title to land by adverse possession did not become operative before the segregation of the particular tracts or sections granted from the public domain and their identification by the approval of the government survey, for until this has been done the federal government retains a proprietary interest in them, to the extent that it will exercise the same dominion over them as over its ungranted lands.

§ 5. Tidelands and the like belonging to the United States; lands below low-water mark of river.

The United States holds title to tide flats below high-water mark in Alaska in trust for the future state, and no title by prescription can be acquired as against such lands. Sutter v Heckman (1900) 1 Alaska 81.

The rule that no prescriptive right or title can be acquired against the United States was applied in Lewis v Johnson (1902) 1 Alaska 529, in a situation involving dispute between certain individuals as to tidelands, and in which it was said: "No person can occupy any portion of the lands below high tide and by such occupancy acquire title thereto. They go upon such lands as trespassers, and remain trespassers until they are ejected by proper authority."

In United States v California (1947) 332 US 19, 91 L ed 1889, 67 S Ct 1658, reh den 332 US 787, 92 L ed 370, 68 S Ct 37, supp op 332 US 804, 92 L ed 382, 68 S Ct 20, a suit to determine the ownership as between the state of California and the United States of lands under the ocean beyond the coast, where the state set up as a defense that by certain conduct the government was barred from enforcing its rights by reason of principles similar to laches, estoppel, and adverse possession, it was said that the government, which holds its interests in trust for all the people, was not to be deprived of those interests by the or-

dinary court rules designed particularly for private disputes over individually owned pieces of property; and that officers who have no authority at all to dispose of government property cannot by their conduct cause the government to lose its valuable rights by their acquiescence, laches, or failure to act.

A riparian owner of land on the Virginia side of the Potomac River under a Virginia grant could acquire no prescriptive title as against the state of Maryland, or its successor, the United States, to land which was below low-water mark until it was filled in by the United States by dredging from the bottom of the river and depositing the material on the other side of a riprap wall built on the river bed. Marine R. & Coal Co. v United States (1921) 257 US 47, 66 L ed 124, 42 S Ct 32, affg 49 App DC 285, 265 F 437.

§ 6. Islands owned by United States.

In Bode v Rollwitz (1921) 60 Mont 481, 199 P 688, it was held that, as to a river island owned by the United States, one could not secure title to it by adverse possession, use, or occupancy, for any length of time, as against the government.

And in Sater v Meadows (1886) 68 Iowa 507, 27 NW 481, a suit to establish which of the litigants had title to certain islands in the Mississippi River, and in which it was claimed that as there was no proof that title to the land had passed from the United States, plaintiff could not invoke the statute of limitations and assert his possession as against the government, the court stated that adverse possession of public lands cannot avail against the government.

In United States v Turner (1949, CA5th Ala) 175 F2d 644, cert den 338 US 851, 94 L ed 521, 70 S Ct 92, revg United States v Property on Pinto Island (DC) 74 F Supp 92, it was conceded that the owner of a portion of an island in a navigable body of water could not, by driving piles and filling the adjacent submerged land of the island, acquire a prescriptive title to the filled land against the United States or the state in which the body of water was located.

§ 7. Accretions to land held by United States.

In so far as title of the government to accreted land is concerned, it was stated in Jackson v United States (1932, CA9th Cal) 56 F2d 340, no adverse occupation of any governmental property, however long continued, can affect the right of the United States.

§ 8. Forest lands of United States.

The rule that statutes of limitation are not available against the government and therefore do not apply as such, and that title to property cannot be acquired in property belonging to the United States, was applied in United States v Burnette (1952, DC NC) 103 F Supp 645, where defendant pleaded adverse possession as a defense, to a proceeding by the United States to enjoin defendant and anyone claiming under him from trespassing on certain forest lands, title to which was acquired by the United States in condemnation proceedings.

§ 9. Lands of United States reserved for school purposes.

As to lands reserved by act of Congress for the support of schools in a state, and as to which lands an act of Congress authorized a sale or lease by the state of such lands as had not already been disposed of for the object aforesaid, the court in Rabb v Washington County Supers. (1885) 62 Miss 589, said that it appeared that the several acts of Congress left the legal title to such land in the United States, subject to be divested by the state through any agencies it might designate, for the purposes specified in the acts and for none other, and that until the state acted with reference to such land it remained as public land of the general government, irrevocably devoted to a specific purpose, and title thereto was not affected by any adverse possession or statute of limitations.

In Hanks v Lee (1920) 57 Utah 537, 195 P 302, an action to recover possession of certain real property, it was held that defendant's answer was in-

sufficient to constitute a plea of adverse possession, where the effect of the allegations of plaintiff's complaint, all of which were admitted by the answer, was that the lands in question were school lands which were selected by the State Board of Land Commissioners on behalf of the state of Utah in lieu of lands which it was supposed were granted by the enabling act, and that the selection of the lands in question was not fully approved by the Interior Department until the final decision was handed down by the Assistant Secretary of the Interior in May, 1918, the legal title in the lands thus remaining in the United States until that decision was rendered, and thus precluding the requisition of title by adverse possession to such land during that period.

§ 10. Swamplands.

In Packard v Moss (1885) 68 Cal 123, 8 P 818, the court, in holding that the testimony was sufficient to warrant the finding, as a matter of fact, that defendant had held the land adversely to plaintiff for more than 5 years next before the commencement of the action, said that in reaching this conclusion, it assumed as correct the position that the statute of limitations did not begin to run as against the title of plaintiff, founded upon his certificate of purchase of swamplands from the state, until the land was certified over to the state of California by the United States government. The purchase was made under an act of the California legislature providing for the sale and reclamation of swamp and overflowed lands of the state.

§ 11. Indian titles.

Where the title is an Indian title, or, in other words, the title is in the United States and an Indian, no statute of limitations can operate against the land. McGannon v Straightlege (1884) 32 Kan 524, 4 P 1042.

B. Acquisition of interest less than full title

§ 12. Acquisition of easement or right of way or user.

An easement cannot be acquired against the United States by adverse possession. Lapique v Morrison (1915) 29 Cal App 136, 154 P 881; Burgett v Calentine (1951) 56 NM 194, 242 P2d 276.

An easement owned by the United States is an exception to the rule that an easement may be lost by adverse possession. Brown v Devlin (1953, DC Mont) 116 F Supp 45.

Specifically, a right of way cannot be acquired by prescription over land title to which is in the United States.

In Bolton v Murphy (1912) 41 Utah 591, 127 P 335, it was held that in order to acquire a private easement in the nature of a right of way over the lands of another, the claimant must have used the same openly, continuously, and adversely for a period of 20 years, during all of which time the title to the land over which the easement is claimed must have been out of the United States.

And in Roediger v Cullen (1946) 26 Wash2d 690, 175 P2d 669, it was held that until the United States granted a patent, there could be no adverse user of land subsequently granted by the United States to a patentee which would, under the limitation statute, give a prescriptive right to a public right of way over the land granted, the court stating that prescriptive rights cannot be acquired against the United States by adverse public use for the period required by the state statute of limitations.

Also, in Lund v Wilcox (1908) 34 Utah 205, 97 P 33, an action to enjoin defendant from tearing down plaintiff's fences and from trespassing on and passing over a certain portion of her land, defendant, on the other hand, claiming a private right of way allegedly acquired by prescription for a period of 20 years, and that the fence obstructed his right of way and that he had a right to remove it, it was held that prescription could not commence to run against the land until plaintiff's husband acquired title to it from the United States, as no portion of the time while the land belonged to the United States could be counted in establishing a private way by prescrip-

tion or limitation; and this is true, although the land at the time may be occupied by a person intending to obtain the land under the pre-emption or homestead laws of the United States, but who has not yet done all that he is required to do in order to obtain the title to the land.

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Some cases have involved alleged prescriptive rights to the use, regulation, etc., of water or streams flowing through lands. The ordinary rule precluding prescriptive easements in land of the federal government is applicable.

In Wilkins v McCue (1873) 46 Cal 656, it was held that no prescriptive right to the use of water could be asserted while the United States owned the lands out of which the springs of water arose, as there can be no prescription against the United States.

In Burgett v Calentine (1951) 56 NM 194, 242 P2d 276, applying the rule that an easement cannot be acquired against the state or United States by adverse possession, it was held that the mere fact that plaintiffs and their predecessors in title made improvements on land owned by the United States and later by the state and thereafter used water of the springs on such land in question, continuously for over 60 years, did not vest them with an easement.

A prescriptive right to conduct water through a ditch over the public domain cannot be acquired against the United States. Smith v Hawkins (1895) 110 Cal 122, 42 P 453.

In Mathews v Ferrea (1872) 45 Cal 51, an action to abate a dam and to enjoin the diversion of water by defendant, in which it appeared that both plaintiff and defendant owned lands over which the water flowed, having acquired title by patent from the United States in 1867, within 5 years before the commencement of the action, that the creek extended through the lands of all the parties, the lands of defendant being above those of the plaintiff, and that in 1869 defendant erected a dam upon his land by which he diverted all of the water of the creek for the purpose of irrigating his land, and plaintiff was thereby deprived of the use of the water, and defendant claimed that he had acquired a right by prescription to divert the water by means of his dam, the court, in affirming a judgment for plaintiff, stated that prescription or adverse user will not mature into a title as against the United States, and that it will not avail as a defense, unless the user has been adverse for the requisite period after the title passed from the United States.

Adverse user cannot be set up as against the patentee from the United States during the time one diverts water from public land prior to the issuance of the patent. Vansickle v Haines (1872) 7 Nev 249.

The government (United States), as proprietor of the land through which a stream of water naturally flows, has the same property and right in the stream that any other owner of land has, be it usufructuary or otherwise, and a statute of limitations does not run against the United States; so, no use of water while the title to the land was in the government could avail defendant as a foundation of title by prescription, or defeat or modify the title conveyed to the grantee by his patent. Union Mill & Min. Co. v Ferris (1872, CC Nev) 2 Sawy 176, F Cas No 14371.

The general government (United States) is not subject to the jurisdiction of a state, and the state is without power to prescribe the time within which the United States shall assert its rights in order to preserve them; it must therefore be regarded as settled that the statute of limitations of a state does not apply to the federal government, and, as a consequence, that there can be no adverse possession of land under such a law or adverse user of water to the natural flow of which such land is entitled while the title remains in the United States. Jatunn v Smith (1892) 95 Cal 154, 30 P 200.

In Miser v O'Shea (1900) 37 Or 231,

62 P 491, 82 Am St Rep 751, a suit by the owner of a placer mining claim on a creek to restrain defendant, owner of a claim above plaintiff's on the creek, from operating his claim in such a way as to deposit tailings or debris along the banks of the creek, on plaintiff's premises, it being claimed by defendant that his predecessor, having deposited tailings upon that part of the public domain now embraced within the plaintiff's mine, thereby appropriated the premises for that purpose, and that plaintiff took his mining claim subject to such prior right, the court held that this contention could not be sustained, for no use of the premises, however long continued, could be adverse to the United States, and, as the defendant had not deposited his tailings on the plaintiff's mine for a period of 10 years after the United States parted with its title thereto, no claim to continue such use could be predicated thereon.

III. States

A. Acquisition of title against, generally

§ 13. General rule prohibiting acquisition.

Although there have been in a few cases holdings or strong intimations that the state is not exempted from the operation of limitation statutes applying generally to suits for the recovery of lands unless the land of the state is dedicated or used for public purposes (see § 29, infra), the great majority of the cases have held, recognized, or applied the broad general rule that in the absence of legislation providing otherwise, statutes of limitation do not operate against the state, and title to the state-owned lands cannot be acquired by adverse possession or prescription while the state retains its title.

United States.—Armstrong v Morrill (1872) 14 Wall 120, 20 L ed 765; Marine R. & Coal Co. v United States (1921) 257 US 47, 66 L ed 124, 42 S Ct 32, affg 49 App DC 285, 265 F 437; Lovell v Dulac Cypress Co. (1941, CA5th La) 117 F2d 1, cert den 314 US 672, 86 L ed 537, 62 S Ct 132, reh den 314 US 713, 86 L ed 568, 62 S Ct 299; United States v Turner (1949, CA 5th Ala) 175 F2d 644, cert den 338 US 851, 94 L ed 521, 70 S Ct 92; Manhattan Land & Fruit Co. v Buras (1942, DC La) 43 F Supp 361; United States v Certain Lands (1943, DC NY) 52 F Supp 540; Continental Oil Co. v Chicago & N. W. R. Co. (1957, DC Wyo) 148 F Supp 411.

Alabama.—Doe ex dem. Kennedy v Townsley (1849) 16 Ala 239; Miller v State (1863) 38 Ala 600; Swann v Lindsey (1881) 70 Ala 507; Swann v Gaston (1888) 87 Ala 569, 6 So 386; Alabama State Land Co. v Kyle (1892) 99 Ala 474, 13 So 43; Wyatt v Tisdale (1893) 97 Ala 594, 12 So 233; Prestwood v Watson (1895) 111 Ala 604, 20 So 600; Stringfellow v Tennessee Coal, I. & R. Co. (1897) 117 Ala 250, 22 So 997; Adler v Prestwood (1898) 122 Ala 367, 24 So 999; Cox v University of Alabama (1909) 161 Ala 639, 49 So 814; Wright v Louisville & N. R. Co. (1919) 203 Ala 118, 82 So 132; State v Inman (1940) 239 Ala 348, 195 So 448; Grissom v State (1950) 254 Ala 218, 48 So2d 197.

Arkansas.—Hibben v Malone (1908) 85 Ark 584, 109 SW 1008; Brinneman v Scholem (1910) 95 Ark 65, 128 SW 584; Jones v Euper (1930) 182 Ark 969, 33 SW2d 378; Wunderlich v Cates (1948) 213 Ark 695, 212 SW2d 556; Bengel v Cotton Plant (1951) 219 Ark 510, 243 SW2d 370.

California. — O'Connor v Fogle (1883) 63 Cal 9; Lapique v Morrison (1915) 29 Cal App 136, 154 P 881.

Colorado.—Lovejoy v School Dist. No. 46, Sedgwick County (1954) 129 Colo 306, 269 P2d 1067.

Connecticut. — Clinton v Bacon (1888) 56 Conn 508, 16 A 548.

Delaware.—Wall v M'Gee (1843) 4 Del (4 Harr) 108.

Florida.—Pearce v Cone (1941) 147 Fla 165, 2 So2d 360.

Georgia.—Brinsfield v Carter (1847) 2 Ga 143; Moody v Fleming (1848) 4 Ga 115, 48 Am Dec 210; Smead v Doe (1849), 6 Ga 158; Kirschner v

Western & A. R. Co. (1881) 67 Ga 760; Glaze v Western & A. R. Co. (1881) 67 Ga 761; Dean v Feely (1883) 69 Ga 804; State v Paxson (1904) 119 Ga 730, 46 SE 872; Western Union Tel. Co. v State (1923) 156 Ga 409, 119, SE 649, error dismd 269 US 67, 70 L ed 166, 46 S Ct 36; Lockwood v Daniel (1941) 193 Ga 122, 17 SE2d 542.

Hawaii. — Kapiolani v Cleghorn (1902) 14 Hawaii 330.

Idaho.—Hellerud v Hauck (1932) 52 Idaho 226, 13 P2d 1099.

Illinois. — Hammond v Shepard (1900) 186 Ill 235, 57 NE 867, 78 Am St Rep 274; Black v Chicago B. & Q. R. Co. (1908) 237 Ill 500, 86 NE 1065; Dunne v Rock Island County (1918) 283 Ill 628, 119 NE 591, error dismd 248 US 532, 63 L ed 405, 39 S Ct 10.

Indiana.—McCaslin v State (1905) 38 Ind App 184, 75 NE 844.

Iowa.—Carr v Moore (1903) 119 Iowa 152, 93 NW 52, 97 Am St Rep 292; Park Comrs. v Taylor (1906) 133 Iowa 453, 108 NW 927; Cedar Rapids Gas Light Co. v Cedar Rapids (1909) 144 Iowa 426, 120 NW 966, 48 LRA NS 1025, 138 Am St Rep 299, affd without mention of question herein annotated 223 US 655, 56 L ed 594, 32 S Ct 389; Wenig v Cedar Rapids (1919) 187 Iowa 40, 173 NW 927; Sioux City v Betz (1942) 232 Iowa 84, 4 NW2d 872.

Kansas.—State ex rel. Dawson v Akers (1914) 92 Kan 169, 140 P 637, Ann Cas 1916B 543, affd 245 US 154, 62 L ed 214, 38 S Ct 55 (without specific mention of the question herein annotated).

Kentucky.—Chiles v Calk (1817) 7 Ky (4 Bibb) 554; Robinson v Neal (1827) 21 Ky (5 TB Mon) 213; Campbell v Thomas (1848) 48 Ky (9 B Mon) 82; Hartley v Hartley (1860) 60 Ky (3 Met) 56; Taylor v Combs (1899) 20 Ky LR 1828, 50 SW 64; Buckner v Kirkland (1908) 33 Ky LR 603, 110 SW 399; Whitley County Land Co. v Powers (1912) 146 Ky 801, 144 SW 2.

Louisiana.—State v Buck (1894) 46 La Ann 656, 15 So 531, error dismd 159 US 248, 40 L ed 142, 15 S Ct 1038, for want of jurisdiction; Slattery v Heilperin (1902) 110 La 86, 34 So 139; Bright v New Orleans R. Co. (1905) 114 La 679, 38 So 494; Wall v Rabito (1913) 138 La 609, 70 So 531; New Orleans v Salmen Brick & Lumber Co. (1914) 135 La 828, 66 So 237; State v New Orleans Land Co. (1918) 143 La 858, 79 So 515, cert den 248 US 577, 63 L ed 429, 39 S Ct 19; Martin v Louisiana Cent. Lumber Co. (1925) 157 La 538, 102 So 662; Ward v South Coast Corp. (1941) 198 La 433, 3 So2d 689; State v Aucoin (1944) 206 La 787, 20 So2d 136; Saucier v Sondheimer Co. (1947) 212 La 490, 32 So2d 900; New Orleans v Ricca (1950) 217 La 413, 46 So2d 505; Douglas v Murphy (1950) 218 La 888, 51 So2d 310.

Maine.—Kinsell v Daggett (1834) 11 Me 309; Cary v Whitney (1860) 48 Me 516; United States v Burrill (1910) 107 Me 382, 78 A 568, Ann Cas 1912D 512.

Maryland.—Hall v Gittings (1806) 2 Harr & J 112; Sollers v Sollers (1893) 77 Md 148, 26 A 188, 20 LRA 94, 39 Am St Rep 404.

Massachusetts.—Sklaroff v Com. (1920) 236 Mass 87, 127 NE 600.

Michigan.—Crane v Reeder (1870) 21 Mich 24, 4 Am Rep 430; State v Venice of America Land Co. (1910) 160 Mich 680, 125 NW2d 770.

Minnesota.—Murtaugh v Chicago, M. & St. P. R. Co. (1907) 102 Minn 52, 112 NW 860, 120 Am St Rep 609; Scofield v Scheaffer (1908) 104 Minn 123, 116 NW 210; Kinney v Munch (1909) 107 Minn 378, 120 NW 374; Junes v Junes (1924) 158 Minn 53, 196 NW 806.

Mississippi.—Clements v Anderson (1872) 46 Miss 581; Penick v Floyd Willis Cotton Co. (1919) 119 Miss 828, 81 So 540; Rotenberry v Arnold (1951) 212 Miss 564, 55 So2d 141.

Missouri.—State v Fleming (1854) 19 Mo 607; Hamilton v Badgett (1922) 293 Mo 324, 240 SW 214.

Nebraska.—Topping v Cohn (1904) 71 Neb 559, 99 NW 372; State v Cheyenne County (1932) 123 Neb 1, 241 NW 747.

New Jersey.—Jersey City v James

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P. Hall, Inc. (1910) 79 NJL 539, 76 A 1058, Ann Cas 1912A 696; Quinlan v Fair Haven (1926) 102 NJL 443, 131 A 870, revd on other grounds 102 NJL 654, 133 A 398.

New Mexico.—Pratt v Parker (1953) 57 NM 103, 255 P2d 311.

New York.—Jackson ex dem. Hoogland v Vail (1831) 7 Wend 125; People v Baldwin (1922) 233 NY 672, 135 NE 964, affg 197 App Div 285, 188 NYS 542, which affd 113 Misc 172, 184 NYS 715; Campbell v Rodgers (1918) 182 App Div 791, 170 NYS 258; Re Roma (1928) 223 App Div 769, 227 NYS 46; People v Shipley (1930) 229 App Div 21, 241 NYS 17; St. William's Church v People (1945) 269 App Div 874, 56 NYS2d 868, revd on other grounds 296 NY 861, 72 NE2d 604, reh den 296 NY 1000, 73 NE2d 576; Leventhal v Gillmore (1924) 123 Misc 703, 206 NYS 121; Re New York (1926) 127 Misc 710, 217 NYS 544.

North Carolina.—Lindsay v Austin (1905) 139 NC 463, 51 SE 990.

Ohio.—Haynes v Jones (1915) 91 Ohio St 197, 110 NE 469; Ohio State University v Satterfield (1886) 2 Ohio CC 86, 1 Ohio CD 377; Jones v Myers (1913) 17 Ohio CC NS 146, 36 Ohio CC 458.

Oregon.—Gatt v Hurlburt (1930) 131 Or 554, 284 P 172, reh den 132 Or 415, 286 P 151.

Pennsylvania.—Johnston v Irwin (1817) 3 Serg & R 291; Munshower v Patton (1823) 10 Serg & R 334, 13 Am Dec 678; Bagley v Wallace (1827) 16 Serg & R 245; Henry v Henry (1847) 5 Pa 247; Troutman v May (1859) 33 Pa 455; Zubler v Schrack (1863) 46 Pa 67; Patten v Scott (1888) 118 Pa 115, 12 A 292, 4 Am St Rep 576; Pennsylvania R. Co. v Freeport (1890) 138 Pa 91, 20 A 940; Hoffman v Pittsburgh (1950) 365 Pa 386, 75 A2d 649.

South Carolina.—Harlock v Jackson (1812) 6 SCL (1 Treadway Const) 135; State ex rel. Peareson v Arledge (1831) 18 SCL (2 Bail) 401, 23 Am Dec 145; Camden Orphan Soc. v Lockhart (1841) 27 SCL (2 McMull) 84; University of South Carolina v Columbia (1917) 108 SC 244, 93 SE 934.

Tennessee. — Wilson v Hudson (1835) 16 Tenn (8 Yerg) 398; Singleton v Ake (1842) 22 Tenn (3 Humph) 626; Sharp v Van Winkle (1883) 80 Tenn (12 Lea) 15; Board of Education v Shelby County (1927) 155 Tenn 212, 292 SW 162; Roysdon v Terry (1927) 4 Tenn App 638; Robinson v Harris (1952) 37 Tenn App 105, 260 SW2d 404.

Texas.—Smith v Power (1859) 23 Tex 29; Milan Co. v Robertson (1870) 33 Tex 366; Austin v Dungan (1876) 46 Tex 236; Truehart v Babcock (1878) 49 Tex 249; Udell v Peak (1888) 70 Tex 547, 7 SW 786; Gunter v Meade (1890) 78 Tex 634, 14 SW 562; Montgomery v Gunther (1891) 81 Tex 320, 16 SW 1073; Weatherly v Jackson (1934) 123 Tex 213, 71 SW2d 259, revd on other grounds (Tex Civ App) 46 SW 2d 1030; Heard v Refugio (1937) 129 Tex 349, 103 SW2d 728, revg on other grounds (Tex Civ App) 95 SW2d 1008; Heard v State (1947) 146 Tex 139, 204 SW2d 344, affg (Tex Civ App) 199 SW 2d 191; Ellis v State (1893) 3 Tex Civ App 170, 21 SW 66, 24 SW 660; Dooley v Maywald (1898) 18 Tex Civ App 386, 45 SW 221; Zapeda v Hoffman (1903) 31 Tex Civ App 312, 72 SW 443; Lawless v Wright (1905) 39 Tex Civ App 26, 86 SW 1039; Houston Oil Co. v Gore (1913, Tex Civ App) 159 SW 924, error ref; Alexander v Garcia (1914, Tex Civ App) 168 SW 376, error dismd; Spearman v Mims (1918, Tex Civ App) 207 SW 573; Thomas v Cline (1940, Tex Civ App) 135 SW2d 1018; Humble Oil & Refining Co. v State (1942, Tex Civ App) 162 SW2d 119, error ref; Harris v O'Connor (1944, Tex Civ App) 185 SW2d 993, error ref w m; Jones v Springer (1952, Tex Civ App) 256 SW 2d 1016; Deep Rock Oil Corp. v Osborn (1953, Tex Civ App) 259 SW2d 625, affd without mention of question herein annotated, in 153 Tex 281, 267 SW 2d 781; Dallas Levee Improv. Dist. v Carroll (1953, Tex Civ App) 263 SW 2d 307, error ref n r e.

Virginia.—Gore v Lawson (1836) 35 Va (8 Leigh) 458; Staats v Board (1853) 51 Va (10 Gratt) 400; Hale v Branscum (1853) 51 Va (10 Gratt) 418; Shanks v Lancaster (1848) 46 Va (5 Gratt) 110, 50 Am Dec 108;

Koiner v Rankin (1854) 52 Va (11 Gratt) 420; Levasser v Washburn (1854) 52 Va (11 Gratt) 572; Cline v Catron (1872) 63 Va (22 Gratt) 378; Hurst v Dulany (1888) 84 Va 701, 5 SE 802; Reusens v Lawson (1895) 91 Va 226, 21 SE 347; Green v Pennington (1906) 105 Va 801, 54 SE 877.

Washington.—Brace & Hergert Mill Co. v State (1908) 49 Wash 326, 95 P 278; State v Scott (1916) 89 Wash 63, 154 P 165; Bowden-Gazzam Co. v Kent (1944) 22 Wash2d 41, 154 P2d 292.

West Virginia.—Hall v Webb (1883) 21 W Va 318.

Wisconsin. — Illinois Steel Co. v Bilot (1901) 109 Wis 418, 84 NW 855, 85 NW 402, 83 Am St Rep 905.

Philippines.—Tiglao v Insular Government (1906) 7 Philippine 80, affd 215 US 410, 54 L ed 257, 30 S Ct 129; Insular Government v Aldecoa & Co. (1911) 19 Philippine 505.

As the statute of limitations does not run against the Commonwealth, entry on her vacant land as a settler is of course referable to the permission which the law gives to enter with a view to acquiring title, and it cannot be adverse as against the Commonwealth, and no title by such possession can be acquired in such case. Zubler v Schrack (1863) 46 Pa 67.

Title to land by 30 years' prescription cannot be acquired where, during such period, the state holds legal title, it being a condition precedent to the acquisition of title by prescription acquirendi causa that the property was severed from the public domain, and transferred to that of private property, at the date such prescription commenced to run. Manhattan Land & Fruit Co. v Buras (1942, DC La) 43 F Supp 361.

Time does not run against the state unless so declared in the statute which prescribes the limitation; so, where the statute does not, in terms, or otherwise, refer to the state, there can be no adversary possession while the title to the land remains in the state. Hall v Webb (1883) 21 W Va 318.

In Illinois Steel Co. v Bilot (1901) 109 Wis 418, 84 NW 855, 85 NW 402, 83 Am St Rep 905, it was stated in the syllabus by the judge that no title can be obtained in adverse possession for 20 years, to land held by the state in any capacity.

It is fundamental that a state cannot be divested of a proprietary title by limitation, as she is not bound by the defaults or negligence of her officers or agents. Harris v O'Connor (1944, Tex Civ App) 185 SW2d 993, error ref w m.

Adverse title to public property of the state may not be acquired by prescription. New Orleans v Salmen Brick & Lumber Co. (1914) 135 La 828, 66 So 237.

No prescriptive right or adverse possession can be acquired against the sovereign. Bright v New Orleans R. Co. (1905) 114 La 679, 38 So 494.

The public domain is not subject to the plea of prescription. Slattery v Heilperin (1902) 110 La 86, 34 So 139.

As to land becoming a part of the public domain of Texas, under the articles of agreement by which the Republic was dissolved and became a member of the American Union, title by limitation cannot be obtained. Alexander v Garcia (1914, Tex Civ App) 168 SW 376, error dismd.

In Kapiolani v Cleghorn (1902) 14 Hawaii 320, where the question was whether defendant made out a case of adverse possession, the court recognized the general rule that when a state acquires title after the statute has begun to run, the running of the statute is stayed as soon as the state acquires title.

In McCaslin v State (1905) 38 Ind App 184, 75 NE 844, a suit by the state against an individual to recover possession of 100 acres of land and quiet title to same, in which defendant based his title and right to the property upon the doctrine of title by prescription or adverse possession, the court pointed out that prior to 1881 the statute of limitations was expressly made applicable to the state as well as individuals, but that since that time the common-law rule had prevailed. So, where it did not appear that defendant had continuous possession of the prop-

erty for 20 years prior to 1881 and thus the state's rights were not barred at that time, whatever rights it had then continued unaffected by defendant's possession.

§ 14. Application of rule; public lands, generally.

The above rule (§ 13) has been applied in actions or suits between individuals one or more of whom were grantees or patentees of certain lands of the state and in which it was held that the period preceding the grant, or, in other words, while legal title was in the state, or at least, as held in some jurisdictions, until equitable title passed to the grantee of patents, the statutes of limitations governing generally the time for bringing suits for the recovery of lands did not operate against the state, and therefore no adverse possession or prescription would begin to run during such period which would be effective as against the grantee.

Thus, it has been said that no length of possession, however adverse, can bar or affect the rights of the commonwealth, and the latter may therefore grant its title to any other person, and the land in the hands of the grantee will be as unaffected by the previous possession of the person claiming under an invalid title as it was in the hands of the commonwealth, the court pointing out that to suppose the contrary would be to advance the absurdity that the commonwealth may have a perfect title to land without the power of transferring it. Gore v Lawson (1836) 35 Va (8 Leigh) 458.

Similarly, in Austin v Dungan (1876) 46 Tex 236, the court, after stating that a grant of the public domain of the state will not be presumed from 10 years' possession, said that it followed, as a necessary consequence, that a purchaser from the state will not be barred; for it would be tantamount to a denial of the title of the state or its right to convey to say that the bar, though not directly applicable to the state, would take effect immediately on the title vesting in the purchaser or grantee from it.

The statute of limitations does not run against the state unless it is expressly named; so the possession of defendant previous to the time when the state divested itself of title could not be taken into estimate under the plea of the statute of limitations; for it was only from that time the statute began to run. Doe ex dem. Kennedy v Townsley (1849) 16 Ala 239.

During the time that title to land is in the state, a school district, being a governmental organization, cannot assert adverse possession against the state, which would be tantamount to asserting such possession against itself; therefore, the period in which adverse occupancy would operate against the property in question would be limited to the time from the date of a patent to such land from the state to an individual in 1908 down to the beginning of the litigation. Lovejoy v School Dist. No. 46, Sedgwick County (1954) 129 Colo 306, 269 P2d 1067.

Statutes of limitation do not run against the state. So, in Smead v Doe (1849) 6 Ga 158, an action of ejectment in which defendant showed a continuous possession in himself and those under whom he claimed for more than 7 years, under color of title, judgment of the court below in favor of plaintiff was affirmed, inasmuch as plaintiff had 7 years within which to institute his action to recover possession of the premises, after his title or cause of action accrued, and such cause of action did not accrue to plaintiff until the grant from the state issued to him, and the action in this case was brought within 7 years after the issuance of the grant from the state.

And in Manhattan Land & Fruit Co. v Buras (1942, DC La) 43 F Supp 361, an action to remove a cloud from title, where the legal title to the lands in question remained in the state until 1894 or 1895, it was held that none of the alleged period of occupancy and possession by defendants' ancestor from 1860 until his death in 1888, nor any alleged continued occupancy and possession by his widow and heirs prior to the acquisition of the land from the state by plaintiff's ancestor in title, could avail defendants in their attempted proof of their claimed 30

years' prescriptive title, against the admittedly perfect record title out of the state, under which plaintiffs, who became the owners of the land in 1905, were in possession.

Also in Lawless v Wright (1905) 39 Tex Civ App 26, 86 SW 1039, where so-called dry agricultural land, which was purchased from the state, was subsequently forfeited to the state for the nonpayment of interest on the purchase money, it was held that the act of the land commissioner in forfeiting the purchase of the land had the effect of restoring it to the public domain of the state, and as statutes of limitation do not apply to the sovereign, the statute of limitations as to the land was interrupted; so, where defendant, who pleaded the 10-year statute of limitations against plaintiff, who had purchased the land from a grantee of the state, whose purchase of the land had been reinstated, and who had been holding a portion of the land in question for only 7 years when the declaration of forfeiture was made, it was held that the reacquisition of the property by plaintiff could not destroy the effect of the interruption and make the 7 years of adverse possession as effective as though there had been no interruption, the court in this connection stating that when the continuity of possession has been once broken, it is not possible afterward to take up its raveled threads and bind them together so as to make a continuous whole.

So, too, in Brinsfield v Carter (1847) 2 Ga 143, a suit involving public lands of the state which had been granted to plaintiff by the state in 1845, and which defendant claimed to have been in quiet and peaceable possession of, under color of title, for more than 7 years previous to the commencement of the action, under deeds from various persons antedating that of the grant to plaintiff, the court held that the statute of limitations did not run against the state, pointing out that the people cannot attend to their rights except through their officers, and therefore they ought not to suffer by the lapse of time or the negligence of those officers.

The case of Buckner v Kirkland (1908) 33 Ky LR 603, 110 SW 399, supports the rule that in the absence of a statute allowing limitations to run against the commonwealth's right of entry into its public lands, one claiming adverse possession of such land as against the patentee of the commonwealth cannot successfully assert any claim of adverse possession for the period anterior to the granting of the patent.

Possession of land by an individual while title thereto remains in the state, even if adverse and exclusive in its nature, cannot operate to disseise or limit the state; a title cannot be acquired by adverse possession of the land of the state while the title and property are in the state. Cary v Whitney (1860) 48 Me 516.

And in Thomas v Cline (1940, Tex Civ App) 135 SW2d 1018, where the land in dispute was the space of a few acres between an old fence and a new fence subsequently erected by defendant after he had received a conveyance of this and other land from the state, which new fence extended over into the strip in question to which plaintiff asserted title by adverse possession, it was held that title to such strip, which belonged to the state, was not acquired by plaintiff by adverse possession while the title was in the state, even though defendant, a purchaser of the land from the state, apparently recognized for a while the old fence as a boundary by occupying the space between it and the new fence as a tenant, prior to his purchase from the state.

No title by prescription can be acquired to the public agricultural lands of the state. Tiglao v Insular Government (1906) 7 Philippine 80, affd 215 US 410, 54 L ed 257, 30 S Ct 129.

In Rotenberry v Arnold (1951) 212 Miss 564, 55 So2d 141, which was a suit between individuals claiming a certain piece of property, and in which it was held that the appellees acquired title by adverse possession, it was conceded that the statute of limitations would not run as against the property while the state had title to it, but that in the case at bar appellees had acquired title by adverse possession for

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the statutory period after the state had relinquished title.

And in Wilson v Hudson (1835) 16 Tenn (8 Yerg) 398, where plaintiff claimed title under a grant from the state, and defendant insisted on the 7-year statute of limitations, and it appeared that defendant had been in possession 9 years, the court held that, as the act of limitations did not run against the state, the computation of time could only commence from the inception of the title of the plaintiff, who was not shown to have had any title until he obtained his grant, which was less than 7 years before the commencement of the suit.

In Johnston v Irwin (1817, Pa) 3 Serg & R 291, the court stated that the commonwealth could not be affected by the statute of limitations, and that unquestionably limitations would run from the date of the patent from the commonwealth. The court did not pass on the question what might be the operation of the statute as to private persons where a legal estate remained in the commonwealth, with an equitable interest in those persons.

In Robinson v Harris (1952) 37 Tenn App 105, 260 SW2d 404, an ejectment suit in which the defense was adverse possession for the statutory period under a registered assurance of title, the court, citing a code provision, said that, where established, 7 years' adverse possession under a registered assurance of title purporting to convey the fee vests a good and indefeasible title in fee to the land described in the assurance of title no less than if the true owner of the fee had conveyed it by deed, and that a title thus acquired will support an action in ejectment or any other affirmative action, but that this was subject to the qualification that it must appear that the land in question was granted by the state of Tennessee or the state of North Carolina; this, for the reason that until there is a valid grant, the title is in the state and the statute does not run against the sovereign.

As limitation does not run against the state, and as all land titles emanate from the sovereign, limitation did not begin to run in plaintiff's favor until the sovereignty had parted with either the legal title by patent or grant, or the equitable title by location and survey; so it followed that in order to enable plaintiff to recover he was required to show 10 years' adverse possession in himself or those under whom he claimed title, after the state had parted with either the equitable or legal title. Houston Oil Co. v Gore (1913, Tex Civ App) 159 SW 924, error ref.

In Truehart v Babcock (1878) 49 Tex 249, involving an article of the code making the statute of limitations unavailable as against the state, and applying the rule that the statute will not run against one claiming under the state until the claimant's right accrues, it was held that the fact that one settled upon the land, asserting a claim to it in good faith, and paying taxes thereon, would not establish title thereto as against a patentee from the state, prior to the time such patentee acquired the patent.

And in Douglas v Murphy (1950) 218 La 888, 51 So2d 310, where plaintiff acquired a lieu warrant for lands to take the place of those which had been erroneously patented to her ancestor, inasmuch as at the time the patents were issued the state had no title to the particular land patented, and plaintiff unsuccessfully applied to the State Land Office for location of the land, under her lieu warrant, and after two lawsuits finally obtained, in 1941, patents for her warrants, it was held, contrary to the contention of defendants that prescription began to run against plaintiff from the date that she first made application to locate a warrant, and their contention that acquisitive prescription will run against one who has a vested right to property the same as if a patent had been issued, that irrespective of what rights existed between the parties, the fact remained that the consent of the state was not obtained until after culmination of the litigation, and it was only then that the state agreed to issue the patent, and that title to property could not vest in plaintiff prior to that time, and, such being the case, the plea of

prescription was not well founded because 10 years had not elapsed from that time to the filing of this suit.

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In some cases where it was contended that the statute of limitations could not commence to run prior to the issuance of the patent because the title remained in the state until that time, it has been held that the original survey segregates the land from the public domain, and the state is subsequently powerless to resume control of it, and, the particular land having been appropriated by virtue of a valid certificate, the equitable title is in the owner of the certificate, and the statute of limitations will run against such title. Udell v Peak (1888) 70 Tex 547, 7 SW 786; Spearman v Mims (1918, Tex Civ App) 207 SW 573.

And in Patten v Scott (1888) 118 Pa 115, 12 A 292, 4 Am St Rep 576, where the controversy was exclusively between private parties, and the commonwealth was not a party in any sense and had no interest whatever in the litigation, it was held that while as against the commonwealth the statute might not be pleaded, a defendant in ejectment could successfully plead title acquired by adverse possession for 21 years, matured after warrant and survey, but before issuance of title to the warantee or those claiming under him, whether patent has issued or not.

See also Hibben v Malone (1908) 85 Ark 584, 109 SW 1008, holding that the statute does not run while the title remains in the state, but that this doctrine does not cover a case where the bare legal title remains in the state after the equitable title has passed to its vendee.

No limitation is available to one claiming by adverse possession until the equitable title by location, or the legal title to the land in question by reason of the patent, has passed out of the state, and become vested in the patentee or his heirs. Montgomery v Gunther (1891) 81 Tex 320, 16 SW 1073.

§ 15. — Bed of river or lake; island in river.

The rule that there can be no title by prescription against the state was applied in Quinlan v Fair Haven (1926) 102 NJL 443, 131 A 870, revd on other grounds 102 NJL 654, 133 A 398, involving land under a river and belonging to the state, and over which the state had licensed a corporation to build a wharf.

Title to the bed of streams, navigable or nonnavigable, is in the state, and dedicated to and definitely reserved for public purposes and uses by the paramount authority, and title thereto cannot be acquired as against the state by adverse possession while the state holds title thereto. Heard v Refugio (1937) 129 Tex 349, 103 SW2d 728, revg on other grounds (Tex Civ App) 95 SW2d 1008.

As against a state which is the exclusive owner of the bed of a navigable stream, no title to the waters or bed of such stream can be acquired by private use or occupancy, whether adverse or by permission, however long continued, or by prescription. State ex rel. Dawson v Akers (1914) 92 Kan 169, 140 P 637, Ann Cas 1916B 543 (affd 245 US 154, 62 L ed 214, 38 S Ct 55, without specific mention of the question herein annotated); Knickerbocker Ice Co. v Shultz (1889) 116 NY 382, 22 NE 564.

In Gatt v Hurlburt (1930) 131 Or 554, 284 P 172, reh den 132 Or 415, 286 P 151, it was pointed out that at the time Oregon was admitted into the Union, it acquired title, not in a proprietary capacity, but in its sovereign capacity, that is to say, as trustee for the public, to all of the bed of navigable streams within its borders, and it was held that no person could acquire title by adverse possession to any submerged land lying between the low-water mark of a navigable river and the navigable waters, for to do so would be to acquire title by adverse possession against the state. So, plaintiff's claim that he acquired title by adverse possession to a part of the bed of the Willamette River lying below the low-water mark and fronting on the property of an upland owner was untenable.

As against the state, holding title to the beds and banks of navigable rivers

for the public, there can be no adverse possession. Park Comrs. v Taylor (1906) 133 Iowa 453, 108 NW 927; Sterling v Sterling (1957) 211 Md 493, 128 A2d 277.

In Jones v Springer (1952, Tex Civ App) 256 SW2d 1016, an action to determine the ownership of lands, in which the state intervened asserting an undivided interest in lands claimed by plaintiff's petition, including a portion of the Salt Fork of the Brazos River, a statutory navigable stream which traversed a portion of the lands in litigation, it was held that the contention of 10 years' adverse possession made by plaintiff must be rejected under the rule enunciated in Heard v State (1947) 146 Tex 139, 204 SW2d 344, affg (Tex Civ App) 199 SW2d 191, in which it was decided that the state held title to the bed of a navigable river, and that title to that part could not be acquired by limitation.

In Dallas Levee Improv. Dist. v Carroll (1953, Tex Civ App) 263 SW2d 307, error ref n r e, a suit to try title to a tract of land lying within the old bed of a river, the course of which had been changed so that the river was made to flow between levees in a new channel, one-half mile distant from the old channel, the court held that such land belonged to the state, and that even if defendant had occupied the land for the 10-year period required under the Texas statutes of limitation, it would not avail him, for title to state lands cannot be acquired by adverse possession.

Title to land reclaimed from the bed of a navigable river beyond high-water mark cannot be acquired, though long in occupancy by one claiming such title, as the statute of limitations does not run against the state. Cedar Rapids Gas Light Co. v Cedar Rapids (1909) 144 Iowa 426, 120 NW 966, 48 LRA NS 1025, 138 Am St Rep 299, affd without mention of this point 223 US 655, 56 L ed 594, 32 S Ct 389.

See also Wenig v Cedar Rapids (1919) 187 Iowa 40, 173 NW 927, holding that, title to the bed of a stream being in the state, an individual cannot acquire title thereto by adverse possession.

And in Sioux City v Betz (1942) 232 Iowa 84, 4 NW2d 872, a suit to recover riparian land which had been patented to plaintiff by the state, and which had been made by the act of defendant in dumping about 100,000 yards of dirt into the river for 10 years, and on which he had built bunkhouses for his employees and stored thereon machinery used in his grading business, and such land was below the high-water mark of a navigable river, it was held that the state had title to such land, which title passed to plaintiff under the patent, and that the defense of adverse possession was not available to defendant as against the state.

The same rule has been applied in cases involving the bed of lakes.

Thus, in Carr v Moore (1903) 119 Iowa 152, 93 NW 52, 97 Am St Rep 292, it was said that whether, under the particular circumstances of the case, title to the land of a lake remained in the United States or passed to the state, no adverse possession thereof would be effectual, for the statute of limitations does not run as against the sovereign.

As against the state as a trustee of an express trust the statute of limitations will not run. State v Venice of America Land Co. (1910) 160 Mich 680, 125 NW2d 770.

Therefore, title to the submerged lands in the Great Lakes held by the state cannot be divested by adverse possession, it being held in trust for the public, according to the original cession from Virginia and the ordinance of 1787. State v Venice of America Land Co. (Mich) supra.

The law in Illinois is that shore owners on meandered lakes, whether navigable or nonnavigable, take title only to the water's edge, title to the bed of the lake being in the state, and where the lake becomes dry land, an individual cannot claim a prescriptive title thereto, inasmuch as no statute of limitations can run against the state. Hammond v Shepard (1900) 186 Ill 235, 57 NE 867, 78 Am St Rep 274.

The state's title to an island in a navigable river cannot be acquired by adverse possession. Jones v Euper

(1930) 182 Ark 969, 33 SW2d 378; Wunderlich v Cates (1948) 213 Ark 695, 212 SW2d 556.

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See also in connection with the above cases, United States v Certain Lands (1943, DC NY) 52 F Supp 540, infra, § 31[a]; State v George C. Stafford & Sons (1954) 99 NH 92, 105 A2d 569, infra, § 32; New York v Wilson & Co. (1938) 278 NY 86, 15 NE2d 108, reh den 278 NY 702, 16 NE2d 850, infra, § 33; Brace & Heigert Mill Co. v State (1908) 49 Wash 326, 95 P 278, infra, § 32.

§ 16. — Tidelands.

The general rule that title by adverse possession or prescription cannot be acquired as against the state has been applied in a number of cases involving tidelands.

United States.—For federal cases involving state law, see state headings infra.

Alabama.—United States v Turner (1949, CA5th Ala) 175 F2d 644, cert den 338 US 851, 94 L ed 521, 70 S Ct 92.

California.—People ex rel. Harbor Comrs. v Kerber (1908) 152 Cal 731, 93 P 878, 125 Am St Rep 93; People v Banning Co. (1914) 167 Cal 643, 140 P 587; Patton v Los Angeles (1915) 169 Cal 521, 147 P 141; People v Banning (1915) 169 Cal 542, 147 P 274.

Maryland.—Sollers v Sollers (1893) 77 Md 148, 26 A 188, 20 LRA 94, 39 Am St Rep 404.

Massachusetts. — Sklaroff v Com. (1920) 236 Mass 87, 127 NE 600. But compare the earlier case of Lakeman v Burnham (1856) 73 Mass (7 Gray) 437, set out in this section.

New York.—Campbell v Rodgers (1918) 182 App Div 791, 170 NYS 258; Re Roma (1928) 223 App Div 769, 227 NYS 46.

Washington.—State v Scott (1916) 89 Wash 63, 154 P 165; Bowden-Gazzam Co. v Kent (1944) 22 Wash2d 41, 154 P2d 292.

Philippines.—Insular Government v Aldecoa & Co. (1911) 19 Philippine 505.

Thus, in People ex rel. Harbor Comrs v Kerber (1908) 152 Cal 731, 93 P 878, 125 Am St Rep 93, an action by the state to recover possession of certain premises alleged to constitute a part of the tidelands of the bay of San Diego, and lying between the lines of ordinary high and low tides and covered successively by the ebb and flow thereof, and constituting a portion of the waters thereof used for navigation, the court, after pointing out that tidelands of this character vest in and belong to the state by virtue of its sovereignty, held that when such tidelands are situated in a navigable bay, and constitute a part of the water front thereof, as was the case herein, they constitute property devoted to a public use, of which private persons cannot obtain title by prescription, founded upon adverse occupancy for the period prescribed by the statute of limitations. The court observed that property held by the state in trust for public use cannot be gained by adverse possession, and that the statute of limitations does not apply to an action by the state or its agents to recover such property from one using it for private purposes not consistent with the public use; that this was a settled rule in this jurisdiction, with respect to all properties devoted to public use, and tidelands—underlying waters forming part of a bay used for navigation—are not, in this respect, to be distinguished from property used for other public purposes. And the fact that the public authorities in charge of the property have power to discontinue or abandon the public use and sell the property for private use does not enable an occupant to gain it by adverse possession before that event occurs, or to invoke the statute of limitations to protect his possession against the state. See in this connection § 29, for other California cases to the effect that property of the state not reserved for public use may be acquired by adverse possession.

And in Patton v Los Angeles (1915) 169 Cal 521, 147 P 141, where plaintiffs, individuals, claimed title by adverse possession against the state to tidelands in a bay, and in which the court rejected the claim, the court,

after conceding that no character or period of adverse possession could terminate or affect public easements for purposes of navigation and fishery, said that it had long been the doctrine in this state that no length of time of maintenance, or number of repetitions, of wrongful encroachments, can legalize a public nuisance; that adverse possession of land devoted to public use does not divest the right of the state or other public body corporate in which the title is vested to maintain such public use, nor in any manner affect the public right or the public use. Therefore, so far as the public easements and the right of the state to improve and control the land for such purposes were concerned, the claim based on adverse possession gave plaintiffs no rights whatever.

And the court in Patton v Los Angeles (Cal) supra, rejected the contention made by the plaintiffs that, although the public easements were not impaired or affected, the adverse possession was effectual to vest in the possessor the servient estate, the fee subject to the public easements. Arguendo, the court, after referring to the case of Almy v Church (1893) 18 RI 182, 26 A 58—in which it was said that individuals may reasonably be held to a limited period to enforce their rights against adverse occupation because they have an interest sufficent to make them vigilant, while, in public rights of property, each individual feels but a slight interest and will tolerate a manifest encroachment rather than seek a dispute to set it right, and that public policy requires the preservation of public rights—said: "The main idea seems to be that a hostile occupancy of land devoted to a public use cannot be allowed to initiate an effective adverse possession, the reason being that land so used is not ordinarily as well guarded against intruders as proprietary land or land in private ownership. The reason applies to the underlying estate as forcibly as to the public easement."

Also, in Sollers v Sollers (1893) 77 Md 148, 26 A 188, 20 LRA 94, 39 Am St Rep 404, in view of a statute providing that no patent should issue for land covered by navigable waters, and in view of the fact that all the soil below high-water mark within the limits of the state, where the tide ebbs and flows, which is the subject of exclusive propriety and ownership, belongs to the state, it was held that adverse possession could not extend to land covered by water within the ebb and flow of the tide.

With respect to that part of tidelands subject to the public uses of navigation and fishery, it has been held that such land is dedicated to such uses, and with respect to the public easement thus constituted there can be no adverse possession sufficient to set in motion the statute of limitations against any action by the state or its authorized agencies to assert the public right or so as to give title by prescription to the adverse claimant against the public easement. People v Banning Co. (1914) 167 Cal 643, 140 P 587.

In United States v Turner (1949, CA5th Ala) 175 F2d 644, cert den 338 US 851, 94 L ed 521, 70 S Ct 92, where the claim of the United States was that most, if not all, of the land in question was, before its filling by defendant, an owner of the upland, submerged land of Mobile Bay lying below high tide and owned by the state of Alabama, and that the state had granted its title to the United States, the court held that while in Alabama the riparian right of access as a way of necessity to reach the deep or navigable portion of the water, including the right to fill in over the shore, existed, the right does not and cannot ripen into title against the state and its grantees.

Lands formed by the action of the sea, which in its ebb and flow left sand and other sediment on the low ground, belongs to the public domain, and is intended for public uses, and is not susceptible of prescription, inasmuch as, being dedicated to public uses, it is not the subject of commerce among men. Insular Government v Aldecoa & Co. (1911) 19 Philippine 505.

And in Campbell v Rodgers (1918) 182 App Div 791, 170 NYS 258, it was

held that a riparian owner could not as against the state acquire title by adverse possession or prescription to the bed of a tidal stream and arm of the sea below high-water mark.

In Re Roma (1928) 223 App Div 769, 227 NYS 46, it was held that, since that portion of the property involved in the action was land under a tidal or navigable body of water (the East River), the title was in the state of New York, and the upland owner could not acquire title thereto by filling in or by adverse possession.

So too, in State v Scott (1916) 89 Wash 63, 154 P 165, an action by the state to recover possession of and quiet title to a portion of the bed of Puget Sound, commonly known and referred to in the record as the "pothole," and to enjoin defendants from trespassing thereon, where it was determined that the pothole was below the plane of extreme low tide, and that title thereto remained in the state, the court applied the elementary rule that adverse possession could not be made the basis of title as against a sovereign state.

And in Sklaroff v Com. (1920) 236 Mass 87, 127 NE 600, where plaintiffs, certain individuals, claimed title below high-water mark to certain province lands in the town of Provincetown, by adverse ownership against the commonwealth, and the statute enacted in 1893, but repealed in 1902, provided that the occupants of the land in question could acquire title by 20 years' adverse occupation after its passage, the court denied plaintiffs' contention that as they held possession for a period of 20 years prior to the statute of 1893 when no title could be acquired against the commonwealth for adverse possession, by force of that statute they could now maintain such title against the commonwealth, the court stating that they acquired no title by adverse possession against the commonwealth prior to the enactment of the 1893 statute, or since.

But in an early Massachusetts case, Lakeman v Burnham (1856) 73 Mass (7 Gray) 437 (no statute referred to) it was held that title to tidelands may be acquired by possession adverse to the commonwealth.

Also, in Tufts v Charlestown (1875) 117 Mass 401, it was held that a title to flats on a river, below high-water mark, and within 100 rods of the shore, could be acquired by prescription or adverse possession.

And in Church v Meeker (1867) 34 Conn 421, it was held that title to sedge flats lying below high-water mark in an arm of the sea may be acquired from the state by adverse possession.

See, in connection with the cases in this section, People v Southern P. R. Co. (1915) 169 Cal 537, 147 P 274, infra, § 33; Nichols v Boston (1867) 98 Mass 39, 93 Am Dec 132, infra, § 31 [c]; Jersey City v James P. Hall, Inc. (1910) 79 NJL 559, 76 A 1058, Ann Cas 1912A 696, infra, § 31[c].

§ 17. — Oyster beds.

In Clinton v Bacon (1888) 56 Conn 508, 16 A 548, it was held that the occupation of defendant for more than 15 years, and without disturbance from any source, of a natural oyster bed, which he had staked out under authority of a town committee which had no right to grant such staking out, did not give him title by adverse possession thereto, inasmuch as title to such beds was in the state, and statutes of limitation do not run against the state.

§ 18. — School lands; college or university lands.

[a] School lands generally.

The general rule stated in § 13 has been applied in cases concerning school lands or property donated by the federal government to the state for school purposes, or otherwise acquired or held by the state for such purposes, so as to preclude acquisition of title to such property by adverse possession or prescription, while the state holds title thereto.

United States.—Continental Oil Co. v Chicago & N. W. R. Co. (1957, DC Wyo) 148 F Supp 411.

Alabama. — Prestwood v Watson (1895) 111 Ala 604, 20 So 600.

Idaho.—Hellerud v Hauck (1932) 52 Idaho 226, 13 P2d 1099.

[§ 18]

Illinois.—Black v Chicago B. & Q. R. Co. (1908) 237 Ill 500, 86 NE 1065.

Louisiana.—State v New Orleans Land Co. (1918) 143 La 858, 79 So 515, cert den 248 US 577, 63 L ed 429, 39 S Ct 19.

Minnesota.—Murtaugh v Chicago, M. & St. P. R. Co. (1907) 102 Minn 52, 112 NW 860, 120 Am St Rep 609, infra, § 31[b]; Kinney v Munch (1909) 107 Minn 378, 120 NW 374; Junes v Junes (1924) 158 Minn 53, 196 NW 806.

Missouri.—State v Fleming (1854) 19 Mo 607.

Nebraska.—State v Cheyenne County (1932) 123 Neb 1, 241 NW 747.

Tennessee.—Board of Education v Shelby County (1927) 155 Tenn 212, 292 SW 462.

Texas.—Gunter v Meade (1890) 78 Tex 634, 14 SW 562; Dooley v Maywald (1898) 18 Tex Civ App 386, 45 SW 221; Thomas v Cline (1940, Tex Civ App) 135 SW2d 1018.

Thus, it has been ruled that property held by the state as trustee for school purposes cannot be acquired by prescription, as prescription acquirendi causa does not run against the state for its own property, and still less could it be allowed to run against the state for school land. State v New Orleans Land Co. (1918) 143 La 858, 79 So 515, cert den 248 US 577, 63 L ed 429, 39 S Ct 19.

Title to lands granted to the state for the use of its schools by the United States cannot be acquired by adverse possession as against the state. Kinney v Munch (1909) 107 Minn 378, 120 NW 374 (action by plaintiff to recover possession of certain school lands which had been conveyed to him by the state and as to which defendant claimed he had acquired title by adverse possession).

Until land owned by the state and held for the benefit of the public free schools of the state is conveyed by the latter no one can acquire title thereto by limitation, and limitation does not begin to run until such conveyance. Thomas v Cline (1940, Tex Civ App) 135 SW2d 1018.

Where the land is school land within the purview of an act of Congress admitting the state to the Union, the act granting said lands to the state prescribes a minimum amount per acre at which they may be disposed of by the state, and the state constitution provides that no school lands shall be sold for less than $10 per acre, and that the legislature shall never pass any law granting any privileges to persons who may have settled upon any such public lands subsequently to the survey thereof by the general government, by which the amount to be derived by the sale, "or other disposition of such lands, shall be diminished, directly or indirectly," title to such lands cannot be acquired as against the state no matter how long they have been adversely occupied. Hellerud v Hauck (1932) 52 Idaho 226, 13 P2d 1099.

In State v Fleming (1854) 19 Mo 607, involving actions in ejectment brought in the name of the state to the use of the inhabitants of a township, respecting a sixteenth section of land, and in which the defendant asserted a 20-year limitation statute, the court pointed out that the grant was to the state for the use of the inhabitants of the township, and that these actions were brought in the name of the state because title was still in the state and the state alone could sue, and, consequently, the limitation statute in question was not applicable.

One governmental agency, such as a county, cannot, it has been held, assert title by adverse possession against another governmental agency, the board of education of the Memphis city schools, to whom the legislature had transferred all of the public schools, public school buildings, lands, leases, lots, and other such property situated within the limits of the city of Memphis, to be held and used for educational purposes. Board of Education v Shelby County (1927) 155 Tenn 212, 292 SW 462, the court pointing out that the language of the constitution had been construed as manifesting the intent of the people that the education of children through a system of common schools should be a state purpose, and that the schools belonged to the state and were under the control of

the legislature. It appeared that the lots in question had been retained in the possession of the county and had been used by it for its stables, in which the mules and horses belonging to the county were kept. The court said: "In the execution of a state purpose neither the Board of Education nor the county has any interest adverse to the other, and the use to which the property has been put by the county while in its possession must be conclusively presumed to have been in recognition of the right of the State, through the Board of Education, as its agency, to claim and use the property for school purposes whenever it should be needed."

In Black v Chicago B. & Q. R. Co. (1908) 237 Ill 500, 86 NE 1065, an action in ejectment by an individual against a railroad company to recover possession of a tract of land to which plaintiff claimed title through a grant from the United States to the state of Illinois for school purposes, and by a patent from that state to him dated September, 1907, the defense being adverse possession of the land in question for 27 years, it was held that such defense was unavailable, inasmuch as adverse possession does not run against the state so long as it holds title for the use of the public or a portion thereof; thus where, as in the instant case, the title to the property in question was in the state in its sovereign capacity during the time defendant claimed the statute of limitations was running against it, that defense was not available.

Where, under concurrent legislation of Congress and the state, the sixteenth sections granted for school purposes by Congress to the state, for the use of the inhabitants of the various townships, have been sold, legal title is in the state, and until full payment of the purchase money and the issuance of a patent by the state, that title is not divested, though the purchaser acquires an inchoate title and the right of possession, and may maintain ejectment against all who wrongfully enter and withhold it, there cannot, under the general principles of the common law, be adverse possession of such lands, as there can be no adverse possession against the government. Prestwood v Watson (1895) 111 Ala 604, 20 So 600.

In Dooley v Maywald (1898) 18 Tex Civ App 386, 45 SW 221, a suit to try title to 160 acres of school land, where plaintiff claimed title under one to whom the land was sold by the commissioner of the general land office, under authorization of statute, while defendant claimed by reason of continuous adverse possession for more than 10 years prior to the institution of suit, the court was of the opinion that the statute of limitations was not available to defendant, for the reason that the title, legal and equitable, was still in the state, and plaintiff had but an inchoate title—a right, under the statute, upon compliance with its terms, to acquire the title from the state, to the exclusion of all claimants. The court said: "The evidence in the case shows the appellee to be but a squatter upon the land; never having made any effort to acquire it from the State; and to permit him to defeat a purchaser from the State from recovering the possession of the premises by plea of the statute of limitations, would in effect be to deprive the State of the power to sell its lands, in the mode and manner prescribed by its laws."

[b] University or college lands or property.

The general tenor of the cases involving land held for state university purposes is the same as that of the school land cases: barring a contrary statute, the usual rule prohibiting adverse possession as against the state is applicable.

In the absence of a statute expressly so providing, limitation statutes will not operate against a state university so as to permit its lands to be acquired by adverse possession, inasmuch as the university is a part of the state and under state control, and is therefore a public municipal corporation, and the law is settled that the statute of limitations, absent an express provision to the contrary, does not run against the state. Cox v Uni-

versity of Alabama (1909) 161 Ala 639, 49 So 814.

And in University of South Carolina v Columbia (1917) 108 SC 244, 93 SE 934, where the University was only a nominal party, inasmuch as it was established that the state was the owner of the college property, and the suit was against the city to recover possession of certain lands of the university, it was held that the municipality could not plead the statute of limitations and could not set up against the state an adverse holding as a fiction to presume a deed from the state. The court said: "The city governing is the State governing through the city in a circumscribed locality; and for a city to claim the property of the State adversely to the State is the same thing as to claim against itself, a manifest incongruity. Such a holding cannot be adverse."

In Grissom v State (1950) 254 Ala 218, 48 So2d 197, a suit in equity by the state to quiet title to 40 acres of land claimed by it for the use of a state college for girls under a land grant by act of Congress, patent to which land issued from the federal government to the state in 1900 and as to which defendants claimed title by adverse possession, the court pointed out that prior to the Code of 1907, which became effective May 1, 1908, the state was subject to the statute of limitations of 20 years for the recovery of school land, and if an adverse claimant had such possession for 20 years prior to the effective date of the Code of 1907, and prior to a suit against him by the state, and after title was divested out of the United States on June 30, 1900, the state could not thereafter sue and recover. However, since the Code of 1907, it was held, there has been no statute of limitations applicable to the recovery of land held as the state claimed to hold the lands in the case at bar. So, whatever possession defendants or their associates may have had after the grant to the state in 1900 did not and could not continue for 20 years prior to the Code of 1907; since that time their possession, even if otherwise adverse to the state, could not affect the right of the state to maintain this suit.

In Stringfellow v Tennessee Coal, I. & R. Co. (1897) 117 Ala 250, 22 So 997, the court, applying the well-settled rule that adverse possession cannot be set up in favor of anyone so long as the title to the land remains in the government, to a situation where a patent issued from the United States government to the University of Alabama for the lands included in the suit, held that until the date of this patent, defendant could not set up adverse possession against the government, nor its grantee, the University of Alabama. It is to be observed that the university was asserting no rights herein, as it had conveyed the property in question to others.

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See also in connection with the cases discussed in this section, the following cases: Alabama v Schmidt (1914) 232 US 168, 58 L ed 555, 34 S Ct 301, affg 180 Ala 374, 61 So 293, infra, § 31[b]; Franklin v Gwin (1920) 203 Ala 673, 85 So 7, infra, § 31[b]; Martin v Louisiana Cent. Lumber Co. (1925) 157 La 538, 102 So 662, infra, § 32; Newton v Weiler (1930) 87 Mont 164, 286 P 133, infra, § 31[b]; Van Wagoner v Whitmore (1921) 58 Utah 418, 199 P 670, infra, § 31[b]; O'Brien v Wilson (1908) 51 Wash 52, 97 P 1115, infra, § 31[b]; State v Jensen (1908) 51 Wash 59, 97 P 1117, infra, § 31[b]; State v Seattle (1910) 57 Wash 602, 107 P 827, 27 LRA NS 1188, infra, § 31[b].

§ 19. — Swamplands.

Swamplands granted to a state, usually by an act of Congress, are usually held within the application of the general rule that property of the state is not subject to acquisition by adverse possession or prescription until the state has relinquished its title thereto. Brinneman v Scholem (1910) 95 Ark 65, 128 SW 584; Clements v Anderson (1872) 46 Miss 581; Penick v Floyd Willis Cotton Co. (1919) 119 Miss 828, 81 So 540.

So, in Clements v Anderson (1872) 46 Miss 581, it was held that inasmuch as statutes of limitation do not run

against the state, adverse possession by an individual, however open and notorious, of swamplands granted to the state by an act of Congress conferred no title. The state may, the court said, by express statute choose to renounce her prerogative and consent to put herself on the same footing as individuals in respect of limitations (as it did by statute enacted in 1857); but occupancy of the locus quo prior to the enactment of such a statute will not avail one claiming the land under a plea of adverse possession.

A statute of limitations conferring title by adverse possession for more than 10 years has no application to swamplands donated to the state by the United States, until the state has conveyed the title thereto by proper patent. Penick v Floyd Willis Cotton Co. (1919) 119 Miss 828, 81 So 540.

A contrary view was taken in People v Banning Co. (1914) 167 Cal 643, 140 P 587, in which it was held that swamplands of the state which have not been dedicated to any public use, but merely withheld from sale, are proprietary lands of the state subject to adverse possession and the running of the statute of limitations.

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See, in connection with the above cases, State v Ancoin (1944) 206 La 787, 20 So2d 136, infra, § 32, and Abernathy v Dennis (1872) 49 Mo 468, infra, § 31[a].

§ 20. — Accretions to riparian land.

In Topping v Cohn (1904) 71 Neb 559, 99 NW 372, involving title to riparian land formerly owned by the state, and which had been increased by accretion, it was held that such land could not be subject to adverse possession while the title was in the state, and that, therefore, the statute did not begin to run in favor of one claiming such land by adverse possession, until the state sold and conveyed it to defendant.

§ 21. — Railroad aid grants; internal improvement lands.

In Swann v Gaston (1888) 87 Ala 569, 6 So 386, the court stated that the act of Congress granting certain sections of land to the state of Alabama, for the purpose of aiding in the construction of certain railroads, operated as a grant in praesenti to the state until the completion of the road, and until then the state alone could maintain an action for possession, and until then the running of the statute of limitations for 10 years could not commence.

And in Swann v Lindsey (1881) 70 Ala 507, the court held that since the legal title to land granted by the federal government to the state for the purpose of aiding in the construction of railroads remained in the state until the road was completed, until then the state alone could maintain suit for possession, and the right of those claiming under the railroad land grant to bring ejectment did not accrue until the completion of the railroad, which was less than 10 years before the present action was brought, and, inasmuch as "time runneth not against the state," the 10-year statute of limitations asserted by one who claimed title by entry and purchase from the United States after the line of the railroad was definitely fixed was no defense.

In Wright v Louisville & N. R. Co. (1919) 203 Ala 118, 82 So 132, it was conceded that while title to public lands in Alabama was in the government, or in the state as trustee, prior to the time such lands were allotted to a railroad company to aid in the construction of railroads, the land was not subject to taxation, and title thereto could not be acquired by adverse possession.

In Alabama State Land Co. v Kyle (1892) 99 Ala 474, 13 So 43, where the lands in question were originally granted by an act of Congress in the year 1856 to the state of Alabama to aid in the construction of certain railroads therein mentioned, and a portion thereof was subsequently conveyed in 1877 by the governor of Alabama to two certain persons, as trustees, who in turn executed a deed to plaintiff, a land company, conveying, among oth-

ers, the lands sued for in this action, but defendants set up title in themselves by adverse possession under color of title for the statutory period, under a certificate of entry in the possession of the federal land office, evidence of which was a copy of the certificate, dated August 10, 1860, the court held that until the state of Alabama divested itself of title to these lands by the authorized conveyance of the governor in 1877, it was clear that the statute of limitations did not begin to run in favor of defendants.

See also, in connection with the above cases, State v Inman (1940) 239 Ala 318, 195 So 448, infra, § 31[a].

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In Pearce v Cone (1941) 147 Fla 165, 2 So2d 360, where certain persons who leased, for grazing purposes, land owned by the state of Florida, in the name of the Trustees of the Internal Improvement Fund, filed suit for injunction against defendants, who continued to trespass on such lands by driving their range cattle onto the enclosed leased lands, and it appeared that defendants claimed some sort of right of possession because they had been in possession of the lands using the same for grazing purposes for a number of years, it was held that such claim was without merit, as one acquires no rights by possession against the title of the state; adverse possession does not obtain against the state.

§ 22. — Railroad or railroad right of way.

Prescription does not run against the state, and this is true of the state's title to a railroad as well as the balance of the public domain, and it does not matter whether the road was for the time being in the hands of the state's own officers, or of her tenants or lessees. Glaze v Western & A. R. Co. (1881) 67 Ga 761.

In Western Union Tel. Co. v State (1923) 156 Ga 409, 119 SE 649, error dismd 269 US 67, 70 L ed 166, 46 S Ct 36, involving a right of way of a railroad owned by the state of Georgia, it was held that under the doctrine of nullum tempus occurrit regi, adverse possession as against the state could not provide the basis for a prescriptive title; the state is not affected by a statute of limitations unless it expressly consents to be held subject thereto.

§ 23. — Canal lands.

Adverse possession cannot be sustained against the state with reference to canal lands. Leventhal v Gillmore (1924) 123 Misc 703, 206 NYS 121.

And in Haynes v Jones (1915) 91 Ohio St 197, 110 NE 469, it was held that the fee simple title to land entered upon and appropriated by the state of Ohio for canal purposes, under a statute authorizing the appropriation, vested in the state of Ohio, and the title of the state could not be divested by any adverse possession by adjoining proprietors.

In Jones v Myers (1913) 17 Ohio CC NS 146, 36 Ohio CC 458, it was held that an appropriation under an act of the legislature providing for the construction of the canal system of the state and authorizing the appropriation of land or materials for that purpose conveyed absolute title in fee to the state, which could not be defeated by a claim of adverse possession or by lapse of time, but remained in the state until conveyed away by virtue of some duly authorized proceeding.

And in Pennsylvania R. Co. v Freeport (1890) 138 Pa 91, 20 A 940, it was held that where a railroad company was granted by the state for railroad purposes canal land owned by the state, the railroad company took the land clear of any encumbrances of any kind, inasmuch as no rights of absolute user of the canal property could have accrued either to the owners or occupiers of lots adjoining the canal while such canal property was vested in the commonwealth.

However, the court in Chesapeake & O. Canal Co. v Great Falls Power Co. (1925) 143 Va 697, 129 SE 731, cert den 270 US 650, 70 L ed 780, 46 S Ct 350, holding that the canal company, a public service corporation, lost title to a canal strip by adverse possession,

said that this conclusion was not affected by the fact that the corporation was a public service one, nor by the fact that the state was a shareholder therein and a guarantor of some of its bonds.

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See in connection with the above cases Banner Mill. Co. v State (1921) 117 Misc 33, 191 NYS 143, mod on other grounds 210 App Div 812, 205 NYS 911, affd 240 NY 533, 148 NE 668, 41 ALR 1019, cert den 269 US 582, 70 L ed 423, 46 S Ct 107, infra, § 31[d].

§ 24. — Lands in forest preserve.

Adverse possession will not run against the state as to lands in the forest preserve. People v Baldwin (1922) 233 NY 672, 135 NE 964, affg 197 App Div 285, 188 NYS 542, which affd 113 Misc Rep 172, 184 NYS 715 (such lands being held for a public use); People v Shipley (1930) 229 App Div 21, 241 NYS 17.

See also in connection with the above cases, People v Douglass (1926) 217 App Div 328, 216 NYS 785, infra, § 33.

§ 25. — Public square.

In Hoffman v Pittsburgh (1950) 365 Pa 386, 75 A2d 649, the court rejected the claim of the city that it acquired title by prescription, or adverse possession, or by lapse of time, as against either the public or the state to land dedicated as a public square, title to which was vested in the commonwealth of Pennsylvania, with a reversionary interest in the heirs of certain persons.

And in Dunne v Rock Island County (1918) 283 Ill 628, 119 NE 591, error dismd 248 US 532, 63 L ed 405, 39 S Ct 10, where the county, which had title to the land in question, dedicated it as a square to the public, it was held that such square became subject to the public right and easement vesting in the state, and the county could not acquire title against its dedication by adverse possession, which does not run against the public as to public rights. The court pointed out that the case of Brown v Trustees of Schools (1906) 224 Ill 184, 79 NE 579, 115 Am St Rep 146, 8 Ann Cas 96, where the statute of limitations was applied in the case of a school district, did not give any support to the county's claim in the Dunne Case, inasmuch as the property of school districts is held by and its use limited to the inhabitants of the local subdivision, and the question involved in the Brown Case did not relate to public and governmental rights in property.

§ 26. — Lands forfeited for nonpayment of taxes.

The general rule that adverse possession or prescription does not operate to deprive the state of its title to lands has been applied in cases where title in land owned by an individual has been forfeited to the state for failure to enter it for taxation or has been adjudicated to the state, in some manner or other, for unpaid taxes; in other words, no adverse possession or prescription will be effective while the state has title under such circumstances.

United States.—Armstrong v Morrill (1872) 14 Wall 120, 20 L ed 765; Lovell v Dulac Cypress Co. (1941, CA 5th La) 117 F2d 1, cert den 314 US 672, 86 L ed 537, 62 S Ct 132, reh den 314 US 713, 86 L ed 568, 62 S Ct 299.

Georgia.—State v Paxson (1904) 119 Ga 730, 46 SE 872.

Louisiana.—Wall v Rabito (1913) 138 La 609, 70 So 531; Saucier v Sondheimer Co. (1947) 212 La 490, 32 So2d 900.

New Mexico.—Pratt v Parker (1953) 57 NM 103, 255 P2d 311.

Virginia.—Staats v Board (1853) 51 Va (10 Gratt) 400; Hale v Branscum (1853) 51 Va (10 Gratt) 418; Levasser v Washburn (1854) 52 Va (11 Gratt) 572; Reusens v Lawson (1895) 91 Va 226, 21 SE 347.

West Virginia.—Hall v Webb (1883) 21 W Va 318.

But see, for a contrary view, Ortiz v Pacific States Properties (1950) 96 Cal App2d 34, 215 P2d 514, infra, § 29.

No adverse possession will run as against land while it is held by the

commonwealth to which it has been forfeited for failure to enter such land on the books of the commissioners of the revenue. Staats v Board (1853) 51 Va (10 Gratt) 400.

And in Levasser v Washburn (1854) 52 Va (11 Gratt) 572, where lands were forfeited to the commonwealth for failure of the owner to comply with the state revenue laws, it was held that if the right of entry when the forfeiture accrued still remained to the owner, though an adversary possession had been commenced, the possession as to the commonwealth must lose its adversary character, and the commonwealth held the land with the same rights, privileges and immunities which pertain to any other lands held by her in her demesne. In this connection it was said: "I can perceive no good reason why any discrimination should be made, or why she should hold forfeited lands upon different principles and with diminished privileges from those applied to other subjects of similar character. Certainly, the reason for exemption from the effects of laches and inattention on the part of her public officers is as cogent in such a case as in any other whatever."

From and after a forfeiture of land by virtue of statute, for failure to enter the same with the Commissioner of Revenue and for failure to pay the taxes thereon, adverse possession will not run against the commonwealth, or against one obtaining a patent after the forfeiture. Hale v Branscum (1853) 51 Va (10 Gratt) 418.

So too, in State v Paxson (1904) 119 Ga 730, 46 SE 872, where title to certain public lands of the state continued in the state because a tax sale of such lands by the Comptroller General was unauthorized and void, and purchasers thereof acquired no title to such lands as against the state, it was held that the title of the state was not lost by the long-continued possession of those claiming under the tax sale, it being settled that prescription does not in any case run against the state.

Pending redemption of land adjudicated to the state for unpaid taxes the title of the state to such land is a complete and absolute one against which no prescriptive title can be acquired. Lovell v Dulac Cypress Co. (1941, CA 5th La) 117 F2d 1, cert den 314 US 672, 86 L ed 537, 62 S Ct 132, reh den 314 US 713, 86 L ed 568, 62 S Ct 299.

In Wall v Rabito (1913) 138 La 609, 70 So 531, where plaintiff claimed certain lots by transfer of a tax title allegedly held by the state, by virtue of tax sales held in 1888, and defendant claimed by 30 years' prescription, the court, applying the rule that prescription acquirendi causa does not run against the state, held that in order for defendant to acquire title by the prescription of 30 years, the possession must have begun 30 years prior to the tax sales of 1888, as to the lots thus acquired by the state tax sale, inasmuch as prescription ceased to run against the state from that date.

If land is granted by the commonwealth, and an adverse possession has commenced against the owner of the legal title, and his land is afterward forfeited to the commonwealth for nonpayment of taxes, such possession would cease to be adversary as against the commonwealth until the land is resold or regranted by it. Reusens v Lawson (1895) 91 Va 226, 21 SE 347.

Of course, if the adverse possession had been sufficiently long to bar the original owner's right of recovery prior to the time the forfeiture took place, the occupant's possession would not cease to be adversary, for the reason that when the forfeiture occurred the original owner had lost his title by adverse possession, and the commonwealth took nothing by the forfeiture. Reusens v Lawson (Va) supra.

Adverse possession will not run during the time the state is the owner of land under a tax deed, notwithstanding a statute (1941 Comp § 27-121, 1953 NM Stat 23-1-22) providing: "In all cases where any person or persons, their children, heirs or assigns, shall have had adverse possession continuously and in good faith under color of title for ten (10) years of any lands, tenements or hereditaments and no claim by suit in law or equity effectu-

ally prosecuted shall have been set up or made to the said lands, tenements or hereditaments, within the aforesaid time of ten (10) years, then and in that case, the person or persons, their children, heirs or assigns, so hold in adverse possession as aforesaid, shall be entitled to keep and hold in possession such quantity of lands as shall be specified and described in some writing purporting to give color of title to such adverse occupant, in preference to all, and against all, and all manner of person or persons whatsoever." Pratt v Parker (1953) 57 NM 103, 255 P2d 311. The court adhered to the rule that the statute of limitations does not run against a state unless there is some special provision to that effect.

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See also in connection with the above cases, Chamberlain v Ahrens (1884) 55 Mich 111, 20 NW 814, infra, § 31[a], and Mogren v A. P. Invest. Co. (1956), — Ohio App —, 73 Ohio L Abs 188, 131 NE2d 620, infra, § 30 [d].

§ 27. — Escheated lands.

The general rule that statutes limiting the time for bringing suits for recovery of lands does not apply to the state and that title by adverse possession or prescription cannot be acquired while the state holds title to the land or lands in question has been applied in cases concerning land escheated to the state.

Michigan.—Crane v Reeder (1870) 21 Mich 24, 4 Am Rep 430.

South Carolina.—Harlock v Jackson (1812) 6 SCL (1 Treadway Const) 135; Camden Orphan Soc. v Lockhart (1841) 27 SCL (2 McMull) 84.

Texas.—Ellis v State (1893) 3 Tex Civ App 170, 21 SW 66, 24 SW 660.

Thus, in Crane v Reeder (1870) 21 Mich 24, 4 Am Rep 430, the court applied the rule that limitations do not operate against the state without express statutory authority to a situation involving title to land which had originally escheated to the state and which had been conveyed to plaintiff by the trustees of escheated lands.

In Harlock v Jackson (1812) 6 SCL (1 Treadway Const) 135, it was held that lands which had been acquired by the state by escheat could not be acquired by adverse possession against the state.

In Ellis v State (1893) 3 Tex Civ App 170, 21 SW 66, 24 SW 660, escheat proceedings instituted by a county attorney in the name of the state, concerning property of one who died seised of such property, without disposing of it by will, and without heirs, defendant, who had taken actual possession of the property (lots) in 1865, three years after the death of S, claiming it as his own, and making valuable improvements thereon and remaining in actual and adverse possession ever since, contended that a compliance with the statute which prescribes the method of procedure to escheat property was essential to vest any title in the state, and that, inasmuch as his adverse possession prior to the institution of this proceeding was sufficient in length and character to confer title to it, his case did not come within the rule which rejects limitation as a defense against the state. The court did not concur with this view, and held that laches or limitation could not be interposed as a bar to the state's recovery, stating that when the death of the owner occurs, and there is no person to take the estate as heir or devisee, it devolves eo instante, by operation of law, upon the state, and that although it was true that article 1779 of the escheat statute provides that the judgment shall vest title in the state, all the preceding articles indicated that a suit in behalf of the state is founded upon a title already vested, and that the procedure required by the statute is simply a means by which the state furnishes authentic evidences of its title.

§ 28. — Land purchased by state.

In State ex rel. Pearson v Arledge (1831) 18 SCL (2 Bail) 401, 23 Am Dec 145, where the state held the land in question as purchaser from a corporation, to whom the land had originally been granted by the state, and where it was held that such land could

not be acquired by adverse possession as against the state, the court, after referring to the case of Harlock v Jackson (1812) 6 SCL (1 Treadway Const) 135, supra, § 27, in which it was held that the statute of limitations does not run against the state, that the state cannot be disseised, and that a citizen cannot hold adversely to the state, said: "If in relation to escheats the principle be, that the statute of limitations will not run, because the State cannot be disseized; the same reason and principle must apply to lands held in any other right, or by any other title."

§ 29. View that property must be reserved for or dedicated to public use.

In California the view has been taken that if land held by the state is neither reserved for nor dedicated to some public use, title as to such land may be wrested from the state by adverse possession. Richert v San Diego (1930) 109 Cal App 548, 293 P 673; Fresno Irrig. Dist. v Smith (1943) 58 Cal App2d 48, 136 P2d 382; Ortiz v Pacific States Properties (1950) 96 Cal App2d 34, 215 P2d 514.

Thus, in Ortiz v Pacific States Properties (1950) 96 Cal App2d 34, 215 P 2d 514, it was held that property sold to the state for nonpayment of taxes could be acquired by adverse possession, where it was neither reserved for nor dedicated to any public use and could be alienated. (But see cases holding a contrary view in § 26, supra.)

Implications in support of the above doctrine may possibly be deduced from other cases in California in which it has been recognized or held that where land has been actually reserved for or dedicated to some specific use, there can be no adverse holding thereof which can give title to the adverse claimant. People ex rel. Harbor Comrs. v Kerber (1908) 152 Cal 731, 93 P 878, 125 Am St Rep 93; Sixth Dist. Agricultural Asso. v Wright (1908) 154 Cal 119, 97 P 144; Los Angeles v Anderson (1929) 206 Cal 662, 275 P 789.

Under the rule that property devoted to public use cannot be acquired by prescription founded upon adverse occupancy for the period prescribed by the statute of limitations, it is immaterial where the title—that is, the record title—is held, whether by the state at large, or by a county, or by some municipal department or other official body. People ex rel. Harbor Comrs. v Kerber (1908) 152 Cal 731, 93 P 878, 125 Am St Rep 93.

In Sixth Dist. Agricultural Asso. v Wright (1908) 154 Cal 119, 97 P 144, it was held that property of a state institution, such as an agricultural association, held in trust by certain trustees for the advancement of agriculture in the state through the holding of agricultural exhibitions or fairs, and which institution was within the exclusive management and control of the state, could not be acquired by adverse possession. The court approved the view that it was immaterial where the title—that is, the record title—is held, whether by the state at large, or a county, or some municipal department or other official body, and that there can be no adverse holding of such land which will deprive the public of the right thereto, or give title to an adverse claimant, or create a title by virtue of the statute of limitations, and that the rule was universal in its application to all property set apart or reserved to the public use, and the public use for which it is appropriated is immaterial.

B. Acquisition of interest less than title

§ 30. Easements, flowage rights, etc.

[a] Generally.

Generally speaking, it may be said that, in the absence of legislation permitting it, no easement can be acquired in property of the state, particularly such property as is held for public use; at least there can be no such right of user by an individual as will interfere with public rights in the property.

Alabama.—Olive v State (1888) 86 Ala 88, 5 So 653, 4 LRA 33.

Indiana.—Verrill v School City of Hobart (1944) 222 Ind 214, 52 NE2d 619.

Iowa.—State v Beardsley (1899) 108 Iowa 396, 79 NW 138.

Maine.—Cottrill v Myrick (1835) 12 Me 222.

Minnesota.—Scofield v Scheaffer (1908) 104 Minn 123, 116 NW 210.

New Hampshire. — See State v Franklin Falls Co. (1870) 49 NH 240, 6 Am Rep 513, which apparently supports the rule, but did not involve a claim of easement.

New Mexico.—Burgett v Calentine (1951) 56 NM 194, 242 P2d 276.

New York.—Burbank v Fay (1875) 65 NY 57; People v New York & O. Power Co. (1927) 219 App Div 114, 219 NYS 497; Re State Reservation (1885) 37 Hun 537. app dismd 102 NS 734, 7 NE 916; Finch, Pruyn & Co. v State (1924) 122 Misc 404, 203 NYS 165; Everett v State (1938) 166 Misc 58, 2 NYS2d 117.

North Carolina.—Shelby v Cleveland Mill & Power Co. (1911) 155 NC 196, 71 SE 218, 35 LRA NS 488. Ann Cas 1912C 179.

Ohio.—Mogren v A. P. Invest. Co. (1956) — Ohio App —, 73 Ohio L Abs 188, 131 NE2d 620.

An easement cannot be acquired against the state by adverse possession. Burgett v Calentine (1951) 56 NM 194, 242 P2d 276.

[b] Dams.

There can be no prescriptive right to maintain or continue an obstruction to the navigation of a public stream by a milldam, regardless of the length of time the dam has been in the river. Olive v State (1888) 86 Ala 88, 5 So 653, 4 LRA 33.

In State v Beardsley (1899) 108 Iowa 396, 79 NW 138, an action by the state against the owner of land through which flowed a river and across which he maintained a dam in such a way as to obstruct the free passing of fish up and down said river, to have the dam adjudged a nuisance and abated. defendant claimed that because the dam was constructed thirty days before the effective date of a law requiring the owners of dams across rivers, streams, creeks, ponds, or water courses to construct a fishway of suitable capacity and facility to afford a free passage for fish when the water was running over the dam, he had a right to maintain his dam by prescription, but it was held that he had no such right. The court said: "The authorities make the police power of the state the basis of legislative authority to prescribe regulations as to fish and its streams; and in Stone v. Mississippi, 101 U.S. 814, it is said that 'all agree that the legislature cannot bargain away the police power of the state.' This being true, how could the legislature, beyond its power of retraction, exempt the dam owner from obligations to maintain passageways for fish, to the detriment of those conditions which it is the office of the police power of the state to conserve and protect? If this could not be, how could it be that a rule of prescription would operate to suspend such a power? It would seem that all reason, if not all authority, is against such a rule."

See also in this connection, State v Franklin Falls Co. (1870) 49 NH 240, 6 Am Rep 513, an information filed by the attorney general against defendants for not providing suitable fishways over dams across a river, and in which it was held that an adverse user, which is known to have originated without right, will not alone and of itself, legitimate a public nuisance, or bar the public of their rights.

In Hazen v Perkins (1918) 92 Vt 414, 105 A 249, 23 ALR 748, it was held that, in view of a statute declaring that nothing in the statute of limitations should be construed as affecting the title to any lands belonging to the state, defendant could not acquire a prescriptive right against the state to control the flow of water from a boatable lake by means of a dam or gate at the outlet, the waters of such lake being public, and the bed and soil thereof being held by the people in their character as sovereigns, in trust for the public uses to which they are adapted.

[§ 30]

Rights in the St. Lawrence River, a navigable stream, which would deprive the state of its power to improve it for navigation, may not be acquired by adverse possession, since the state could not make such a grant. People v New York & O. Power Co. (1927) 219 App Div 114, 219 NYS 497.

Streams in which salmon, shad and alewives are accustomed to ascend are subject to the regulation of the legislature, and the riparian proprietor may erect a dam upon such a stream, without providing therein a passage for fish, so long as he violates no existing law, but subject to the well-established right of the legislature to interpose, and no individual can prescribe against this right, which is held to belong to the public. Cottrill v Myrick (1835) 12 Me 222.

In Scofield v Scheaffer (1908) 104 Minn 123, 116 NW 210, an action to compel a lower riparian owner to remove a milldam which caused the water to overflow plaintiff's land, it appeared that the latter had purchased from the state in 1905 at a sale of swampland, and defendant purchased his land on the river in 1893, his predecessors in title having erected the dam in question, it was held that the defendant had not acquired the right to overflow the land by adverse possession for the statutory period, inasmuch as the statute of limitations did not run against the state in such a case so as to allow defendant to acquire a prescriptive right to overflow the land before plaintiff acquired his title in 1905, in view of the fact that in 1881, before any prescriptive rights had been acquired by defendant or his predecessors in title, an amendment was embodied in the Constitution which provided that swamplands held by the state should be sold in the same manner as school lands, and that one-half of the proceeds of the principal derived from the sale of such lands should be apportioned to the common school fund of the state, and the remaining half to the educational and charitable institutions of the state. The court observed that the Constitution as thus amended placed the same restrictions upon the disposition of swamplands as then existed in reference to school lands, and thereafter title to such lands could be acquired only at public sale and subject to the constitutional restriction. So the decision in Murtaugh v Chicago, M. & St. P. R. Co. (1907) 102 Minn 52, 112 NW 860, 120 Am St Rep 609, infra, § 31[b], to the effect that the title to lands granted by the United States to the state of Minnesota for school use could not be acquired by adverse possession against the state, was applicable and controlling in the case at bar.

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However, in Finch, Pruyn & Co. v State (1924) 122 Misc 404, 203 NYS 165, where one of the questions involved was whether an easement by prescription could be acquired against the state, the court concluded that an easement in the bed of a navigable stream may be acquired by prescription by a private individual or corporation against the state, provided such easement does not interfere with navigation, and could otherwise have been the subject of a lawful grant. Upon the facts in this case the court was of the opinion that the claimant had fairly established that it had acquired such an easement in the bed of the Hudson River at Glens Falls, and was entitled to maintain its dam in its present location and condition for the purpose of diverting water into its manufacturing plant and using such waters to produce power, by which its plant was in part operated. In this connection the court, after pointing out that it was well settled that an easement by prescription could not be obtained against the governmental interests of the state, which it holds in trust for the public, citing Burbank v Fay (1875) 65 NY 57, where the plaintiff claimed an easement by prescription in the waters of the state canals, and after stating that to the same effect were decisions holding that no easements by prescription could be obtained in a highway, said, however, "We are not unmindful that a navigable stream is a public highway, but the character of such a highway is entirely different from that of a highway upon the land. The method of

travel and transportation over a navigable stream is upon the water and it is to this which the governmental ownership of the state in trust for the people attaches. Of course such governmental ownership attaches also to the bed of the stream, but only to the extent to which it is necessary for the purposes of navigation. It is an interest different, separate and apart from the private proprietary ownership of the bed of the stream, which latter may or may not be vested in the state. If vested in the state, this proprietary ownership may be alienated at pleasure, always subject to the navigable rights of the public. There can be no doubt that it would have been entirely competent for the legislature at any time to have granted the claimant the right to maintain its dam where now located, saving to the public its navigable rights in the stream. If such rights might lawfully have been granted to claimant there seems to be no logical reason why they could not have been obtained by prescription." See also, Re Commissioners of State Reservation (1885, NY) 37 Hun 537, app dismd 102 NY 734, 7 NE 916, in which a prescriptive easement against the state in the bed of navigable stream, similar to that urged by the claimant in the Finch, Pruyn & Co. Case (Ky) supra, was sustained.

In Atty. Gen. v Revere Copper Co. (1890) 152 Mass 444, 25 NE 605, 9 LRA 510, an action by the attorney general to compel defendant to refrain from drawing water from a great pond, where it appeared that defendant owned the land on both sides of the stream which flowed from the pond, and maintained a flume and gate at the outlet of the pond and regulated the flow of water by holding it back or letting it down to be used for power in running its mills on the stream below, and at times lowered the surface of the water in the pond to the depth of three feet and ten inches below the lowest point at which it would stand if left in its natural condition, it was held that private rights in great ponds could be acquired by prescription during the interval between the passage in 1835 of the statute making the statute of limitations of real actions applicable to suits brought on or on behalf of the commonwealth, and a statute enacted in 1867 providing that such statute should not apply "to any property, right, title or interest of the Commonwealth below high-water mark or in the great ponds"; so defendant had a right to draw the water at the outlet of the pond as it was accustomed to do for more than forty years prior to the change of the law by the enactment of the 1867 statute. In this connection the court ruled that a law taking a certain class of cases out of the operation of the statute of limitations, which had previously been within its provisions, could have no effect on rights acquired under the statute previously to the passage of such law.

[c] Canal property.

The Erie Canal is a great public highway, and no individual can gain for himself an easement on a highway by prescription, or in any way make a valid encroachment upon the public right. Burbank v Fay (1875) 65 NY 57.

And in Everett v State (1938) 166 Misc 58, 2 NYS2d 117, it was held that there could be no rights as against the state by user, however long it may have been, and that such part of the traveled roadway in question at the locus in quo, which was on Barge Canal property, was and had been used by sufferance and not by right.

[d] Right of way over property.

In Verrill v School City of Hobart (1944) 222 Ind 214, 52 NE2d 619, where plaintiff sought to establish an easement or right of way over school property, alleging he had continuously for twenty years used this right of way as a passageway or driveway, the court, after pointing out that school corporations are a part of the educational system of the state, and are agencies of the state, and that their property is governmental property, applied the rule that, in the absence of a statute, an easement cannot be acquired by prescription against the government.

And in Mogren v A. P. Invest. Co. (1956) — Ohio App —, 73 Ohio L Abs

183, 131 NE2d 620, a suit to enjoin defendant from obstructing plaintiff's use of a private driveway located for the most part on defendant's property which he had purchased from the state at a county auditor's sale of land forfeited for nonpayment of taxes, the court held that since there could be no prescriptive right claimed against the state, the claimed open, notorious and adverse possession of plaintiff ended when the state took possession.

[e] Right to empty sewage in river.

In Shelby v Cleveland Mill & Power Co. (1911) 155 NC 196, 71 SE 218, 35 LRA NS 488, Ann Cas 1912C 179, where defendant unsuccessfully contended that it could not be restrained by legislative action from emptying raw sewage into a river, the court stated that it was well settled that, unless by legislative enactment, no title can be acquired against the public by user alone, nor lost to the public by nonuser. The defendant in this case had unsuccessfully contended that it had acquired the prescriptive right to empty its sewage into the river.

C. Effect of statutes or constitutional provisions

§ 31. Legislation making limitations applicable to state.

[a] Generally.

Statutory provisions limiting the time within which a state may bring suit to recover its lands were applied in the following cases, in which the land in question was apparently state-owned and was not used or reserved for any specific public purpose.

United States.—For federal cases involving state law, see state headings infra.

Alabama. — State v Inman (1940) 239 Ala 348, 195 So 448.

Kentucky.—Gray v Soden (1905) 120 Ky 277, 86 SW 515; Richie v Owsley (1909) 137 Ky 63, 121 SW 1015, mod on other grounds 143 Ky 1, 135 SW 439; Whitley County Land Co. v Powers (1912) 146 Ky 801, 144 SW 2; McCoy v Thompson (1916) 172 Ky 794, 189 SW 1139.

Missouri. — Abernathy v Dennis (1872) 49 Mo 468; Wickersham v Woodbeck (1874) 57 Mo 59; Burch v Winston (1874) 57 Mo 62.

New York.—People v Arnold (1851) 4 NY 508; People v Trinity Church (1860) 22 NY 44; People v Clarke (1850, NY) 10 Barb 120, affd 9 NY 349; United States v Certain Lands (1943, DC NY) 52 F Supp 540.

South Carolina.—Busby v Florida C. & P. R. Co. (1895) 45 SC 312, 23 SE 50.

West Virginia.—State v Harman (1905) 57 W Va 447, 50 SE 828.

So, in People v Trinity Church (1860) 22 NY 44, action of ejectment to recover a lot which the People claimed to own in fee, but with respect to which the church corporation was in possession from the year 1714, claiming to own it under a patent from the Crown, and asserting that its possession was adverse to the title of any other real or pretended owner, it was held that the church could avail itself of a statute of limitations providing that the People will not sue or implead any person for or in respect to any lands by reason of any right or title of the People to the same which shall not have accrued within the space of 40 years before suit for the same be commenced, unless the People, or those under whom they claim, shall have received the rents and profits thereof within the space of 40 years, the court being of the opinion that a corporation was a "person" within the meaning of the statutes of limitation, and could avail itself of the defense.

And in People v Arnold (1851) 4 NY 508, an action by the state to recover possession of 50 acres of wild and uncultivated land in a certain county in the state, it was held that the action was barred under the above statute, the court stating that there must be an adverse possession of 40 years, and that to constitute a bar, there must be such a holding for 40 years as would constitute a good adverse possession if the land had been owned by an individual, instead of the state.

Also, in United States v Certain Lands (1943, DC NY) 52 F Supp 540, defendants claimed title under Crown grants to lands under the water of a pond which was 39 acres in area, to which the state of New York, on the other hand, claimed to hold title to fee in its sovereign capacity as successor to the Crown of England, and in addition to their claim of title to the lands in question by conveyance to them and their predecessors in title, defendants also claimed adverse possession against the state, and also invoked the 40-year statute of limitations above referred to. It appeared that the state never exempted the pond from taxation as public land or made any claim of ownership of the pond until the commencement of the proceedings in the case at bar, and there was no proof that the state had received any rents and profits, but on the contrary, it appeared that defendants had used the pond, paid taxes, and exercised ownership over it for more than 40 years. The court held that defendants established actual, hostile, open, notorious, exclusive, and continuous possession of the pond for over 40 years and that, therefore, the state was estopped from setting up any claim to the land under the water; that the cause of action herein did not accrue within 40 years before the commencement of this proceeding and that neither the state nor anyone from whom it might claim title had, during said period of 40 years, received the rents and profits of the real property involved or from any part of it. In this connection it is to be noted that the court approved the view that to constitute a bar, there must be such a holding for 40 years as would constitute a good adverse possession if the land had been owned by an individual, instead of by the state. The court observed that generally the statute of limitations does not run against the state, but that in the case at bar the state had by statutory enactment elected to come within the statute of limitations. And the court made the further observation that even after a state has enacted a statute by which it agrees not to sue for, or with respect to, real property or the issues or profits therefrom by reason of the right or title of the people to the same, unless the cause of action accrues within 40 years before the commencement of the action, it cannot lose such lands as it holds for the public in trust for a public purpose such as highways, public streams, canals, and public fairgrounds.

So too, in State v Harman (1905) 57 W Va 447, 50 SE 828, it was held that as the land in question was wild land of the state—not used in administration of government—the statute of limitations, which provided that "every statute of limitations, unless otherwise expressly provided, shall apply to the state," ran against the state.

In Abernathy v Dennis (1872) 49 Mo 468, where plaintiff who claimed the swampland in question by virtue of a purchase from a certain county consummated by a patent executed by the governor in 1869, conveying the land in dispute to the plaintiff, commenced an action for ejectment against defendant in 1870, the court held that if it was conceded that defendant had been in the open, notorious, adverse possession of this land, claiming it as his own, to the exclusion of all others, for more than 10 years before the commencement of this suit, such adverse possession was a bar to plaintiff's recovery, and vested title in defendant, notwithstanding plaintiff's contention that the title remained in the state of Missouri until the emanation of the patent to the plaintiff in 1869, and that the statute of limitations did not run against the state, and that the adverse possession of defendant prior to the issuance of the patent amounted to nothing. The court pointed out that a statute of 1857 expressly named the state as being comprehended within its provisions, and that the statute of 1865, in which it was provided that "nothing contained in any statute of limitations shall extend to any lands given, granted, sequestered or appropriated to any public, pious or charitable use, or to any lands belonging to this State," was prospective, and did not apply to "any actions commenced, nor to any cases where the

right of action or of entry shall have accrued, before the time when this chapter takes effect, but the same shall remain subject to the laws then in force." So, whether title to the land in question was vested in the state or a county, the suit was subject to the bar of the statute of limitations of 1857.

And in Burch v Winston (1874) 57 Mo 62, involving title to a lot which had originally been donated by the United States to the state of Missouri for a permanent seat of government and which had been conveyed in 1868 by the Commissioner of the Permanent Seat of Government to plaintiff, defendant set up the defense of the statute of limitations, and it was held that, in view of the above statutes, the trial court erred in excluding from the jury evidence offered by defendant tending to prove adverse possession, it appearing that defendant had been in actual possession of the lot in question for more than 10 years before the commencement of the suit (in 1869), under a claim of title or right thereto.

In Chamberlain v Ahrens (1884) 55 Mich 111, 20 NW 814, the court sustained defendant's claim of title by adverse possession for more than 10 years, under claim of tax titles under a deed which proved to be invalid, holding that the state was bound by a limitation statute providing, inter alia, that no actions for the recovery of lands may be brought after 10 years, where defendant claims title under a deed made by some officer of the state, or the United States, authorized to make deeds upon the sale of land for taxes assessed and levied within the state.

In State v Inman (1940) 239 Ala 348, 195 So 448, a suit in ejectment by the state to recover possession of certain lands granted to it by the United States as internal improvement lands by an act of Congress providing for the sale and distribution of the proceeds of said lands, as to which defendant claimed clear title by adverse possession for more than 20 years prior to 1908, it was held that the state was not entitled to recover where, during all of the period the lands were adversely held by the defendant, a statute provided a limitation of 20 years within which actions at the suit of the state against a citizen thereof, for the recovery of real or personal property, could be brought, although a statute which became effective in 1908 provided that there should be no limitation of time in which the state might bring action for the recovery of land.

The holding in McCoy v Thompson (1916) 172 Ky 794, 189 SW 1139, that a patentee from the commonwealth could not under his patent derive title to land that had been in the adverse possession of another person for more than 15 years (or any other number of years prescribed by a limitation statute) before the issuance of the patent if the adverse holding was of such nature and continued for such length of time as would defeat the right of an individual in the constructive possession of the patented land to recover it from the adverse holder, is based on a statute providing that limitation shall run against the commonwealth in the same manner that it runs against an individual.

[b] School or university lands.

In a few cases statutes of limitation expressly applicable to actions by the state for the recovery of real property have been held to apply in actions by the state for the recovery of school or university lands.

So, under a statute authorizing the defense of limitations in actions brought by the state for the recovery of real and personal property, an action by the board of trustees of the state university to recover certain of its lands from one whose title and claim is based solely upon adverse possession is governed by such statute. Cox v University of Alabama (1909) 161 Ala 639, 49 So 814. See also in this connection Alabama v Schmidt (1914) 232 US 168, 58 L ed 555, 34 S Ct 301, affg 180 Ala 374, 61 So 293, an action in ejectment brought by the state of Alabama to recover possession of a specified part of the sixteenth section of school lands of a certain township, which lands had been given

to the state by an act of Congress, and to which defendant claimed title by adverse possession under the statutes of Alabama, applicable to all other lands, and limiting suits to 20 years, and in which it was held that the title of the state to such lands given by the congressional act above referred to could be extinguished by adverse possession for the length of time prescribed by the state statute of limitations, inasmuch as the state had the authority to subject this land in its hands to the ordinary incidents of other titles of the state. The court observed that the trust created by these common acts (grant of sixteenth section land) relates to a subject of universal interest, but of municipal concern, over which the power of the state is plenary and exclusive, and pointed out that the state could sell its school lands without the consent of Congress, the gift to the state being absolute. See to the same effect, Franklin v Gwin (1920) 203 Ala 673, 85 So 7.

Schneider v Hutchinson (1899) 35 Or 253, 57 P 324, 76 Am St Rep 474, was an action to recover possession of land which was a part of the grant to the state by an act of Congress for the use of schools, and commonly known as "school lands," and as to which defendant claimed title by adverse possession, it appearing that in 1874 the property in question had been sold and conveyed to a certain person, and that his successors in interest, including defendant, had been in the continuous, open, exclusive, and adverse possession thereof ever since, claiming title thereto. While the land was so occupied and claimed by defendant or his predecessors the board of commissioners for the sale of school lands sold and conveyed the same, in 1897, to plaintiff's grantor, and the court, in affirming a judgment in favor of defendant, held that the statute of limitations ran against the state while it had the title to land in controversy, in view of a statute providing that actions for the recovery of real property should be commenced within 10 years after the cause of action accrued, and, further, that this limitation "shall apply to actions brought in the name of the state, or any county or other public corporation therein, or for its benefit, in the same manner as to actions by private parties." The court said that a distinction was sometimes made between actions brought by the state in its sovereign and its proprietary capacities, and that the authorities showed much diversity in the decisions and reasoning upon this subject. However, it was said, this distinction was generally suggested in the discussion of the question as to when and in what cases, if any, the statute of limitations applies to actions brought by the state, when it was not expressly made applicable to such actions by its terms. And the court further said: "No distinction is to be found in the decisions, under statutes providing that actions by the state shall be barred within a specified period, between actions brought in its sovereign and those brought in its proprietary capacity, but all alike are held to be within the terms of the statute. There is a line of authorities, however, which hold that such statutes have no application to actions concerning property held by the state for public purposes without power of alienation: . . . But these authorities, if sound, can have no application to the question at hand, because the Board of Commissioners for the Sale of School and University Lands not only has the power and authority to alienate and dispose of school lands, but it is expressly made its duty to do so."

And where it was claimed that the deed from the state to plaintiff's grantor was a final and conclusive adjudication in his favor, and against the defendant and his predecessors in interest, in reference to their claim of adverse possession, the court in another Oregon case said that if, as above indicated, the statute of limitations runs against the state, one who has held adverse possession of state lands for the statutory period has a perfect and complete title thereto, which cannot be taken away from him, and vested in another, by any action of the school board. Schneider v Hutchinson (1899) 35 Or 253, 57 P 324, 76 Am St Rep 474.

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Again, where it was contended that the land in question was granted to the state by the general government for the use of schools as upon a condition subsequent, and that upon its application to other purposes the United States had the right to enter and take possession, and against this right the statute of limitations did not run, and therefore no person could acquire title to such lands by adverse possession prior to its alienation by the state, the court in Schneider v Hutchinson (Or) supra, remarked that the vice of this position lay in the fact that the grant to the state was not upon a condition subsequent, but was an absolute grant, vesting the title in the state for a special purpose, and that the language of the Congress was that such land "shall be granted to the state for the use of schools," the court stating that the United States had no right to re-enter for any reason whatever.

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But other cases have held, in construing the terms of particular grants by Congress of land to states for school purposes, in connection with the terms of the state constitutions, that statutes limiting the time within which suits may be brought by the state for the recovery of its lands are not applicable with respect to suits for the recovery of the state's school lands.

So, in Murtaugh v Chicago, M. & St. P. R. Co. (1907) 102 Minn 52, 112 NW 860, 120 Am St Rep 609, it was held that title to land granted to the state of Minnesota by the United States for the use of a school could not be acquired by adverse possession, as against the state, notwithstanding a Minnesota statute which provided that "the limitations prescribed in this chapter for the commencement of actions shall apply to the same actions when brought in the name of the state, or in the name of any officer, or otherwise, for the benefit of the state, in the same manner as to actions brought by citizens" the court pointing out that, by their approval and ratification of the state constitution, the people of the state originally accepted the land in question for the use of the schools of the state, and safeguarded the trust by providing that the proceeds of such trust lands should remain a perpetual school fund, and that no portion of the lands should ever be sold otherwise than at public sale, and that, such being the nature of the title of the state to its school lands, it was unthinkable that the legislature intended by the statute, and later acts amending it, to provide a way whereby the trust as to any of the school funds might be defeated, and title thereto acquired by adverse possession, contrary to the mandate of the constitution that title thereto could only be obtained by public sale thereof. And the court said: "We are, then, of the opinion that, if the statute under consideration must be construed as authorizing the acquisition of title to the school lands of the state by adverse possession, it violates in this respect, not only the terms of the grant, but also the Constitution of the state. We are, however, of the opinion that the statute fairly may be given a construction which is consistent with the terms of the school land grant and the provisions of the state Constitution applicable thereto. If the statute be read in connection with the general and well-understood rule of law that title to public land cannot be acquired by adverse possession, the history of our school land grant, the nature of the title of the state to its school lands, and the mandates of our Constitution with reference to them, it is clear upon the face of the statute that the Legislature did not intend to provide for the acquisition of the title to school lands by adverse possession."

With respect to a statute to the effect that the state cannot sue for the recovery of land after the same has been held for a period of 10 years, the court said that there were exceptions to the rule applying the adverse possession statutes to state lands, as where the land has been actually reserved for or dedicated to some public use. Hellerud v Hauck (1932) 52 Idaho 226, 13 P2d 1099.

Thus, Hellerud v Hauck (Idaho) supra, was a suit by a church against

an individual, to quiet title to a tract of land, where it appeared that the church claimed adverse possession under a 5-year limitation statute of lands originally granted by the federal government to the state as school lands under an act prescribing the minimum amount per acre at which they could be disposed of by the state. The state deeded the land to defendant on April 18, 1927, when, presumably, he paid the final instalment of the purchase price, and the present action was commenced March 13, 1931. It was held that the statutory period of 5 years had not elapsed, since adverse possession could not have been initiated against defendant prior to the deed to him from the state.

And in Van Wagoner v Whitmore (1921) 58 Utah 418, 199 P 670, where plaintiff claimed title under a patent from the state of Utah issued by its Board of Land Commissioners in 1916 to the land in controversy, which was granted to the state of Utah by an act of Congress, commonly known as the Enabling Act, for the support of common schools in the state, and defendant claimed by adverse possession, dating back as early as 1887, and it was conceded that everything that was necessary to be done by him to establish title by adverse possession had been done if the land was within the class covered by the statutes upon which he relied, it was held that the plea of the statutes of limitation and the claim of title by adverse possession should not prevail, notwithstanding statutory provisions that the state would not sue any person for or in respect of real property unless such right accrued within 7 years before any action or proceeding for the same should be commenced, and that no action could be brought for real property by any person claiming under a patent or grant from the state unless such action might have been commenced by the state in case such patent or grant had not been issued. The court pointed out that the sections of the above statute relied on by defendant were repugnant to, and in conflict with, the spirit of the Enabling Act and the state constitution, the Enabling Act providing that "the proceeds of lands herein granted for educational purposes, except as hereinafter otherwise provided, shall constitute a permanent school fund, the interest of which only shall be expended for the support of said schools," and a provision of the state constitution (Art 20 § 1) declaring that all lands of the state that had been or might thereafter be granted to the state by Congress, and all lands acquired by gift, grant or devise, from any person or corporation, or that might otherwise be acquired, were accepted and declared to be the public lands of the state "and shall be held in trust for the people, to be disposed of as may be provided by law, for the respective purposes for which they have been or may be granted, donated, devised or otherwise acquired." The court also referred to Art 10 § 3 of the state constitution providing that the proceeds of the sale of state lands and other lands granted for the support of common schools should be and remain a perpetual fund, the interest only to be used, and § 7 of the same article of the constitution providing that "all public school funds shall be guaranteed by the state against loss or diversion."

Notwithstanding legislation making statutes of limitation applicable to actions by the state for or in respect to real property to which it had title, the court in Newton v Weiler (1930) 87 Mont 164, 286 P 133, held that no title to school lands granted to the state by the United States could be acquired by adverse possession, inasmuch as if the statutes of limitation respecting the state were construed as authorizing the right of one to obtain title to, or any estate or interest in, any part of the school lands of the state by adverse possession, it would readily appear that they would impinge upon the terms of the grant from the United States which provided that such land "shall be disposed of only at public sale, and at a price not less than ten dollars per acre, the proceeds to constitute a permanent school fund, the interest of which only shall be expended in the support of said

schools," and would also conflict with § 1, Art 17 of the state constitution by which the state convenanted that such lands "shall be held in trust for the people, to be disposed of as hereafter provided, for the respective purposes for which they have been or may be granted, donated or devised; and none of such land, nor any estate or interest therein, shall ever be disposed of except in pursuance of general laws providing for such disposition, nor unless the full market value of the estate or interest disposed of, to be ascertained in such manner as may be provided by law, be paid or safely secured to the state; nor shall any lands which the state holds by grant from the United States (in any case in which the manner of disposal and minimum price are so prescribed) be disposed of, except in the manner and for at least the price prescribed in the grant thereof, without the consent of the United States."

In State v Seattle (1910) 57 Wash 602, 107 P 827, 27 LRA NS 1188, it was held that land granted by an individual to the state for the purpose of a state university was held in trust and subject to the provisions of the constitution and statutes relating to the disposition of school lands, and that the provision of the statute of limitations making it run against the state did not apply to it, and therefore the state's title could not be lost by adverse possession.

And in O'Brien v Wilson (1908) 51 Wash 52, 97 P 1115, followed in State v Jensen, 51 Wash 59, 97 P 1117, it was held that sections of land granted to the state by the Enabling Act (Feb. 22, 1889) as school lands could not be acquired by adverse possession, notwithstanding a provision of the state statute of limitations that "The limitations prescribed in this chapter shall apply to actions brought in the name of the state or any county or other public corporation therein, or for its benefit, in the same manner as to actions between private parties," the court being of the opinion that if the latter statute was construed as permitting acquisition of title to school lands by adverse possession it would be repugnant to the Enabling Act, which provided that all lands granted thereby for educational purposes should be disposed of only at public sale, and at a price not less than $10 per acre, the proceeds to constitute a permanent school fund, the interest of which should only be expended in the support of schools, and provisions of the state constitution that all the public lands granted to the state were held in trust for all the people, and not to be disposed of unless a full market value of the estate or interest disposed of, ascertained in such manner as might be provided by law, was paid or safely secured to the state, and that none of the lands granted to the state for educational purposes should be sold otherwise than at public auction to the highest bidder, at a price at least equal to the appraised value of such land as fixed by a board of appraisers to be provided by law. The court observed that in Schneider v Hutchinson (1899) 35 Or 253, 57 P 334, 76 Am St Rep 474, in which it was held that title to school lands of that state might be acquired by adverse possession, there was no limitation on the power of alienation in Act of February 24, 1859, admitting Oregon into the Union, or in the Oregon Constitution, such as was found in the Washington Enabling Act and in the constitution of that state.

[c] Tidelands.

The few cases which have been concerned with the matter are not altogether in harmony with respect to the applicability to tidelands of the state of statutes limiting the time within which the state can sue for the recovery of its lands.

In Nichols v Boston (1867) 98 Mass 39, 93 Am Dec 132, it was held that an individual acquired by adverse possession title to a wharf and a dock or berth for vessels, extending below the original low-water mark, and which was covered by the sea even at low water, the court pointing out that the applicable statute made the time of limitation of real actions by the Commonwealth the same as of those by individuals, and that 20 years' exclu-

sive possession barred the right of the commonwealth to maintain an action for the recovery of flats.

However, in Weber v State Harbor Comrs. (1873, US) 18 Wall 57, 21 L ed 798, where plaintiff claimed that he had acquired by prescription against the state a perfect title to a wharf which he had built out from his land into the Bay of San Francisco, basing his claim upon a statute of limitations declaring that the people of the state would not sue any person for or in respect of any real property, or the issues or profits thereof, by reason of the right or title of the people to the same, unless such right or title accrued within 10 years before any action or other proceeding for the same was commenced, or unless the people, or those from whom they claimed, received the rents or profits of such real property, or some part thereof, within the space of 10 years, the court, in rejecting this claim, pointed out that even if it was assumed that the statute applied to lands owned by the state sovereign in trust for public purposes, an assumption which the court doubted, it nevertheless appeared that before the 10 years prescribed had elapsed after the erection of the wharf in 1854, a statute enacted in 1863 creating commissioners and authorizing them to take possession of and improve the water front prevented plaintiff, who was the owner of a lot on the bay, from acquiring the title of the state by operation of the statute of limitations. The court explained that the terms "shall have accrued" were used in the sense of "shall have existed" within the period designated. The court apparently approved the view that a statute declaring that the people of the state would not sue for or in respect to real property unless title or right had existed within a prescribed term or rents or profits had been received within that period, only applied to lands which the state held as private property, for sale or other disposition, in respect of which title might be lost by adverse possession, as defined in the same statute, and did not apply to lands held by the state as sovereign in trust for the people; in order to constitute adverse possession under the statute to bar the owner, when the claim of title was not founded upon a written instrument, the land must have been protected by a substantial inclusion, or been usually cultivated or improved, conditions inapplicable to the possession of land covered by tidewaters or of a wharf constructed thereon.

And in Jersey City v James P. Hall, Inc. (1910) 79 NJL 559, 76 A 1058, Ann Cas 1912A 696, an action by the mayor and aldermen of the city to recover a portion of a tidewater basin, to which defendants pleaded that they had acquired title by adverse possession under the statute of limitations of New Jersey, it was held that a statute providing that "no person or persons, bodies politic or corporate shall be sued or impleaded by the State of New Jersey for any lands, tenements or hereditaments, or for any rents, revenues, issues or profits thereof, but within twenty years after the right, title or causes of action to the same shall accrue, and not after," was not a bar to an action for recovery of lands of the state covered by tidewaters, it being conclusively shown that the state had the title to the shore and the lands below high-water mark in the right of its sovereignty and for the benefit of the public.

[d] Canal lands.

In Banner Mill. Co. v State (1921) 117 Misc 33, 191 NYS 143, mod on other grounds 210 App Div 812, 205 NYS 911, aff'd 240 NY 533, 148 NE 668, 41 ALR 1019, cert den 269 US 582, 70 L ed 423, 46 S Ct 107, it was held that a strip of land constituting a part of the Erie canal system, and which was obviously held by the state as sovereign in trust for the people, for the commercial advancement and prosperity of the state and the people, and not as proprietor, could not be lost to the state by any adverse user, notwithstanding § 362 of the Code of Civil Procedure.[4]

4. Section 362 of the Code of Civil Procedure provided: "The people of

[§ 32]

§ 32. Construction and application of legislation excluding state from operation of limitation statutes.

Some cases have involved the question whether statutes of the kind described in the section heading should be given a retroactive or prospective operation.

In Abernathy v Dennis (1872) 49 Mo 468, it was held that § 6 of the General Statutes of 1865, which provided that "nothing contained in any statute of limitations shall extend to any lands given, granted, sequestered or appropriated to any public, pious or charitable use, or to any lands belonging to this State," was prospective, and did not apply to "any actions commenced, nor to any cases where the right of action or of entry shall have accrued, before the time when this chapter takes effect, but the same shall remain subject to the laws then in force." (Gen Stat 1865, ch 191 § 32.)

In Brace & Hergert Mill Co. v State (1908) 49 Wash 326, 95 P 278, an action to quiet title brought by a certain company against the state of Washington, and involving lands lying below the line of ordinary high-water mark in the bed of a navigable meandered lake, and as to which plaintiff claimed to have acquired title by adverse possession for more than 10 years prior to February 26, 1903, on which date a statute was enacted providing that no previously existing statute of limitations "shall be interposed as a defense to any action brought in the name of or for the benefit of the state, although such statute may have run and become fully operative as a defense prior to the adoption of this act." The court said that it was at once apparent that if it was within the power of the state to remove the bar of the statute by legislative act after the bar had become perfect, plaintiff, who claimed by adverse possession against defendant, the state, had no standing on this branch of the case; but since plaintiff denied to the state such power, it would not examine the question, as there was another ground free from any constitutional objection on which a decision against plaintiff's contention might rest. The court called attention to a statute permitting persons in the possession of, and who had erected structures of various sorts on, the state's tide and shore lands, to purchase such lands when they should be appraised and put on the market for sale by the state, and, after stating that it must follow that the state intended possession by private persons to be permissive until the land on which the improvements were situated had been placed on the market for sale and that it intended to withdraw, in so far as these lands were concerned, the consent formerly given that the general statute of limitations should operate against it, held that, since the lands in question were finally appraised and placed on the market for sale about the time this action was commenced, the statute had not run in plaintiff's favor.

The court in State v George C. Stafford & Sons (1954) 99 NH 92, 105 A2d 569, stated that it was a well-settled principle that lakes and great ponds in New Hampshire belonged to the public and are held in trust by the state for public use, and that since the state's rights in land and water are not always enforced and protected with the same alacrity as private rights, the legislature had provided that no person could acquire title to state lands by adverse possession.

In Martin v Louisiana Cent. Lumber Co. (1925) 157 La 538, 102 So 662, where the question involved was whether the prescription of 10 years, by which, according to the code, property might be acquired by a person

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the state will not sue a person for or with respect to real property, or the issues or profits thereof, by reason of the right or title of the people to the same, unless either (1) the cause of action accrued within forty years before the action is commenced; or (2) the people, or those from whom they claim, have received the rents and profits of the real property or of some part thereof, within the same period of time."

having possession under a title apparently valid, but in fact invalid, was applicable to lands which belonged to an educational institution (title to which had been affirmed by an act of Congress) when the term of its charter expired, the court rejected the plea of prescription, stating that the constitution itself declared that "prescription shall not run against the state in any civil matter, unless otherwise provided in this constitution or expressly by law," and that as to this civil matter there was no other provision in the constitution or any statute declaring that prescription should run against the state, the court further stating that from and after the date when the charter of the academy in question expired, its lands belonged to the state, and the fact that the state's title to the land was restricted with the obligation to administer and dispose of it for the educational purposes for which it was intended was no reason why prescription should run against the state in favor of an adverse possessor of the land, in contravention of the constitutional provision above referred to.

And in State v Aucoin (1944) 206 La 787, 20 So2d 136, where defendant claimed as against the state title by prescription to certain swamp and overflowed land originally conveyed by the federal government to the state under swampland grants, it was held that defendant's plea of prescription was disposed of by the declaration of the state constitution that prescription shall not run against the state in any civil matter, unless otherwise provided in the constitution, or expressly by law, the court pointing out that there was no provision in the constitution or in any law allowing prescription to run against the state in any civil matter. Defendant in this case was asserting prescription against the state and not against anyone claiming title from the state.

§ 33. Lands expressly made inalienable by statute or constitution.

Lands of the state made inalienable by statute or constitutional provisions cannot be acquired by adverse possession while the state holds title to same.

Thus, in New York v Wilson & Co. (1938) 278 NY 86, 15 NE2d 408, reh den 278 NY 702, 16 NE2d 850, involving land below the high-water line of the East River, the court held that when property of the state or city is made inalienable by statute, as had been done in this case, title cannot be obtained by adverse possession, citing Hinkley v State (1922) 234 NY 309, 137 NE 599, which held that an adjacent owner could not acquire title to land under water, the Hudson River in this case, by filling it up; and Knickerbocker Ice Co. v Shultz (1889) 116 NY 382, 22 NE 564 (land between high- and low-water mark of river). The court stated that the theory upon which this rule rests had been well expressed in the following words: "The whole theory of prescription depends upon a supposed grant. No such grant can be presumed where a grant would be unlawful or contrary to law. . . . Where no express grant can be allowed, the law will not resort to the fiction of an implied grant so as to create a prescriptive right. If it would, the whole policy of the prohibitory statute might be subverted by the supineness or willful fraud of public officers, and the State deprived of most important rights."

By the express terms of a section of the constitution providing that lands of the state constituting the forest preserve shall be forever kept as wild forest lands, and shall not be leased, sold, or exchanged, or be taken by any corporation, public or private, nor the timber thereon be sold, removed, or destroyed, such lands were rendered inalienable, and title thereto could not be acquired by adverse possession as against the state, the owner of such lands. People v Douglass (1926) 217 App Div 328, 216 NYS 785.

In Galt v Waianuhea (1905) 16 Hawaii 652, after referring to a statute taking the control of crown lands out of the hands of the King and putting it into the hands of crown land commissioners, and further providing that these lands "shall be henceforth inalienable," which was done for the

purpose, among other reasons, of "maintaining the royal state and dignity," the court said that no clearer language could be used to indicate that such lands should not and could not be disposed of, and that what could not be disposed of could not be taken away by adverse possession.

Attention is called to People v Southern P. R. Co. (1915) 169 Cal 537, 147 P 274, where it was held that title to tidelands, withheld from sale by the state, cannot be acquired by adverse possession, and People v Southern P. R. Co. (1915) 169 Cal 537, 147 P 274, holding that a qualified title to tidelands withheld from sale by the state (that is, a title in fee, subject to the easements of the public) cannot be acquired by prescription.

IV. Municipalities

§ 34. Property held for public use; general rule of nonacquisition.

In the absence of legislation providing otherwise, the weight of authority is to the effect that property held by a city in trust for public use cannot be acquired by adverse possession or prescription.

Alabama.—Mobile Transp. Co. v Mobile (1900) 128 Ala 335, 30 So 645, 64 LRA 333, 86 Am St Rep 143, affd 187 US 479, 47 L ed 266, 23 S Ct 170, overruled on other grounds in Mobile Dry Docks Co. v Mobile (1906) 146 Ala 198, 40 So 205, 3 LRA NS 822, 9 Ann Cas 1229; Hughes v Tuscaloosa (1916) 197 Ala 592, 73 So 90. But see Miller v State (1863) 38 Ala 600, infra, § 52.

California.—San Francisco Bd. of Education v Martin (1891) 92 Cal 209, 28 P 799; San Francisco v Bradbury (1891) 92 Cal 414, 28 P 803; Ames v San Diego (1894) 101 Cal 390, 35 P 1005; Home for Care of Inebriates v San Francisco (1898) 119 Cal 534, 51 P 950; Cimpher v Oakland (1912) 162 Cal 87, 121 P 374; Patton v Los Angeles (1915) 169 Cal 521, 147 P 141; Los Angeles v Anderson (1929) 206 Cal 662, 275 P 789; San Diego v Cuyamaca Water Co. (1930) 209 Cal 105, 287 P 475; Martin v Stockton (1919) 39 Cal App 552, 179 P 894.

Connecticut. — Goldman v Quadrato (1955) 142 Conn 398, 114 A2d 687, 55 ALR2d 549.

Illinois.—See Brown v Trustees of Schools (1906) 224 Ill 184, 79 NE 579, 115 Am St Rep 146, 8 Ann Cas 96, infra, § 57; Black v Chicago B. & Q. R. Co. (1908) 237 Ill 500, 86 NE 1065; Savoie v Bourbonnais (1950) 339 Ill App 551, 90 NE2d 645.

Kansas.—Douglas County v Lawrence (1918) 102 Kan 656, 171 P 610.

Louisiana.—Mayor v Magnon (1815) 4 Mart 2; New Orleans v Salmen Brick & Lumber Co. (1914) 135 La 828, 66 So 237.

New Jersey. — Reutler v Ramsin (1917) 91 NJL 262, 102 A 351.

Oklahoma.—See Merritt Independent School Dist. v Jones (1952) 207 Okla 376, 249 P2d 1007, infra, § 57.

Wyoming.—Holt v Cheyenne (1914) 22 Wyo 212, 137 P 876.

In San Francisco Bd. of Education v Martin (1891) 92 Cal 209, 28 P 799, the court said: "In our opinion there is no reason for not applying the same rule to property which is dedicated or reserved to a public use, when the title is held by the municipality, as is applicable when it is held by the state. The same principles which prevent an adverse possession from ripening into a title when the title to the property belongs to the public, and is held for public use, apply in the one case as in the other. It is immaterial where the title, that is, the record title, is held, whether by the state at large, or by a county, or by some municipal department or other official body. There can be no adverse holding of such land which will deprive the public of the right thereto, or give title to the adverse claimant, or create a title by virtue of the statute of limitations. This rule is universal in its application to all property set apart or reserved for public use, and the public use for which it is appropriated is immaterial. The same principles which govern in the adverse holding of a street, a public square, a quay, a wharf, a common, apply to the adverse holding of a court-house, a jail, or

school-house. The public is not to lose its rights through the negligence of its agents, nor because it has not chosen to resist an encroachment by one of its own number, whose duty it was, as much as that of every other citizen, to protect the state in its rights."

So, while a municipal corporation may part with its private, proprietary rights through conveyances, or lose them through prescription, adverse possession, or by statute of limitation, yet the great weight of authority is that those rights, duties, and privileges which are conferred or imposed upon a municipal corporation exclusively for the public benefit are not ordinarily lost through nonuse, laches, estoppel, or adverse possession, nor are statutes of limitation applicable thereto. Douglas County v Lawrence (1918) 102 Kan 656, 171 P 610.

And in Black v Chicago B. & Q. R. Co. (1908) 237 Ill 500, 86 NE 1065, there is a statement to the effect that although the maxim of the common law, "nullum tempus occurrit regi," extends to the state in its sovereign capacity as to all governmental matters, and that no delay in resorting to the remedy will bar the right, on the other hand, the reason for the maxim fails in the case of a minor municipality holding the title of property for purely local use, and, therefore, the exemption does not extend to it. Title to the property involved in this case was in the state in its sovereign capacity during the time defendant claimed the statute of limitations was running.

Notice also Savoie v Bourbonnais (1950) 339 Ill App 551, 90 NE2d 645, where the court said that although it was recognized that municipal corporations, as contrasted with state and federal governments, may be subject to the statute of limitations to the same extent as private individuals, nevertheless they do enjoy immunity in matters involving public rights.

§ 35. Specific applications; school lands and property.

Public school property is public property, and the law of prescription is not applicable to the state of Louisiana, or any of its subdivisions, where public property is involved. New Orleans v Salmen Brick & Lumber Co. (1914) 135 La 828, 66 So 237.

So, in New Orleans v Salmen Brick & Lumber Co. (La) supra, it was held that land bequeathed to the city for educational purposes was a trust fund, hors du commerce, not liable to seizure, inalienable, and not subject to prescription. In this connection the court said: "A better reason for its not running against said property in city is the great public policy of preserving public rights and property from damage and loss through the negligence of public officers. The exception from the effects of prescriptive statutes is essential to the well-being of the government of the state. And we have held that the maxim 'Nullum tempus occurrit regi' is not restricted in its application to the state, but that it applies to municipal corporations as trustees of the rights of the public."

Similarly, in Reutler v Ramsin (1917) 91 NJL 262, 102 A 351, it was held that a grant of land for the purpose of erecting and building a schoolhouse thereon for the accommodation of the neighborhood was a grant or dedication of land for a public and not a private use, and in no way different from a grant or dedication of land in a municipality for use by the public as a park, and, the grant being for a public use, adverse possession could not be set up against the public.

And in San Francisco Bd. of Education v Martin (1891) 92 Cal 209, 28 P 799, an action for the recovery of land claimed to have been reserved as a school lot, it was held that land reserved by the city of San Francisco for public purposes when it granted all its right and claim to lands within the corporate limits to parties in the actual possession thereof on or before January 1, 1855, could not be divested by adverse possession. The court expressly disapproved the view taken in a few cases that only such public property of the city is exempt from acquisition by adverse possession as

is reserved for the entire public, like streets, squares, or highways, in which not only the people of the municipality, but those of the state at large, have an interest.

§ 36. — Rights of city in river and river lands.

In Mobile Transp. Co. v Mobile (1900) 128 Ala 335, 30 So 645, 64 LRA 333, 86 Am St Rep 143, affd 187 US 479, 47 L ed 266, 23 S Ct 170, overruled on other grounds in Mobile Dry Docks Co. v Mobile (1906) 146 Ala 198, 40 So 205, 3 LRA NS 822, 9 Ann Cas 1229, an action in ejectment by the city to recover certain real estate constituting the shore or part of Mobile River below high-water mark, the title of the city having been derived from the state of Alabama, it was held that there was no error in rejecting the defendant's offered evidence of adverse possession of the land in controversy since the grant to the city, inasmuch as there can be no limitation against a municipal corporation as to property held for the public. The words in the grant made the property in question public.

In San Diego v Cuyamaca Water Co. (1930) 209 Cal 105, 287 P 475, an action instituted by a municipal corporation to determine its title to certain rights in the waters of the San Diego River, to the extent necessary for the requirements of the city and its inhabitants, in which the city, by virtue of its incorporation and right of succession, had become the successor to and owner of certain prior preferential rights to the river with which the Peublo of San Diego, as established in the year 1834, had become invested by virtue of its formation under the laws of Spain and Mexico, the court said that it was a general rule that no invasion of the rights of property which are held by a public or municipal corporation in perpetual trust for public uses can be held sufficient to furnish the basis of a defense based solely upon prescription.

And in Holt v Cheyenne (1914) 22 Wyo 212, 137 P 876, it was held that an individual could not acquire title to the use of the waters of a creek for irrigation purposes by adverse user for a period of 24 years, as against a city which had been awarded the right to a certain number of cubic feet per second of the water of such stream for the use of its inhabitants, the court approving the rule, sanctioned by the great weight of authority, that in the absence of any express statutory provisions, municipal corporations with regard to lands held for public use act in a sovereign capacity, and title to such lands cannot be acquired as against the municipality by adverse possession. The court stated that such rule was applicable herein, for it might with equal propriety be said that the city of Cheyenne, in the matter of acquiring and holding the right to the use of water for the benefit of the whole public, acts as the agent of the state in exercising, within the provisions of its charter and the statutory law, governmental functions and powers, and that securing water sufficient not alone for its present but also for its future inhabitants was within its governmental powers.

And see also in this connection Douglas County v Lawrence (1918) 102 Kan 656, 171 P 610, in which it was held that adverse possession will not run as against a city levee.

§ 37. — Tidelands.

In Patton v Los Angeles (1915) 169 Cal 521, 147 P 141, involving tideland owned by the city in trust for the uses set forth in the act of the legislature granting said lands to the city, it was held that title to the lands could not be acquired by adverse possession.

And in Los Angeles v Anderson (1929) 206 Cal 662, 275 P 789, where the state granted, and the city (plaintiff herein) accepted, all the right, title, and interest of the state in all the tide and submerged lands within the city boundaries, in trust for certain enumerated uses and purposes, such as that of public navigation and commerce, the court applied the long-settled doctrine in this jurisdiction that property held by the state or any political subdivision in trust for public use cannot be gained by adverse

possession, and the statute of limitations does not apply to an action to recover such property from one using it for private purposes not consistent with the public use. So the contention of defendants that they had, by prescription, obtained title to portions of the controverted strip of land was held without merit.

Likewise, in Cimpher v Oakland (1912) 162 Cal 87, 121 P 374, in which plaintiff claimed title by prescription to premises known as the Lake Merritt Boat House, which was an area 75 feet square of the waters of Lake Merritt, it being admitted on the trial that the space in question was tideland situated upon a navigable estuary, and over which the ordinary tides regularly ebbed and flowed, the court held that, this being the case, the property was charged with a public trust for the purposes of navigation and fishery, and no title thereto could be obtained by any private person by prescription.

§ 38. — Fire engine lot.

In San Francisco v Bradbury (1891) 92 Cal 414, 28 P 803, an action of ejectment involving land which, it was found, had been reserved for public use as a fire engine lot, the court applied the rule that inasmuch as the reservation was for a public use, the title to the land remained in the public, irrespective of the particular municipal agency which was charged with its custody and management, and that an individual could not by mere adverse possession acquire any title to such land, or invoke the aid of the statute of limitations as a defense to its recovery.

§ 39. — Drainage or flood control project.

In Martin v Stockton (1919) 39 Cal App 552, 179 P 894, an action to quiet title to a parcel of land situated within the boundaries or exterior lines of a drain or waterway used by the defendant city to drain a large portion of its territory and to obviate the recurrent floods of winter seasons, the drain being necessary to conserve the public health and safety of a great number of the residents of the city, it appeared that the city held the land in which the drain was excavated in defeasible fee, the instrument under which it took title limiting the use of the land to drainage purposes, and it was held that plaintiff and his grantors did not, by using a portion of such premises for a period exceeding 20 years, and erecting and maintaining thereon a small building used as a paint shop, acquire any rights against the city. The court stated that in some states the doctrine was admitted that title to property devoted to a public use may be acquired by adverse possession, but that in this state no such principle prevailed, and that whenever the subject had come before the California courts for final determination it had been decided that no rights can thus be acquired in public property, or property devoted to a public use or owned by a municipality for public uses.

§ 40. — Land furnishing access to river or waterway.

In Hughes v Tuscaloosa (1916) 197 Ala 592, 73 So 90, an ejectment suit by a city against an individual, and involving a parcel of land lying between subdivided lots and the river in Tuscaloosa, part of a tract called the "River Margin," it appeared that an act of Congress vested in the corporation of the town all the right and title of the United States to certain lots in the town, said lots having already been set apart for public uses and designated in the plan of the town as "Court Square," "Market Square," "Jail Lot," "Spring," "Church," and "Burial Ground," and also vested "all of the right of the United States to the tract between the lots and the river at Tuscaloosa called the 'River Margin,' and that called the 'Pond,' and also of that called the 'Common;' on condition, however, that the corporation shall not lease or sell any portion of the last mentioned tracts, but that the same shall be appropriated to the purpose for which they were designated and set apart, as well for the benefit of the inhabitants of said town as that of those resorting to or visiting the same, and if

the same, or any part thereof, be applied to any other purpose, that it revert to the United States." The court said that by this act the title of the United States to the "River Margin" passed out of the United States and into the town of Tuscaloosa in trust for the inhabitants of the town, and that a disseisor could not, as against the public, acquire title thereto by adverse possession. The court pointed out that the grant was for a public use or purpose; that at the time of the grant the river at Tuscaloosa was the main avenue of that town's communication with the outside world, and that no doubt the public purpose to which its margin was appropriated was the purpose commonly served by public riparian rights, chiefly the right of access, and the right of the public to that use must rest upon the same principle as would its right to the use of a public street granted upon like conditions.

And in Mayor v Magnon (1815, La) 4 Mart 2, a suit by the mayor of the city of New Orleans to compel defendant to remove certain structures used in connection with his ship-repairing business, from the ground between the levee and the river, and which was public property, it was held that the premises, not being susceptible of alienation, could not be acquired by prescription.

§ 41. — Home for inebriates; public building.

In Home for Care of Inebriates v San Francisco (1898) 119 Cal 534, 51 P 950, an action by a private corporation against the city and county of San Francisco to quiet title to a lot of land of which the corporation had been in possession since 1870, it was held that where the lot in question had been, by an ordinance enacted by the city in 1868, reserved and dedicated to public use by the city (out of lands granted to it by an act of Congress) for a "Home for Inebriates," it was thereby withdrawn from commerce, and title thereto could not be acquired by prescription.

Land held by a city in trust for the general public upon dedication to the public for use as a street, park, or for a public building cannot be alienated by the city, and the title of the public thereto cannot be lost by a possession adverse to the city. Ames v San Diego (1894) 101 Cal 390, 35 P 1005.

§ 42. Property not held for public use; general rule permitting acquisition.

The general rule is that land or property of a municipality which is not held for a public use and is as alienable as land belonging to a private individual, or, in other words, is held by the city in a proprietary or business capacity, may be acquired by adverse possession or prescription, in the absence of statutory modifications or enactments to the contrary.

California. — San Francisco v Straut (1890) 84 Cal 124, 24 P 814; Ames v San Diego (1894) 101 Cal 390, 35 P 1005; Santa Cruz v Southern Pac. R. Co. (1912) 163 Cal 538, 136 P 362; Richert v San Diego (1930) 109 Cal App 548, 293 P 673.

Connecticut.—Goldman v Quadrato (1955) 142 Conn 398, 114 A2d 687, 55 ALR2d 549.

Idaho.—Robinson v Lemp (1916) 29 Idaho 661, 161 P 1024.

Illinois.—Chicago v Middlebrooke (1892) 143 Ill 265, 32 NE 457. See also Brown v Trustees of Schools (1906) 224 Ill 184, 79 NE 579, 115 Am St Rep 146, 8 Ann Cas 96, infra, § 57.

Louisiana.—New Orleans v Salmen Brick & Lumber Co. (1914) 135 La 828, 66 So 237; Louisiana Highway Com. v Raxsdale (1943, La App) 12 So2d 631.

Michigan.—See Schneider v Detroit (1904) 135 Mich 570, 98 NW 258, and Cass Farm Co. v Detroit (1905) 139 Mich 318, 102 NW 848, both infra, § 43.

Oregon.—Ebell v Baker (1931) 137 Or 427, 299 P 313.

Texas.—Laredo v De Moreno (1916, Tex Civ App) 183 SW 827; Brown v Fisher (1917, Tex Civ App) 193 SW 357, error dismd.

Thus, in Chicago v Middlebrooke (1892) 143 Ill 265, 32 NE 457, an action by an individual to remove a cloud

from his title to certain vacant lots, in which the defendant city contended that the statute of limitations requiring certain real actions to be brought within 7 years after possession taken by defendant did not apply, because the property was held for public use, it was ruled that since the lots were not used for a park, a street, or any other public purpose, and were not purchased with any special fund, or used by the city for any purpose whatever, the city held the property in the same way that an individual would hold it, subject to the same duties and liable to the same obligations; in other words, the city was subject, under the circumstances, to the limitation statute.

And in Louisiana Highway Com. v Raxsdale (1943, La App) 12 So2d 631, the court observed that the fact that a municipal corporation is a creature of and in some respects the agent of the state in the exercise of governmental functions does not elevate it to the same status as the state with respect to the running of prescription against it; and it was held that a lot owned by a municipality but which had never been dedicated to public use nor used by the public for over a half century and which had been, to all intents and purposes, abandoned for public use, took on the character of alienability and became subject to ownership by any method (including prescription) fixed by law.

Limitation statutes run against lands granted by the state to a city which have not been dedicated or used for streets or any other purpose by the city. Laredo v De Moreno (1916, Tex Civ App) 183 SW 827.

In a syllabus by the court in New Orleans v Salmen Brick & Lumber Co. (1914) 135 La 828, 66 So 237, it was stated that municipal property which, though it belongs to the corporation, is not for the common use of the inhabitants but may be employed to their advantage by the administrators of its revenues, is alienable and subject to private ownership and the laws of prescription.

So, in New Orleans v Salmen Brick & Lumber Co. (La) supra, it was held that property which was bequeathed to a municipal corporation under the condition, pronounced invalid by the court, that the property should never be sold but should be let to tenants and the rents used for public purposes, was alienable, was subject to private ownership, and could be acquired by prescription.

§ 43. —Specific applications of rule.

The rule that title may be acquired by adverse possession as to land owned by a city where it is held by the latter for other than a public use was applied in Robinson v Lemp (1916) 29 Idaho 661, 161 P 1024, with respect to lands entered by the mayor under the townsite laws of the United States.

In San Francisco v Straut (1890) 84 Cal 124, 24 P 814, an action against certain individuals by the city and county of San Francisco to recover certain land granted to the city by the state pursuant to an act granting to the city the use and occupation of beach and water lots therein described, with certain specified exceptions, for the period of 99 years, with a proviso that the city should pay into the state treasury, within 20 days after their receipt, 25 per cent of all moneys arising in any way from the sale or other disposition of the property, it was held that the title therein granted to the city could be extinguished by adverse possession, inasmuch as the right of the city during the term fixed was as absolute a title and as free from trust as that of any other private proprietor. The court said that the proviso did not create a trust in the city in favor of the state, so far as the property itself was concerned; that is to say, the estate granted was not, by force of the proviso, held in trust partly for the benefit of the state.

And in Santa Cruz v Southern Pac. R. Co. (1912) 163 Cal 538, 126 P 362, it was held that land of the city between the street and tide line, which was proprietary land not dedicated to public use, was subject to the ordinary rules concerning title by prescription. So, possession of such land by a rail-

road company for more than 30 years, under a claim of right, pursuant to an ordinance granting a wharf franchise, establishes title thereto by prescription for the term of the grant, even if it is conceded that the ordinance was invalid.

In regard to Mexican pueblo lands, such as house lots, in which title to the city has been confirmed and patent thereto issued by the United States, and which lands are the subject of alienation, the statute of limitations applies in favor of an adverse possessor, precisely the same as if such land had been acquired by the city by purchase and for purposes of sale, or for any other use not strictly municipal. Ames v San Diego (1894) 101 Cal 390, 35 P 1005. See, to the same effect, Richert v San Diego (1930) 109 Cal App 548, 293 P 673, an action by an individual against the city to quiet title to certain pueblo lands within the city limits.

Title by adverse possession can be acquired as against a city, with respect to a lot which, for more than 15 years after it obtained title thereto by judgment foreclosing a tax lien, the city never used or dedicated to any public purpose, allowing it to remain a vacant lot in which the public was given no beneficial rights to be enjoyed presently or in the future, and the city being at liberty to sell or dispose of it at pleasure. Goldman v Quadrato (1955) 142 Conn 398, 114 A 2d 687, 55 ALR2d 549, where it appeared that during such period of 15 years or more the defendant exercised various acts of ownership as to such lot, under a claim of right. There was, it was said, no decisive significance to the fact that the lot was acquired by the city in performing its governmental duty of collecting taxes, the controlling factor being the use to which the realty was put after its acquisition.

And in Schneider v Detroit (1904) 135 Mich 570, 98 NW 258, where the city had bid in and purchased a lot upon which improvement assessments due it had not been paid, title to such lot having vested in the municipality, it was held that adverse possession thereof by an individual and her predecessors in title would give a good title as against the city. The court observed that the same rule was applied in Michigan to both city and state lands, namely, that the statute of limitations runs against the state upon lands bid off to the state at a tax sale, citing in this connection Chamberlain v Ahrens (1884) 55 Mich 111, 20 NW 814, supra, § 31[a].

Also in Cass Farm Co. v Detroit (1905) 139 Mich 318, 102 NW 848, where a partnership association filed its bill of complaint against the city of Detroit to quiet title to certain premises, alleging that it claimed title by warranty deed dated March 22, 1893, and that for more than 15 years prior to the filing of the complaint, complainant and its grantor had been in open, notorious, adverse, and exclusive possession of said premises, and had paid taxes and assessments thereon, and claimed title in fee simple to the same, and that in August, 1869, the premises in question were sold to the city of Detroit for alleged default in payment of a special assessment for paving, and that the city treasurer had threatened to issue a tax title on the said property to some person to complainant unknown, the prayer of the bill being that complainant's title be quieted, and that defendant city treasurer be restrained from issuing the tax title, as threatened, the court upheld the overruling of a demurrer to the bill. The city claimed that the case was distinguishable from that of Schneider v Detroit (1904) 135 Mich 570, 98 NW 258, supra, for the reason that in the latter case it appeared that complainant had no knowledge of defendant's lien or title and that in the case at bar the bill of complaint contained no averment that such was the fact; however, the court in the case at bar held that whether the claim of defendant was known to complainant or not could make no difference, inasmuch as adverse possession, in order to be invoked as a basis of title, must necessarily be exclusive, and hostile as to all claimants, whether known or un-

known. So the cases were held to be not distinguishable. This case apparently holds that a city's tax title may be extinguished by adverse possession.

In Brown v Fisher (1917, Tex Civ App) 193 SW 357, a suit between individuals, defendant claimed title by adverse possession under the 10-year limitation statute, and plaintiff contended that for a portion of the statutory period the land belonged to a city and that title to land belonging to a city or town could not be acquired by adverse possession, it was held that under the circumstances of the case limitations did run against the city in favor of defendant, where it appeared that the land in controversy, which was wild thicket land at the time defendant entered thereon, was not in actual possession of anyone, and had no improvements of any character upon it, and was never used or ever intended to be used by the city for any public purpose whatever; thus, the city did not come within the purview of a statute providing: "The right of the state shall not be barred by any of the provisions of this chapter, nor shall any person ever acquired, by occupancy or adverse possession, any right or title to any part or portion of any road, street, sidewalk or grounds which belong to any town, city or county, or which have been donated or dedicated for public use to any such town, city or county by the owner thereof, or which had been laid out or dedicated in any manner to public use in any town, city or county in this state."

Generally as to effect, etc., of statutory provisions, see § 45, infra.

In Ebell v Baker (1931) 137 Or 427, 299 P 313, it was held that the statute of limitations runs against the city in its proprietary or business capacity, and that a city could lose its water rights by adverse possession and user by another, amounting to prescription, the court stating in this connection that to provide a water system is not governmental or legislative in character, but strictly proprietary, and a city engaged in the prosecution of such an improvement and selling water for gain is subject to the same liabilities as a private person.

§ 44. View that property, even though dedicated to public use, is subject to limitation statutes.

A few jurisdictions appear to support the view, with varying degrees of definiteness, that limitations will run against a municipal corporation whether the property in question was held for a public use or not.

In Cincinnati v First Presby. Church (1838) 8 Ohio 298, 32 Am Dec 718, where the proprietors of the city of Cincinnati at the time of originally laying out the grounds for a town, set apart the ground in controversy for a public use, designating the lots, on the map, with red ink, and indorsing a note in the words: "The town lots given for public uses are numbered and painted with red ink," and it appeared that the first settlors erected their first church on a part of these grounds, and continued to occupy them from that period, 1790, to the commencement of the present suit, and it further appeared that as early as 1807, the First Presbyterian Church was incorporated, and from that time exercised exclusive ownership over the grounds in respect to the graveyard, and other appurtenances, and it appeared that the defendants claimed the protection of the statute of limitations, but that the trial court instructed the jury that the statute did not run against the claim of a town or city to property dedicated for public uses, and the error of this instruction was one of the grounds alleged for a new trial, the appellate court, in granting a new trial and in holding that the statute of limitations ran against the city, observed that the immunity extended under the principle that the sovereign power of a state is not bound by statutes of limitation, without express words, seemed to be an attribute of sovereignty only, and predicated on the necessity of preserving against negligence or cupidity those rights which the state had acquired or retained, and that none of the reasons for the exemption applied with much

force to municipal corporations. The court remarked: "The law imposes upon them the duty of defending the interests which they are created to hold, and has conferred every power necessary to this end. When the property is their own, the statute has been always held as binding; when their land, or franchises are of public character, the public which they represent, are principally members of their own body, sufficiently vigilant to watch their own interests, and sufficiently powerful to defend them. The rights of the corporation, therefore, seem well enough protected without invading the letter of the statute. And the very loose and indefinite character of some of these rights renders the protection of the law peculiarly necessary for the security of occupants."

See also in this connection Hart v Sternberg (1943) 205 Ark 929, 171 SW2d 475, infra, § 56, and Thompson v Morris (1951) 218 Ark 542, 237 SW2d 473, 24 ALR2d 627, infra, § 57.

§ 45. Applicability, construction, and effect of statutory and constitutional provisions.

[a] Legislation exempting from operation of limitation statutes property appropriated to public use, or rendering such property inalienable.

In some instances the courts have held applicable to the facts of the particular case statutes exempting property devoted to public purposes of the city, or owned by the latter, from the operation of limitation statutes.

After stating that a public wharf on a navigable stream connected, as in the case at bar, with public streets was in a sense an extension of such streets and was in the eye of the law a public highway, that the right of the public to the common use of it was similar to the public's right to use streets, and that, in a very just sense, the rights of the city in, and its duty toward it, were akin to the city's rights and duties in respect of its public streets, the court in Hafner Mfg. Co. v St. Louis (1914) 262 Mo 621, 172 SW 28, was of the opinion that no possession by a manufacturing company of the public wharf, however long continued, could ripen into title by limitations, in view of a statute reading: "Nothing contained in any Statute of Limitation shall extend to any lands given, granted, sequestered or appropriated to any public, pious or charitable use, or to any lands belonging to this State."

And in Bach Brick Co. v Chicago (1929) 335 Ill 101, 166 NE 495, it was held that a statutory provision that every person in the actual possession of land under claim and color of title made in good faith, who should for 7 successive years continue in such possession and pay all taxes legally assessed on the land, should be held to be its legal owner to the extent and according to the purport of this paper title, was not applicable to a strip of land which the city, by condemnation proceedings, acquired for the purpose of constructing a public sewer thereon, in view of another section of the same statute expressly providing that the aforementioned section should not extend to lands held for any public purpose.

In Vernon Compress Co. v Wright (1955, Tex Civ App) 284 SW2d 168, where a city held title to certain lots under sale of such property for taxes, it was held that no one could claim title by limitation against the rights of the city, in view of a statute providing: "The right of the State shall not be barred by any of the provisions of this Title, nor shall any person ever acquire, by occupancy or adverse possession, any right or title to any part or portion of any road, street, alley, sidewalk, or grounds which belong to any town, city, or county, or which have been donated or dedicated for public use to any such town, city, or county by the owner thereof, or which had been laid out or dedicated in any manner to public use in any town, city, or county in this State."

Constitutional or statutory provisions in some jurisdictions expressly render property used for public purposes inalienable and therefore not

subject to acquisition by adverse possession.

Since the year 1873 the water front of the city of New York has been inalienable (as provided by chapter 335, § 102, Laws of 1873, now § 71 of the Greater New York Charter), and since that year no title by adverse possession may be had against the city as to any portion of its water front. Re Piers Old Nos. 8–11 (1920) 228 NY 140, 126 NE 809, affg 188 App Div 960, 176 NYS 917; Re East River Drive, Borough of Manhattan (1936) 159 Misc 741, 289 NYS 433, affd Re Klingenbeck, 259 App Div 1007, 21 NYS2d 507, app den 260 App Div 847, 23 NYS2d 203.

In New York v Wilson & Co. (1938) 278 NY 86, 15 NE2d 408, reh den 278 NY 702, 16 NE2d 850, an action in ejectment brought by the city of New York, in which the city alleged that it was the owner in fee simple and entitled to immediate possession of all the property within the plot bounded by 45th Street, 46th Street, First Avenue and East River to the extent that it lay off shore of the original high-water line of the East River, the properties specifically involved being covered by substantial brick buildings used by defendant for slaughtering and dressing meat, and by a pier bulkhead and platform along the water, it was held that the city had title to the land under water claimed by it, and that title thereto could not be acquired as against the city by adverse possession, inasmuch as such land was inalienable in view of chapter 574 of the Laws of 1871,[5] indicating the purpose of the legislature to make the property of the city constituting its water front inalienable, and in view of chapter 335 of the Laws of 1873 providing that the Commissioners of the sinking fund might sell any city property "except wharves and piers."

Title to tidelands withheld from sale by provision of the state constitution cannot be acquired by adverse possession. Oakland v Wheeler (1917) 34 Cal App 442, 168 P 23, error dismd 254 US 659, 65 L ed 462, 41 S Ct 5. So, where defendants and their predecessors in ownership of water-front property, granted to the city under an act of legislature incorporating it as such, and located on the Oakland water front of San Francisco Bay, exercised from 1852 to 1889 certain wharfing-out privileges granted by the town of Oakland, but in 1879 the land in question (land below low tide on which the wharf stood) was withdrawn from sale by the state constitution, defendants could not acquire title thereto by adverse possession. Oakland v Wheeler (Cal) supra.

See in this connection Brown v Fisher (1917, Tex Civ App) 193 SW 357, supra, § 43, where a statute exempting municipal property from the normal effect of an adverse holding was held inapplicable to land not held for public purposes.

[b] Statutes relating to collection of taxes, or to property held under tax deed.

In Eason v David (1950, Tex Civ App) 232 SW2d 427, error ref n r e, the court was of the opinion that statutes excepting suits for collection of taxes by a city from the operation of the statutes of limitation indicated an intention that the city's power to collect the tax was not to be defeated, and that in order to effectuate this intention and preserve the city's power to collect taxes, the property bought by the city at the sale under tax judgment and subsequently held by the city for resale in order to collect the taxes which this property represented must be excepted from the operation of a statute (Art 5510 of Vernon's Civ Stat), providing, in part, that "any person who has a right of action for the recovery of lands, tenements or

5. Chapter 574 of the Laws of 1871 authorizes the Department of Docks to lease the city's water front only for a period of 10 years, and specifically provides that the terms "property" and "wharf property," whenever used therein, shall be taken to mean not only all wharves, piers, docks, bulkheads, slips, and basins, but the land beneath the same, and all rights, privileges, and easements thereto.

hereditaments against another having peaceable and adverse possession thereof, cultivating, using or enjoying the same, shall institute his suit therefor within ten years next after his cause of action shall have accrued, and not afterward."

On the other hand, in Helena v Horner (1893) 58 Ark 151, 23 SW 966, an action of ejectment brought by a city for certain lots deeded to it by an individual, in which the answer pleaded 2 years' adverse possession under a tax deed executed by the commissioner of state lands conveying the lots in controversy, which lots the state had acquired by forfeiture and sale for the nonpayment of taxes, it was held that a demurrer to the answer was properly overruled, inasmuch as defendant could avail himself as against the municipality of a statute the purpose of which was to quiet title of those who held or might hold under a deed from the state of forfeited lands, after 2 years' adverse possession: in other words the defendant could avail himself of the statute bar, as against a municipal corporation.

[c] Applicability to city of statutory or constitutional provisions exempting state or "people" from limitation statute.

In Timpson v New York (1896) 5 App Div 424, 39 NYS 248, it was held that title to land under water in the Hudson River, with the rights of wharfage and cranage appurtenant thereto, could, in the absence of statutory restrictions, be acquired by adverse possession and prescription against the city of New York, in view of a section of the code expressly providing that "an action to recover real property or the possession thereof cannot be maintained by a party other than the people," unless there has been seisin within 20 years, the court pointing out that the city was certainly a "party other than the people"; thus, the conclusion of the court was that there was nothing to prevent plaintiffs from acquiring title by adverse user to the bulkhead and wharfage rights for which they sued.

In New Orleans v Salmen Brick & Lumber Co. (1914) 135 La 328, 66 So 237, it was stated in syllabi by the court that a constitutional provision that prescription shall not run against the state does not refer to municipal corporations; that by an express provision of the code prescription runs against all persons unless they are included in some exception established by law, and that the only exception established by law in favor of municipal corporations is that municipal property which is dedicated to the public use is not alienable and not subject to private ownership, and therefore cannot be acquired by prescription.

See also in this connection School Directors v Goerges (1872) 50 Mo 194, infra, § 53.

[d] Statutes expressly making limitation statute applicable to municipal corporation.

In St. Paul v Chicago, M. & St P. R. Co. (1891) 45 Minn 387, 48 NW 17, followed in St. Paul, M. & M. R. Co. v Minneapolis (1891) 45 Minn 400, 48 NW 22, an action involving land used as a public levee and as to which defendant claimed to have acquired title by adverse possession, the court held that the defense of adverse possession or the statute of limitations was available as against the city with respect to the land in question, in view of a statute providing that "the limitations prescribed in this chapter for the commencement of actions shall apply to the same actions when brought in the name of the state, or in the name of any officer, or otherwise, for the benefit of the state, in the same manner as to actions brought by citizens," and in view of a subsequent statute providing that "all the provisions of this title, as to the time of the commencement of civil actions, shall apply to municipal and all other corporations with like power and effect as the same applies to natural persons." The court pointed out that the first statute quoted would clearly cover the case of an action by a municipal corporation as an agency of the state. In this connection the court observed: "There is no

distinction suggested, in either of these statutes, between actions brought as 'sovereign' or in a governmental capacity, and those brought as 'proprietary' or such as a private person might bring for the same or a similar purpose. To hold that it was the intention to make or preserve such a distinction, so as to exclude from the operation of the statutes any actions, in whatever capacity the right involved may be claimed, would be applying a strict rule of construction, contrary to the rule that statutes of limitation, being statutes of repose, are to be liberally construed so as to effectuate the intention of the legislature. . . . The considerations of policy and justice, furnishing the reasons for limiting the times within which actions may be brought by private persons, apply with equal force to the bringing of actions by the state or a municipal corporation; with equal force when brought to assert what is denominated a 'sovereign' right, —that is, a right which the state alone, or some of its governmental agencies, can possess,—as when brought to assert a right such as a private person may possess. The legislature recognized this in passing the statutes we have quoted. Those statutes settled the question that in all actions, or proceedings in the nature of actions, by the state or municipal corporations, the limitation prescribed for similar or analogous actions by private persons shall apply."

[e] "Easement" within meaning of statute exempting such from operation of limitation statute.

In Franklin v St. Mary's Roman Catholic Church (1920) 188 Ky 161, 221 SW 503, it was held that a cemetery owned in fee simple by a city was not an "easement" within the meaning of a statute providing that the statute of limitations shall not begin to run against a town or city in respect to actions for the recovery "of any street, alley or other public easement, or any part of either, or the use thereof"; so, a Catholic church could acquire title by adverse possession to a portion of a municipal cemetery which had been set aside by the municipality as a burial ground for Catholics.

V. Counties

§ 46. Rule that property devoted to public use cannot be acquired.

Although the cases are not entirely in accord on this point, the majority either expressly hold or strongly intimate that property of a county which is devoted to public use cannot be acquired by adverse possession or prescription.

California.—Yolo County v Barney (1889) 79 Cal 375, 21 P 833, 12 Am St Rep 152; People ex rel. Harbor Comrs. v Kerber (1908) 152 Cal 731, 93 P 878, 125 Am St Rep 93; Sixth Dist. Agricultural Asso. v Wright (1908) 154 Cal 119, 97 P 144. See also San Francisco Bd. of Education v Martin (1891) 92 Cal 209, 28 P 799, supra, § 34.

Illinois. — Piatt County v Goodell (1880) 97 Ill 84; Hammond v Shepard (1900) 186 Ill 235, 57 NE 867, 78 Am St Rep 274; Gerbracht v Lake County (1927) 328 Ill 399, 160 NE 1; People ex rel. Carlstrom v Hatch (1932) 350 Ill 586, 183 NE 610.

Indiana.—Bedford v Willard (1893) 133 Ind 562, 33 NE 368, 36 Am St Rep 563, followed in Bedford v Green (1893) 133 Ind 700, 33 NE 369.

Mississippi. — Bay St. Louis v Hancock County (1902) 80 Miss 364, 32 So 54; Warren County v Lamkin (1908) 93 Miss 123, 46 So 497, 22 LRA NS 920. But see Brown v Issaquena County (1876) 54 Miss 230 [infra, § 47].

Missouri. — Dunklin County v Chouteau (1894) 120 Mo 577, 25 SW 553; Nall v Conover (1909) 223 Mo 477, 122 SW 1039; Truitt v Bender (1917, Mo) 193 SW 838; Reynolds v Ellison (1920, Mo) 225 SW 948.

Texas.—Hardin County v Nona Mills Co. (1908, Tex Civ App) 112 SW 822; Colorado County v Travis County (1915, Tex Civ App) 176 SW 845; Jackson v Nacogdoches County (1945, Tex Civ App) 188 SW2d 237.

West Virginia.—Foley v Doddridge County Ct. (1903) 54 W Va 16, 46 SE 246.

Property of a county or municipal department or other official body which is devoted to public use cannot be acquired by prescription founded upon adverse possession for the period prescribed by the statute of limitations. People ex rel. Harbor Comrs. v Kerber (1908) 152 Cal 731, 93 P 873, 125 Am St Rep 93; Sixth Dist. Agricultural Asso. v Wright (1908) 154 Cal 119, 97 P 144.

Counties, being subdivisions of the state, seeking to enforce a right in which the state sovereignty has an interest, adverse or limitation possession is not available against either the legal or equitable title to land granted to counties for educational purposes, this doctrine of exemption resting upon the theory that, in a representative government where the people do not and cannot act in a body, where their power is delegated to others and must of necessity be exercised by them, if exercised at all, no time runs against the government. Jackson v Nacogdoches County (1945, Tex Civ App) 188 SW2d 237. It was further said in this case: "There is a distinction as to the application of the law that general limitation statutes are available in actions brought by municipalities, counties and other governmental subdivisions based upon 'private' or 'proprietary' rights, and those based upon 'public' or 'governmental' rights; accordingly, in absence of specific provisions in the statutes, actions involving so-called 'private' or 'proprietary' rights, as opposed to 'public' or 'governmental' rights, municipalities and other governmental subdivisions are not exempted from the operation of general statutes of limitation; but, in actions involving the public and pertaining purely to governmental affairs, in which the political subdivision represents the public at large, or the state, in favor of sovereignty affairs, the general statutes of limitation do not operate as a bar."

§ 47. — Applicability and applications in particular situations.

In Jackson v Nacogdoches County (1945, Tex Civ App) 188 SW2d 237, an action instituted by a county for itself and for the use and benefit of the county public school system for title and possession of 187 acres of land granted by the state to the county for and in behalf of its public schools, it was held that the suit was not barred by limitation, the court saying that it was settled law in Texas that title to state lands cannot be acquired by adverse possession, nor can it be so acquired against a political subdivision of the state dedicated under the constitution to the furtherance of public rights and duties. It was pointed out that the state constitution declares that counties hold their school lands in trust for their public schools and are trustees of the state to protect the lands and funds of which they have control for the purposes of the trust, and that title to the public school lands vests in the trustees for educational purposes; hence suits to protect and recover the trust are in effect but suits for and in behalf of the public and in furtherance of the governmental policy.

Likewise, in Colorado County v Travis County (1915, Tex Civ App) 176 SW 845, a suit by a county against two other counties and various individuals, involving the location of the school lands of said counties, it was held that adverse possession would not run against the county inasmuch as such lands and the proceeds therefrom are expressly held in trust for the benefit of the public schools, the county being an agent of the state for educational purposes, and limitation statutes being inoperative against the state.

In Yolo County v Barney (1889) 79 Cal 375, 21 P 833, 12 Am St Rep 152, an action to quiet a county's title to a piece of land to which defendant claimed title by continuous adverse possession for more than 5 years before the commencement of the action, a judgment quieting plaintiff's title to the land as against defendant was affirmed on the ground that the land was dedicated to a public use and could not be subjected to the operation of the statute of limitations. It appeared that the land was purchased by the

county for the purpose of erecting thereon a county hospital, and using the land for purposes connected therewith, and it also appeared that the hospital had been established thereon for about 8 years when defendant's grantors took possession of and fenced off the portion of the land in controversy, and defendant's possession by himself, or grantors, had been since that time, for about 15 years, peaceable and continuous, although the hospital was not removed from the land until within about a year of the institution of this action. The court said that it saw no reason to declare that the dedication was incomplete because the county may have the power given by statute afterward to discontinue the use and apply the land to another public use, or to sell it in a statutory and limited way.

And in Bay St. Louis v Hancock County (1902) 80 Miss 364, 32 So 54, an action by a county against a city for possession of a room in the county courthouse, which the city was using as a city hall, in which action the city set up the 10-year statute of limitations as a bar to plaintiff's recovery, the court, in affirming a judgment in favor of plaintiff, pointed out that, antecedently to the constitution of 1890, the law was that statutes of limitation ran against counties and municipal corporations, but even then this was true only as to property they did not hold for use for public or governmental purposes.

But compare Brown v Issaquena County (1876) 54 Miss 230, an action in ejectment by the board of school directors of a county for the recovery of school land, as to which defendant claimed title through mesne conveyances from one who entered upon the land 28 years before the institution of this suit, and in which the court held that if the title was regarded as vested in the county, or in any of the officers or boards thereof, the statute of limitations would run against them; and if the title be regarded as vested in the state the action was equally barred, since more than 15 years intervened between the adoption of the provision applying the statute of limitations to the state and the bringing of this suit.

In Foley v Doddridge County Ct. (1903) 54 W Va 16, 46 SE 246, it was stated in the syllabus by the court that no title by adverse possession can be acquired in land owned by a county and used for public use for the site of a courthouse or other public buildings. The court observed that both a street and a courthouse lot are held in trust for public use, and no other purpose whatever, by a town and county court, and that they are not in such cases private property owners, the county court having legal title it is true, but solely for governmental purposes.

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Inferential support, at least, for the rule stated above (§ 46) may, it would seem, be deduced from cases set out below in which it was held that the land in question, held by the county, was subject to limitation statutes and could be acquired by adverse possession or prescription, where it was not held for public purposes.

For example, in Nall v Conover (1909) 223 Mo 477, 122 SW 1039, it was held that the statute of limitations would run against the county and that an individual could acquire title by adverse possession against a county to swamplands, the court in this connection quoting from Dunklin County v Chouteau (1894) 120 Mo 577, 25 SW 553, where it was said: "Distinction must also be made between property held for strictly public purposes, as for streets, parks, commons and the like, and property held by the corporation in its private character."

And in Piatt County v Goodell (1880) 97 Ill 84, it was held that title of swamplands belonging to a county, which were not held for public use or trust, and which the county might at pleasure sell and convey without any breach of duty, could be defeated by possession and payment of taxes under color of title made in good faith, for a period of 7 years, in the same manner as if they belonged to an individual. The court pointed out that the public

generally had no interest in the land in common with the citizens and taxpayers of the county in question, and that the right of the county to the tract of land in controversy was not of that public character as exempted it from the operation of the limitation statute. The court conceded that in all matters involving strictly public rights, municipal corporations are not subject to the limitation laws as such.

Title to lands in a county which obtained title to said lands by virtue of the Swamp Land Act of the United States of 1850, by which act the lands were ceded to Illinois, and which, by an act of the Illinois legislature, were ceded to the county, may be acquired against the county by prescription, as the statute of limitations runs against the county in favor of the party holding swamplands adversely against it. Gerbracht v Lake County (1927) 328 Ill 399, 160 NE 1.

For other cases holding that swamplands of a county are subject to adverse possession or prescription, see People ex rel. Carlstrom v Hatch (1932) 350 Ill 586, 183 NE 610; Truitt v Bender (1917, Mo) 193 SW 838; Reynolds v Ellison (1920, Mo) 225 SW 948.

In Hammond v Shepard (1900) 186 Ill 235, 57 NE 867, 78 Am St Rep 274, it was held that one could acquire title by adverse possession to an island in a lake as against a county which did not hold it for a public use, and which the county could sell, and use the proceeds for a lawful purpose.

Also, in Warren County v Lamkin (1908) 93 Miss 123, 46 So 497, 22 LRA NS 920, an action of ejectment by a county for a small portion of land included within a larger tract purchased by the county for jail purposes, but all of which was not used for such purpose, and in which case the court expressly stated that the question presented was whether a statute of limitations applies against the county, arising out of the adverse possession of land, it was held that in the absence of a constitutional or statutory provision to the contrary, the statute of limitations will run in favor of one who takes possession of a part of a parcel of land purchased by a county for jail purposes, which was not needed for such use, and was deeded to him by a void conveyance by the county authorities. The court remarked: "It is apparent on casual examination that, if between private persons, recovery in this case would be impossible. But a slice of sovereignty in the shape of a county as plaintiff erects itself here, and, while there can be no criticism of the authorities in trying to recover what may be legally public property, still courts will be disposed, if they can, to apply the same rules that the law applies as between the humblest and most pretentious private citizens. This is incumbent on us, and exceptions in favor of sovereignty in matters of property on the application of the statute of limitations must have, of course, strict construction as against the sovereignty. The doctrine, nullum tempus occurrit regi, in its enlarged scope, is the invention and one of the instruments of despotism, and has no place in free countries, if it be attempted to go beyond the point of application strictly to holdings for the public user by the people, such as streets, parks, necessary grounds for courthouses, jails, public hospitals, etc." The court stated that the fact that the county sold the lease of this property for 99 years, and conveyed it with warranty of title, ought to be of great force in compelling the conclusion that it was not dedicated to public uses, so as to avoid the statute. The court further noted that if it was assumed that the whole lot was bought for jail purposes, it did not absolutely follow that it all could be used for those purposes; that on the contrary, it was manifest that the county had all it wanted for jail purposes, and that much of it was so occupied, and the remainder, in the opinion of the court, was subject to be held adversely, so that title might be acquired by adverse possession for the proper time.

So too, in Hardin County v Nona Mills Co. (1908, Tex Civ App) 112 SW

822, a suit by a county against a private corporation to recover certain land which had been patented by the state to the county for public purposes, donated under authority of law for the purpose of a public courthouse, but which was never used for or dedicated to public purposes, it was held that defendant was entitled to recover on the 10 years' limitation statute, having been in actual, exclusive, and continuous possession and use of the premises, claiming and enjoying them for 13 years, and, besides, paying taxes all the time on the land and having improvements thereon, inasmuch as, under the circumstances, the land was surplus and private land belonging to the county, and never used for or dedicated to public purposes.

In Bedford v Willard (1893) 133 Ind 562, 33 NE 368, 36 Am St Rep 563, followed in Bedford v Green (1893) 133 Ind 700, 33 NE 369, land which was conveyed to a county by an individual was platted to streets, alleys, squares, and lots; but, giving all these full width, there remained a strip on the south side of the plat, and off the south side of the tract a strip 32 feet in width was enclosed by plaintiff and his grantor and possessed by them continuously and uninterruptedly for a period of 30 years prior to March, 1890, and prior to the commencement of the present action, which was one to recover possession of, and quiet title to, such strip. In the month mentioned a city to whom the county had conveyed the strip ordered that the latter be opened, but the court held that the statute of limitations ran as to the strip in question, against both the county and city, and that plaintiff gained title in fee by possession thereof, inasmuch as the strip was not dedicated to the use of the public, but was held by the county and city in a private capacity, subject to being sold to an individual purchaser.

§ 48. View that adverse possession or prescription will run against county.

In a few jurisdictions it has been held that the maxim "nullum tempus occurrit reipublicae" does not apply to a county.

So, in Williams v First Presby. Soc. (1853) 1 Ohio St 478, it was held that the right of a county or town to property dedicated to public uses may be lost by adverse possession. In this connection the court said that it did not, of course, speak of easements belonging to the state; but, as against counties, cities, and towns, the statute of limitations runs as it does against individuals.

And in Oxford Twp. v Columbia (1882) 38 Ohio St 87, an action by an Ohio township to recover possession of a tract of land as to which the President of the United States had issued, in 1841, a patent granting said lands "unto the trustees of the township of Oxford and the county of Butler, in the state of Ohio, for the use of schools," and which defendant and his predecessors had held by adverse possession beginning in 1852, and extending for 21 years or more, preceding the institution of this action, the court, although conceding that the maxim "nullum tempus occurrit regi" was applicable to the general and state governments, held that the maxim did not apply to the action in the case at bar by the trustees of the township to recover the lands in question. The court observed that it was aware that there were decisions to the contrary in other jurisdictions, but that it approved the rule laid down in Cincinnati v First Presby. Church (1838) 8 Ohio 298, 32 Am Dec 718, supra, § 44, to the effect that the maxim "nullum tempus occurrit regi" did not apply where a city prosecuted an action of ejectment to recover possession of lots dedicated to public use, the defendants in the action having been in adverse possession of the lots for more than 21 years.

Also, in Evans v Erie County (1870) 66 Pa 222, it was held that after the title of the commonwealth to a section of land owned by it was divested by an act of the legislature granting such land to a county, reserving 100 acres, to be selected by the county commissioners, for a poorhouse, and the selec-

tion was made by the commissioners, leaving a strip occupied by defendant at the time of the passage of the act, the statute of limitations commenced to run against the county on the date of the passage of the act if defendant was then in peaceable and adverse possession of such land, and so continued until the commencement of the action, the court stating that the statute of limitations runs against the county or other municipal corporations. In this connection the court remarked that the prerogative "nullum tempus occurrit reipublicae" was that of the sovereign alone, and that her grantees, though artificial bodies created by her, are in the same category as natural persons.

See also in this connection Thompson v Morris (1951) 218 Ark 542, 237 SW2d 473, 24 ALR2d 627, infra, § 57.

§ 49. Effect of statutes and constitutional provisions.

Statutes or constitutional provisions frequently affect the question whether title to land held by a county may be acquired by adverse possession. Results in individual cases depend, of course, on the statutory language involved and the particular facts and circumstances presented. The right to acquire a prescriptive title as against a county has sometimes been denied.

Thus, in San Augustine County v Madden (1905) 39 Tex Civ App 257, 87 SW 1056, the court applied a statute providing that all lands granted to the several counties of the state for educational purposes were of right the property of those counties respectively to which they were granted, that title thereto was vested in such counties, and that no adverse possession or limitation should ever be available against the title in any county.

And in Lamar County v Talley (1910, Tex Civ App) 127 SW 272, affd 104 Tex 295, 137 SW 1125, the court applied statutory and constitutional provisions to the effect that as to lands granted to the counties of the state for educational purposes no statute of limitation or adverse possession should operate in favor of one settling on such lands.

Also, in Caledonia County Grammar School v Kent (1912) 86 Vt 151, 84 A 26 (for earlier app see 84 Vt 1, 77 A 877), it was said that, as to lands granted by the state to trustees for the use and benefit of a county grammar school, limitations were not applicable, in view of a statute prohibiting the extension of the statute of limitations to lands given, granted, sequestered, or appropriated to a public, pious, or charitable use, the court being of the opinion that the land in question was granted for a public use.

But on the other hand, a statute of such nature has been regarded as not applying to swamplands, with the result that ownership by a county of such lands is subject to the ordinary ills and vicissitudes of private ownership of lands—among them the danger of losing such lands by adverse possession. Himmelberger-Harrison Lumber Co. v Craig (1913) 248 Mo 319, 154 SW 73.

Likewise, in Palmer v Jones (1905) 188 Mo 163, 85 SW 1113, an action of ejectment by an individual to recover possession of swampland patented to a county by the state of Missouri, and as to which plaintiff showed paper title in himself through mesne conveyances from said county, while defendant, another individual, showed actual, continuous, open, notorious, and adverse possession of the land in himself and those under whom he claimed title, for more than 10 years before the institution of the action, it was held that the statute of limitations relied upon by defendant was a bar to the action, the court thus overruling plaintiff's contention that the statute did not run against the county, and his contention that the swamplands in question came within the contemplation of a statute excepting from the operation of the act lands given, granted, and appropriated to a "public" use, the court being of the opinion that swamplands would not come within the terms of the exception, and noting that distinction must be made between property held for

strictly public purposes, as for streets, parks, commons, and the like, and property held by the corporation in its private character.

See also, in connection with the foregoing Missouri cases, School Directors v Goerges (1872) 50 Mo 194, infra, § 53.

Adverse possession of school lands was held to have been effective as against the county in Foster v Jefferson County (1947) 202 Miss 629, 32 So2d 126, 568, a suit by a county to cancel all claims of defendant to school lands in the county which his predecessor in title had, pursuant to statutory authority, purchased from the county. In view of a section of the code, in effect since 1892, applicable to school lands, and providing that "Adverse possession for a period of twenty-five years, under a claim of right or title, shall be prima facie evidence in such case that the law authorizing the disposition of the lands has been complied with and the lease or sale duly made," the court was of the opinion that two deeds of 1875 to the predecessors in title of defendants evidenced a claim of right in their behalf, and were color of title in fee simple, and their possession under that claim and color for more than 25 years after 1892, in the absence of an affirmative showing that no valid sale was in fact made, rendered unassailable the title acquired by them. The court pointed out that the undisputed facts were that defendants and their predecessors in title had been the undisputed, continuous, and actual occupants of the lands for more than 50 years after adoption of the Code in 1892, under recorded deeds in fee simple purporting to have been executed by lawful authority, and that if they could be put off the lands because a record could not be found that this or that statutory step was taken, then the 25-year statute had as well never been enacted. The court said: "To bridge such things was the purpose of the statute."

In Johnson v Llano County (1897) 15 Tex Civ App 421, 39 SW 995, a suit by a county to recover several parcels of real estate, described as certain blocks in the town of Llano, there was nothing in the statement of facts or the petition to indicate that the lots were used or intended to be used by the county for public purposes, and it was held that the statute of limitations could be interposed as a defense to the county's suit. The court, after referring to a statute providing that "The right of the State shall not be barred by any of the provisions of this chapter, nor shall any person ever acquire, by occupancy or adverse possession, any right or title to any part or portion of any road, street, sidewalk or grounds which belong to any town, city or county, or which have been donated or dedicated for public use to any such town, city or county by the owner thereof, or which have been laid out or dedicated in any manner to public use in any town, city or county in the State; provided, this law shall not apply to any alley laid out across any block or square in any city or town," pointed out that the very fact that in according full exemption to the state the legislature did not include counties in such immunity, but undertook to enumerate the instances in which they should be exempt, was conclusive proof that the purpose was to allow them a limited exemption, not equal to that accorded to the state; that it was manifest that the words "road," "street," and "sidewalk" have a definite and restricted meaning, and do not include all real estate; that, considering the entire statute, it was quite clear that the term "grounds," as used therein, was intended to apply only to such real estate as was dedicated to or intended for public use, such as sites for public buildings, parks, etc.

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See also, in connection with the above cases, Trustees of College of De Kalb v Williams (1912, Tex Civ App) 143 SW 348. This was a suit by the trustees of a college incorporated by an act of the Republic of Texas in 1839 to recover a tract of land where, although it appeared that the trustees were given power to alienate, sell,

lease, rent or otherwise dispose of lands granted them by the state for the establishment of the college, and were endowed with some of the sovereign functions of the state—they were, for example, given jurisdiction, within a half mile in either direction from the college, to suppress and abate nuisances, and levy fines upon the retainers of spirituous liquors—and although the college was designed to promote a public purpose, namely, that of furnishing educational facilities to the youth of the country, yet the state exercised no control over the action of the trustees with respect to the management or control of the finances and management of the college. It was held that this suit by the trustees was governed and controlled by a statute providing that "Any person who has the right of action for the recovery of any lands, tenements or hereditaments against another having peaceable and adverse possession thereof, cultivating, using or enjoying the same shall institute his suit therefor within ten years next after his cause of action shall have accrued, and not afterward," and that the college property in question was not within the exemption of another statute providing that all lands theretofore or thereafter granted to the several counties of the state for educational purposes were of right the property of the counties respectively to which they were granted, and title thereto was vested in said counties, "and no adverse possession or limitation shall ever be available against the title of any county." The court said that it must construe the exception here made in favor of lands theretofore granted for purposes of education as being restricted to lands donated to the several counties, and that there was at present no express exemption in favor of the particular class of titles to which that here asserted by the trustees belonged. This decision in effect overruled the contention of the college trustees that the college was a public corporation, and agency of the state, and their further contention that while the land was granted to the trustees by the state, yet it was only in trust, and still remained the property of the state, which by the express terms of the statutes was not subject to limitations. This case was followed in Trustees of College of De Kalb v Stevens (1912, Tex Civ App) 143 SW 352, error ref.

§ 50. Easements.

In Guilford v Bynum (1921) 181 NC 288, 107 SE 8, where plaintiff, an insurance company, purchased from a county, coplaintiff herein, lands popularly known as "the courthouse square," and defendants, who owned offices whose doors opened upon the square, denied the right of the county to sell the property at all, claiming an easement in the whole tract, and the present suit was to clear a cloud from the title of the insurance company, it was held that the insurance company held an absolute fee simple title, unencumbered by any easement; in other words, defendants had no easement to have the entire square retained by the county.

In Wilson v Gloucester County (1914) 83 NJ Eq 545, 90 A 1021, it was held that a contribution of land by the county board of chosen freeholders for the erection of a statue commemorating a battle fought during the Revolutionary War was more than a mere permission or license; it was a cession by the county to the state of the use of the land, by which the state acquired an easement, to endure as long as the land should be used for the purpose to which it was dedicated.

VI. Towns or townships

§ 51. View that property devoted to public use cannot be acquired.

Some cases adhere to the view that land which a town holds in a governmental capacity, or which it holds in trust for the use of the public, cannot be acquired by adverse possession or prescription.

For example, the court in Refugio v Heard (1936, Tex Civ App) 95 SW2d 1008, revd on other grounds 129 Tex 349, 103 SW2d 728, pointed out that on the assumption that the sovereign

legally passed the title to the riverbed to the town under the Mexican rule, the town so owned and held title thereto for the public, in trust, and it could not by simple sale of adjoining lands barter away the rights of the public therein, any more than it could sell the public streets, plazas, or the town hall, without fully complying with all the laws enacted for the protection of the public in such matters; furthermore, as to such public property so held in trust, no person could acquire an interest in or claim to it, against the town, by or through any of the several statutes of limitation.

And it has been held that tidelands which a town holds in a governmental capacity may not be alienated and hence may not be the subject of acquisition by adverse possession. Gunn v Bergquist (1951) 201 Misc 992, 108 NYS2d 644.

In Commonwealth v Viall (1861) 84 Mass (2 Allen) 512, it was held that no adverse rights could be established by prescription to land that had been dedicated to a town as a burial ground, although defendant and his ancestors may have used that portion of the land on which bodies were not interred, such uses having consisted of cutting trees therefrom or using certain parts of the land for pasturage and cultivation; while no objection had been made in the past to such uses, they were to be regarded as permissive, and not inconsistent with the degree of control which the public desired, or its officers and representatives chose to exercise.

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In some cases, however, a distinction has been made between public rights and uses in which the general public has an interest in common with the people of a town, on the one hand, and rights or uses which the inhabitants of a local district enjoy exclusively, on the other.

See, in connection with the above statement, Savoie v Bourbonnais (1950) 339 Ill App 551, 90 NE2d 645, where the apparent purpose of the construction and maintenance of a ditch by highway commissioners of a town was to drain a public highway to keep it open for traffic, although it incidentally protected plaintiff's land from overflowing, and in which the court denied plaintiff's contention that, as the water had been diverted by the ditch for over 40 years from his land, he acquired a prescriptive right against the town to compel it to continue the repair and maintenance of the ditch, the court being of the opinion that in view of the purpose of construction of the ditch as above stated, the use would appear to be one from which the public at large benefited, and in which it had an interest in common with the people of the town; therefore, the town could properly claim immunity from the operation of the statute of limitations, and from any prescriptive rights and correlative duties asserted by plaintiff. Further along this line, the court said that courts have defined the mentioned distinction, and hold that public rights or uses are those in which the public has an interest in common with the people of such municipality, whereas private rights or uses are those which the inhabitants of a local district enjoy exclusively, and the public has no interest therein.

See also Brown v Trustees of Schools (1906) 224 Ill 184, 79 NE 579, 115 Am St Rep 146, 8 Ann Cas 96, infra, § 57.

And in Mowry v Providence (1871) 10 RI 52, it was held that where the dedication of land for a burial ground was for the benefit of the people of a town, and not of the general public or the people of the whole state, the state had no interest in the use thereof, as in the case of highways, and a title to it could be acquired by adverse possession. The court concluded that this was a dedication or gift to a charitable use, not for the whole public, but for a limited portion of the public, and that the doctrine of adverse possession would apply to it.

§ 52. View that adverse possession or prescription will run against town.

The maxim, "nullum tempus," etc., applies only to the state at large, and

not to the political subdivisions thereof, hence, a statute limiting the time for bringing actions for the recovery of lands runs against municipal corporations and other authorities established to manage the affairs of the public subdivisions of the state. Miller v State (1863) 38 Ala 600.

In the Miller Case (Ala) supra, which was an action brought in the name of the state to recover a sixteenth section of land which had been granted to the township pursuant to an act of Congress granting the sixteenth section in every township to the inhabitants thereof for the use of schools, and in which defendant claimed adverse possession for the statutory period, the court observed that although the legal title to the land was in the state, in trust for the inhabitants of the respective townships in which the land was situated, and although the state was a party to the suit, it had no real interest in the litigation, for, if there was a right of recovery, the property sued for belonged, not to the state, but to the township. The inhabitants of the town were incorporated, and there was provision for the election of school trustees, who were entrusted with the management of the sixteenth section and authorized to bring suits affecting the interests of the township. In point of fact, the court said, the suit herein was substantially between the township and the defendant, and, in the opinion of the court, the rule that the statute of limitations does not run against the state had no application to a case like this one, where the state, although a nominal party on the record, had no real interest in the litigation, but its name was used as a means of enforcing the rights of a third person, who alone would enjoy the benefits of a recovery.

§ 53. Effect of statutes.

The legislature has authority to make a statute prescribing the time within which suits must be brought for the recovery of real or personal property applicable to suits by the state or a township for the recovery of sixteenth section (school) lands. Wyatt v Tisdale (1893) 97 Ala 594, 12 So 233. The statute applied in this case provided that the limitation period for actions at the suit of the state against a citizen for the recovery of real property, or actions by or for the use of any township for the recovery of any sixteenth section or other school lands belonging to the township, should be 20 years.

And in Alabama v Schmidt (1914) 232 US 168, 58 L ed 555, 34 S Ct 301, affg 180 Ala 374, 61 So 293, it was held that title of the state of Alabama to the sixteenth section school lands given to it by a federal statute providing that section 16 in every township should be granted to the inhabitants of such township for the use of schools might be extinguished by adverse possession for the length of time prescribed by the state statute of limitations, the court observing that the state had authority to subject the land in question to the ordinary incidents of other titles in the state.

In Phinney v Gardner (1921) 121 Me 44, 115 A 523, it was pointed out that for a period of 38 years the state of Maine, and therefore a political subdivision thereof, could, by statute, be disseised of its public lands by 20 years' adverse possession; such a statute, while in effect, limited the effect of the common-law rule, "nullum tempus occurrit regi." Adverse possession was claimed in this case as against land conveyed to a town for a cemetery, but the court held that the necessary elements that ripen into title by adverse possession had not been proved.

A question as to the retroactive operation of a statute exempting land appropriated to public purposes was involved in School Directors v Goerges (1872) 50 Mo 194, in which it was held that notwithstanding § 7 of the Act of 1865 declaring that "nothing contained in any statute of limitation shall extend to any lands given, granted, sequestered, or appropriated to any public, pious, or charitable use, or to any lands belonging to this State," it was apparent that the legislature did not intend to stop the running of the statute in cases where it had already com-

menced to run, in view of § 32 of the same law providing that "the provisions of this chapter (191) shall not apply to any actions commenced nor to any cases where the right of action or of entry shall have accrued before the time when this chapter takes effect, but the same shall remain subject to the laws then in force."

The question whether a statute exempting state and federal sovereignties from the operation of limitation statutes applied to minor political subdivisions of the state was involved in School Directors v Goerges (1872) 50 Mo 194, in which it was held that adverse, open, and hostile possession for more than 10 years before the commencement of the suit was a defense to an action in ejectment by school directors of a township who claimed title under acts of Congress whereby the lot in controversy was set apart and donated for school purposes, the court being of the opinion that the maxim "nullum tempus occurrit regi," which was applicable to sovereignties, state and federal, did not apply to any of the subdivisions of the state, such as counties, cities, or other municipal corporations, or to any corporations, private or public, and that unless such corporations were excepted from the statute of limitations, they were comprehended within it under the general term "persons."

VII. Minor political units

§ 54. Irrigation districts.

In Fresno Irrig. Dist. v Smith (1943) 58 Cal App2d 48, 136 P2d 382, the court approved the rule, in a case involving an irrigation district, that where land held by the state or any of its subdivisions has been actually reserved for or dedicated to some specific public use, there can be no adverse possession thereof which can give title to an adverse claimant.

However, in Fresno Irrig. Dist. v Smith (Cal) supra, where the strip of land in question lay some miles outside an irrigation district, and was not specifically mentioned in a deed to the irrigation district, but was claimed by the district under an omnibus provision in the deed, and it was never actually reserved for or dedicated to any public use, and the irrigation district, assuming that it had title to the strip in question, could have sold it at any time, it was held that an individual could acquire title to it by adverse possession.

And in Big Rock Mut. Water Co. v Valyermo Ranch Co. (1926) 78 Cal App 266, 248 P 264, the court approved the view that where public lands have been devoted to a public use, persons cannot obtain title thereto by prescription founded on adverse occupancy, but held it inapplicable to an irrigation district after the latter had ceased to avail itself of its right of usufruct in the waters of the creek in question.

A particular statutory provision was involved in Anderson-Cottonwood Irrig. Dist. v Zinzer (1942) 51 Cal App 2d 587, 125 P2d 82, in which it was held that even if the possession of a designated person had been adverse he could not have acquired title by prescription against an irrigation district, because in 1935, before the 5-year period had elapsed, a statute was enacted which prevented the acquiring of such a title as against an irrigation district and other public agencies.

§ 55. Levee districts.

In Tensas Basin Levee Dist. v Earle (1939) 189 La 565, 125 So 619, an action to recover lands brought by the levee district commissioners against those who, together with their predecessors in title, had held quiet, peaceful, undisturbed actual adverse possession of the land in good faith for more than 10 years prior to the institution of the suit, it was held that the plea of prescription should prevail, inasmuch as the levee district was a separate entity from the state, created, it is true, to accomplish certain public purposes, but nevertheless distinct from it, and vested with the power of alienation and with the right to sue and be sued.

And in Hass v Board of Comrs. (1944) 206 La 378, 19 So2d 173, the contention that acquisitive prescrip-

tion did not run against a levee district, because it was an agency of the state performing public service, was denied, the court holding that prescription did run against a levee board as a separate entity of the state, even though it was an agency of the state performing public service.

§ 56. Drainage districts.

In Hart v Sternberg (1943) 205 Ark 929, 171 SW2d 475, it was held that one may acquire title by adverse possession against a governmental agency, such as a drainage district; in other words, the 7-year statute of limitations under which title is acquired by adverse possession operates during the period such governmental agency has title to the land in question, as well, of course, as the period it is held by a grantee of such agency. The court, in this connection, approved the view that municipal corporations are bound, the same as individuals, by the statute of limitations, unless the statute expressly provides otherwise, and that the maxim, "nullum tempus occurrit regi," applies only to the sovereign itself, and not to public corporations or other such governmental agencies to whom powers are delegated.

§ 57. School districts.

Putting aside for the moment the effect of statutory or constitutional provisions pertaining to the applicability of particular limitation statutes to suits by school districts for the recovery of its lands or property, there is a divergence of opinion on the general question whether lands of a school district may be acquired by adverse possession or prescription.

In a Pennsylvania case it was held that school districts of Pennsylvania performing the constitutional duty of administering the system of public schools, holding their property for this purpose only, and prohibited from diverting the same to any other uses, are agencies of the commonwealth, and, since it is well-established law that title cannot be acquired or established against the commonwealth by adverse possession, title cannot be so acquired against an agency of the commonwealth such as a school district. Warren Borough School Dist. v Peck (1940) 39 Pa D & C 689.

And in a California case it was held that land set aside for public school purposes by a town school district cannot be acquired by adverse possession. Howard v Oroville School Dist. (1913) 22 Cal App 544, 135 P 689.

Again, in an Oklahoma case it was stated that ordinarily limitations will not run against the state or its subdivisions, unless they are expressly included as being within the operation of the statute. Merritt Independent School Dist. v Jones (1952) 207 Okla 376, 249 P2d 1007. The court remarked that in Oklahoma the statute of limitations is not operative against the state or its subdivisions where public rights are involved, the determining factor being whether the right affected is a private right or a public right.

So, in Merritt Independent School Dist. v Jones (Okla) supra, a quiet title action in which plaintiff sued a school district and its successors, alleging abandonment of a school site and asserting a prescriptive title thereto by adverse possession, where it appeared that the school building was removed from the site many years prior to the bringing of the action, and that for more than 25 years no school district claimed or possessed the land, or had any improvements thereon, and that plaintiff and his predecessors in title had been in continuous, quiet, peaceable, open, and notorious possession of said land for more than 20 years, claiming the title thereto adversely to defendants, the court reversed a judgment for plaintiff, and instructed that judgment be entered against plaintiff, holding that land owned by a school district is held as a public trust and the doctrine of adverse possession did not apply to school property, and that a statute providing that "occupancy for the period prescribed by civil procedure or any law of this State as sufficient to bar an action for recovery of the property, confers a title thereto, denominated a title by prescription, which is sufficient

against all," could not be invoked to acquire school property. The court remarked in connection with the above decision that land owned by a school district could only be disposed of in the manner provided by statute.

Title by adverse possession cannot be acquired to school property, for the reason that the statute of limitations does not run against the school district and not because it is impossible to hold possession against the school sufficiently adverse to create an action for possession. Grand Lodge of Oklahoma v Webb (1956, Okla) 306 P2d 340. The court said: "This was pointed out in the Merritt Case, 207 Okl. 376, 249 P. 2d 1007, when we noted that title by adverse possession could be acquired against all 'except those excepted from the operation of the statute of limitations.' There is no such period of limitation insofar as the school district is concerned."

A contrary conclusion was reached, however, in Thompson v Morris (1951) 218 Ark 542, 237 SW2d 473, 24 ALR2d 627, where the contention made was that title to land owned by a school district cannot be acquired by adverse possession, and in which the court stated that this was perhaps the majority rule elsewhere, but that in Arkansas it was well settled that the statute of limitations runs against a city, county, or school district, in the absence of a statute to the contrary, so that title to its land may be acquired by adverse possession.

And in Illinois it has been held that adverse possession operates as against a school district for the reason that only local rights are concerned, rather than governmental affairs affecting the general public.

For example, in Brown v Trustees of Schools (1906) 224 Ill 184, 79 NE 579, 115 Am St Rep 146, 8 Ann Cas 96, an action of ejectment brought by school trustees against an individual with respect to part of a schoolhouse lot to which plaintiffs held the legal title, for the use of a school district in the county, and as to which defendant claimed title by adverse possession for more than 20 years, the court held that the 20-year statute of limitations was a good defense, inasmuch as the people of the state in general had no interest, in common with the inhabitants of a school district, in the schoolhouse site or the proceeds of it. The court pointed out that the use of and right to the land was confined to the particular local district; that the trustees of the same are invested by statute with title, care, and custody of all schools and schoolhouse sites, although the supervision and control of such schools and schoolhouse sites was vested in the directors of the particular district; and that the trustees are required by statute to sell and convey any schoolhouse site which has become unnecessary, unsuitable, or inadequate for a school, pursuant to a petition of a majority of the voters of the district, and pay over the proceeds to the treasurer for the benefit of the school district. The court said that the rule that statutes of limitation do not run against the state also extends to minor municipalities created by it as local governmental agencies, in respect to governmental affairs affecting the general public, and that the exemption extends to counties, cities, towns, and minor municipalities in all matters respecting strictly public rights as distinguished from private and local rights, but that as to matters involving private rights they are subject to statutes of limitation to the same extent as individuals. Further along this line, the court said: "There are numerous cases where it has been held that municipalities or minor political subdivisions of the state are not subject to limitation laws in respect to streets and public highways . . . , but streets and highways are not for the use of the inhabitants of any municipality or locality alone, but for the free and unobstructed use of all the people in the state. Such rights are clearly distinguishable from the rights or interests of the inhabitants of a locality in property acquired for a mere local use, such as city offices, a library site, or the use of a fire department. Such property is held and used for strictly local purposes. In Greenwood v Town of La Salle [137 Ill. 225, 26 N. E.

1089], where it was held that an action by the town to recover taxes was not barred by any statute of limitation, the taxes were levied for purposes in which the public generally are directly interested, such as repairing bridges, roads, or causeways, in which the public at large are as much interested as the people of the township. In the case of Trustees of Commons v McClure, 167 Ill 23, 47 NE 72, it was held that the statute of limitations did not run against the state itself in respect to the commons held in trust for a portion of the general public, where there was no power, except in the state, to authorize a diversion of the lands to any use different from that provided for in the grant, but it was said that the court did not wish to be understood as holding that, if the inhabitants of the village of Kaskaskia had been incorporated and endowed by the state with full authority to divide, divert, and convey the commons, or any part thereof, in fee, the statute of limitations would not run against them as in other cases. It was there held that the state could not, by mere lapse of time, be barred from the exercise of its sovereign power in respect to the alienation of the lands, although the trust was for the benefit of a portion, only, of the general public, but the court declined to hold that a municipality would be exempt under the same circumstances. That decision was based on the prerogative of the state as a sovereign."

The court in Brown v Trustees of Schools (Ill) supra, observed that, although in one sense, all property held by a municipal corporation is held for public use, and the public at large, or some portion of the public, have rights or interests in such property, the public right and public use must be in the people of the state at large, and not in the inhabitants of a particular district, in order to successfully invoke the rule that statutes of limitation do not run against minor municipalities created by the state as local governmental agencies, in respect to governmental affairs affecting the general public. The court further noted that the people of the state in general have no interest, in common with the inhabitants of a school district, in the schoolhouse site or the proceeds of it, the use and right being confined to the particular local district.

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In some cases the question whether adverse or prescriptive rights can be acquired as against a school district has been controlled by particular constitutional provisions or statutes.

For example, in Texas Co. v Davis (1936, Tex Civ App) 93 SW2d 180, error ref, it was held that the exemption from adverse possession and occupancy set out in a statute providing that the rights of the state should not be barred by limitations, and that no person should acquire, by occupancy or adverse possession, any right or title to a part or portion of any street, road, sidewalk, or grounds belonging to "any town, city or county," or which were donated or dedicated for public use to any such "town, city or county" by the owner thereof, or which were laid out or dedicated in any manner to public use in any "town, city or county in this state," was restricted in application to counties, cities, and towns, and was unavailable to independent school districts. The court stated that it was true that the act creating the independent school district in question vested it with all the rights, powers, privileges, and duties of a town or village incorporated under the general laws of the state "for free school purposes only," but observed that the act did not make of the district a town or city, and concluded that such powers, rights, privileges, etc., were given to it for the purpose, alone, of conducting and operating the public free schools in that particular locality. And it was held that limitations would run against such a district, barring an action for the recovery of real estate, in view of a statutory provision that "every suit to recover real estate as against a person having peaceable and adverse possession thereof, cultivating, using or enjoying the same, and paying taxes thereon, if any, and claiming under a deed or deeds duly registered, shall be

instituted within five years next after cause of action shall have accrued, and not afterward," and notwithstanding a provision of the Constitution of Texas that "all lands heretofore, or hereafter granted to the several counties of this State for educational purposes, are of right the property of said counties respectively, to which they were granted, and title thereto is vested in said counties, and no adverse possession or limitation shall ever be available against the title of any county," the court being of the opinion that this constitutional provision had reference to lands donated to the several counties by the "state of Texas."

And in Pioneer Invest. & T. Co. v Board of Education (1909) 35 Utah 1, 99 P 150, 136 Am St Rep 1016, the court, after conceding that as a general rule adverse or prescriptive rights cannot be acquired as against the sovereign, and that the ordinary statutes of limitation, unless they contain some express provision to that effect, are held not to apply as against the state, observed that it was further held by some courts that where they do not apply against the sovereign they do not apply as against governmental agencies, in so far as such statutes are attempted to be invoked in matters pertaining to governmental duties or affairs. And the court further stated that other courts held that statutes of limitation do apply against governmental agencies such as cities, towns, counties, and other public corporations, although such statutes may not apply as against the sovereign state itself. But, the court said, it was not necessary either to review the authorities, or to determine which among the various rules adopted by other courts was the most reasonable, since the whole matter was regulated in Utah by statute.

So, in Pioneer Invest. & T. Co. v Board of Education (Utah) supra, where a public corporation asserted that the doctrine of adverse possession had no application, since the property in question was held by such corporation for a public use, namely for school or educational purposes, the court denied such contention, and held that limitation statutes could be invoked, inasmuch as the property had, for 10 or 15 years immediately preceding the transactions involved in this case, not been used for public school purposes, but held merely for sale when an opportunity to sell occurred, and the school formerly conducted there had been abandoned because in the opinion of the public corporation in question it was no longer suitable for school purposes, and was held for sale as business property. The court referred in this connection to § 2856, Comp Laws, 1907, which provided that the state is barred from bringing an action for the recovery of real property claimed by it unless such action is commenced within 7 years, and § 2884, which provides that the limitations which apply to actions generally also apply against the claims of the state, and to § 2866x, which provides that "no person shall be allowed to acquire any right or title in or to any lands held by any town or city, or the corporate authorities thereof, designated for public use as streets, lanes, avenues, alleys, parks, public squares, or for other purposes, by adverse possession thereof for any length of time whatsoever." After noting that the legislature apparently made an exception in favor of towns and cities, the court said, however, that the phrase "or for other purposes" as used in § 2866x, must, under familiar rules of construction, be limited to things ejusdem generis with the property specially named, that is, of the same class or kind, and that even as to cities and towns the exception applied only to property devoted to a special public use. And the court said that even if it should assume that the public corporation in question held title to property exclusively devoted to public school purposes in a governmental capacity, yet, in view of the facts in this case, the property in question could not be held to come within the class of such property, because it was not so held. The court said that in such circumstances it would seem that if the property had been owned by a city the statute of limitations would apply, because the character of the

property was not of the class excepted by the section above quoted; if therefore the statute of limitations would apply as against the town and city, it must necessarily follow that it also applied as against appellant as a public corporation.

R. P. Davis.

+ Consult ALR2d SUPPLEMENT SERVICE for subsequent cases +

PAT CAFFEE et al., Appts.,

v

J. D. THOMPSON et al.

Alabama Supreme Court — June 16, 1955
262 Ala 684, 81 So2d 358, 55 ALR2d 638

SUMMARY

In the instant suit in equity involving the descent of realty sought to be sold for division among the joint owners, it appeared that the intestate was survived, as his next of kin, by aunts and uncles on both his father's and his mother's side; and that the land in question had been inherited by the intestate from his father.

Upon an appeal by the paternal aunts and uncles, a decree of the Circuit Court, Pike County, for equal distribution among all the aunts and uncles was affirmed by the Supreme Court of Alabama, which, in an opinion by Goodwyn, J., held that the statute of descent showed no intention that an intestate's ancestral estate should descend only to those of the blood of the ancestor.

SUBJECT OF ANNOTATION

Beginning on page 643

Descent and distribution to and among uncles and aunts

HEADNOTES

Classified to ALR Digests

Descent and Distribution § 12 — aunts and uncles — effect of source of title.

1. Land of one who inherited it from his father and who is survived upon his death intestate, as his next of kin, by aunts and uncles on both his father's and mother's side, descends to such aunts and uncles without exclusion of those on the mother's side.

[Annotated]

Descent and Distribution § 12 — aunts and uncles — effect of source of title.

2. A statute of descent which, with respect to property which came to the intestate by descent, devise, or gift from his ancestor, makes a distinction "between the whole and the half blood in the same degree," so as to exclude from inheritance those of the same degree not of the blood of the ancestor, applies only where the rights of an intestate's kindred of the half blood are involved, and does not apply to exclude maternal aunts and uncles, to the benefit of paternal aunts and uncles, merely because the intestate had inherited the land from his father.

[Annotated]

Descent and Distribution § 9 — aunts and uncles.

3. Maternal and paternal aunts and uncles of an intestate who are his