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Dear Mr. Gonski:

It is my pleasure to enclose a reprint of your article, "Disrupting More Than a Half Century of Accepted Law," which was published in the June real estate supplement to the Law Journal.

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Sincerely yours,



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Real Estate

Disrupting More Than a Half Century of Accepted Law

Supreme Court rejects previously accepted 20-year statute of limitations for adverse possession

By Dennis M. Gonski

On Feb. 27, 2001, the New Jersey Supreme Court decided *J&M Land Co. v. First Union Nat'l Bank*, 166 N.J. 493, bringing reconciliation to the four separate statutes pertaining to the acquisition of title by adverse possession: N.J.S.A. 2A:14-6 — 20 years, N.J.S.A. 2A:14-7 — 20 years, N.J.S.A. 2A:14-30 — 30 years and N.J.S.A. 2A:14-31 — 60 years.

The Court's decision in *J&M* rejects what was previously accepted as a 20-year statute of limitations and establishes a 30-year/60-year rule, relying on N.J.S.A. 2A:35-1 (jurisdiction in real property possessing actions), enacted more than 50 years ago, as having superceded and rendered obsolete the provisions of N.J.S.A. 2A:14-6 and N.J.S.A. 2A-7:

We hold, therefore, that because N.J.S.A. 2A:35-1 contains no specified time in

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which proceedings must be instituted thereunder, its practical effect is to supercede those provisions in N.J.S.A. 2A:14-6 and -7 that create repose for common-law ejectment actions after twenty years. If we have misperceived the Legislature's intended scope of N.J.S.A. 2A:35-1, or any other statute we have interpreted in this opinion, the Legislature is of course free to correct our interpretation.

Hence, for more than 50 years bench and bar alike have seemingly placed their reliance on the wrong law.

Adverse Possession

To real estate lawyers and other students of the law, "adverse possession" is a well-known legal concept, defined by decades of case law and applied by rote. It is one of the law's great legal fictions. By its authority, the fee title to a corporeal hereditament (a tangible item of property, such as land, a building or a fixture) is deemed to pass with the lapse of time to the beneficial user of the property, without benefit of consideration.

The companion doctrine known as "prescription" allows the acquisition of

an incorporeal hereditament (an intangible right in land, such as an easement) under the identical circumstances giving rise to adverse possession. See *Plaza v. Flak*, 7 N.J. 215 (1951).

The law of adverse possession is an entirely statutory remedy; the notion of "prescription," has developed in the courts, aided in most part by strict analogy to adverse possession. See *Predham v. Holfester*, 32 N.J. Super. 419 (App. Div. 1954).

Notwithstanding that the doctrine of prescription and the doctrine of adverse possession are truly separate and distinct, they have nevertheless been accepted by many courts as interchangeable. See *Baker v. Normanoch Association, Inc.*, 25 N.J. 407 (1957), and *Spiegle v. Borough of Beach Haven*, 116 N.J. Super. 148 (App. Div. 1971).

The mixing and matching of these two concepts has been approved and is indeed highlighted in the Supreme Court's *J&M* discussion, since that case arose as a declaratory judgment action seeking a prescriptive easement — but the Court's decision speaks entirely in terms of adverse possession. By failing to make any distinction between the legal elements of adverse possession and prescription in such an intense case as *J&M*, the Supreme Court has put an end to future debate on this issue.

Historical Background

In his lengthy opinion in *J&M*, Justice James Coleman Jr. explained the historical development of adverse possession. The English common law did not recognize the transmission of land title by the lapse of any period of time.

The possession of one's land by another — no matter how long in duration — was at common law, tortious conduct remediable by ejectment in favor of the true land owner — no matter how long the land had been abandoned and no matter how long the land was used by one other than the true owner. The common-law rule, as expressed in *Edward Altham's Case*, 8 Coke Rep. 147, 77 Eng. Reprint 698, was simple and strict: "For true it is that neither fraud nor might can make a title where there wanteth right."

For obvious reasons, such a rule was most popular with the landed gentry who in turn courted the favor of the Crown. Ownership of land, once established, was ensured more or less, in perpetuity.

With the growth of the English population, however, there also came the call for social change. Societal pressure was brought upon the absentee ownership of land that was available for more productive and bountiful uses required by a growing population.

The early rules of "blind" perpetual ownership of land gave way to the need for a more practical rule, rewarding those making productive use of land, and punishing those who did not.

One of the first laws enacted by the English Crown to rebuff the notion of perpetual ownership of land was a statute of limitation intended to settle real estate claims based on 60 years of continuous possession (32 Henry VIII, Ch. 2). This 60-year period was eventually reduced to a 20-year period (21, Jas I, ch. 16), which in turn: "forbade entry on land against whom it had been adversely held for twenty years or more."

By the time the American Revolutionaries were stirring, the English Court was already opining on the virtues of physical possession as opposed to absentee ownership. One of the more famous observations in this regard was that made by Lord Mansfield in *Corporation of Kingston upon Hull v. Horner*, Lofft., 576 (1774): "Possession is very strong; rather more than nine points of the law."

Soon after American independence, and the creation of its statehood, New Jersey enacted two separate statutes, each directed at the legal notion of

adverse possession. Sections 1 and 2 of the Act of June 5, 1787, fixed 60- and 30-year periods. Then in 1799, the Legislature enacted two more statutes, Sections 9 and 10 of the Act of February 7, 1799, establishing a 20-year limitation. The descendants of these original statutes may now be found in today's statutes for action seeking to retake possession of real property (i.e., ejectment).

Hence, the statutory development of adverse possession, in derogation of the common law, can be seamlessly traceable from early English law to the current New Jersey statutory scheme.

Statutes Considered in *J&M*

The most recent statutes that pertain to adverse possession are N.J.S.A. 2A:14-6, N.J.S.A. 2A:14-7, N.J.S.A. 2A:14-30 and N.J.S.A. 2A:14-31 (and, by implication, the "tolling" provision of N.J.S.A. 2A:14-21).

The Court in *J&M* clearly recognized the conflict in the various cases that seek to justify their application of 20-year, 30-year and 60-year statutes, stating "Our decisional law has created tension between N.J.S.A. 2A:14-6 and -7 on the one hand, and N.J.S.A. 2A:14-30 and -31 on the other hand."

The two statutes previously recognized by most practitioners (including the author's) as creating a 20-year statute of limitations in "adverse possession" actions, are:

2A:14-6. 20 YEARS; RIGHT OF ENTRY INTO REAL ESTATE

Every person having any right or title of entry into real estate shall make such entry within 20 years next after the accrual of such right or title of entry, or be barred therefrom thereafter; and

2A:14-7. 20 YEARS, REAL ACTIONS

Every action at law for real estate shall be commenced within 20 years next after the right or title thereto, or cause of such action shall have accrued.

These two statutes collectively place a limit on the right of a true owner to sue to reclaim the land or to seek an ejectment (an action at law) after 20 years of adverse possession. This 20-

year period is tolled by statute as to anyone who is either "insane" or under 21 years of age at the time "such cause of action or right or title" shall accrue. See N.J.S.A. 2A:14-21 and 13 Lieberman, *Abstracts & Titles*, §132.

N.J.S.A. 2A:14-7 extinguishes a cause of action, and is clearly a "statute of limitations." It does not address the status of the landowner's title.

N.J.S.A. 2A:14-6 is likewise framed as a limitation. By its terms the true owner must make entry into real estate within 20 years. Of course, the notion of what constitutes entry is circumscribed with the implication that entry must be accomplished by lawful means — meaning proper use of judicial process (i.e., file a lawsuit). This then also makes N.J.S.A. 2A:14-6 a statute of limitations.

In theory, the 20-year period, under either statute, is available only as a defense and not as a cause of action because a statute of limitations acts as a bar to a remedy. It does not, by itself, extinguish the title of the true owner. This distinction between a bar to the claim and the failure to extinguish the underlying right is meaningful because a statute of limitations can be waived, permitting the record title rights to continue to survive.

The trend of much case law has been for many courts to interpret these procedural statutes of limitations to state that possession, adverse for 20 years, is sufficient to pass title by adverse possession — although a few courts have instead insisted on application of a stricter 30/60-year rule. As expressed in *J&M*, "Generally, the past trend in the cases has been to state that title vests after twenty years of adverse possession. Some cases have faithfully applied the thirty/sixty-year adverse possession statutes or at least indicated that title would not vest until the thirty/sixty-year time limit had been met."

N.J.S.A. 2A:14-30 provides for the actual passage of "good title" based on adverse possession, after either 30 or 60 years, whichever is applicable:

2A:14-30. 30 YEARS' POSSESSION OF REAL ESTATE, EXCEPT WOODLANDS OR UNCULTIVATED TRACTS, AND 60 YEARS' POSSESSION OF WOODLANDS OR UNCULTIVATED TRACTS HOWEV-

ER COMMENCED OR CONTINUED

Thirty years' actual possession of any real estate excepting woodlands or uncultivated tracts, and 60 years' actual possession of woodlands or uncultivated tracts, uninterruptedly continued by occupancy, descent, conveyance or otherwise, shall, in whatever way or manner such possession might have commenced or have been continued, vest a full and complete right and title in every actual possessor or occupier of such real estate, woodlands or uncultivated tracts, and shall be a good and sufficient bar to all claims that may be made or actions commenced by any person whatsoever for the recovery of any such real estate, woodlands or uncultivated tracts.

This statute distinguishes between cultivated and uncultivated land — assigning the substantially longer period of 60 years (as opposed to 30 years) to claim uncultivated land. Title that is properly acquired under this statute is deemed to be marketable title. See *Conklin v. Davi*, 76 N.J. 468 (1978).

The fourth statute, N.J.S.A. 2A:14-31 (30 YEARS' ACTUAL POSSESSION OF ANY REAL ESTATE UNDER CLAIM OR COLOR OF TITLE) likewise provides for the passing of good title (i.e., marketable title) for any land — be it cultivated or uncultivated — after 30 years' possession — if the claim is based on "color of title."

Color of title is generally accepted to mean a title based on a defective instrument that appears to give title, but in reality does not.

Distinction Between Procedure and Substance

The Court in *J&M* undertook reconciliation of the tension created by these four statutes by applying a rule of substance over procedure, stating "We hold that title does not vest in an adverse possessor until the passage of thirty or sixty years and that neither the

adverse possessor nor the owner of record determines which statute controls."

In coming to its conclusion, the Court reasoned that N.J.S.A. 2A:14-30 and -31 are substantive, in that they vest title where a person actually adversely possesses real property for the prescribed period (30/60 years). Under these statutes a person "shall be vested" with title to the possessed real estate.

On the other hand, the 20-year statutes (N.J.S.A. 2A:14-6 and -7) are procedural limitations on one who is already in title, against seeking relief (by way of ejectment) against the adverse user.

However, said the Supreme Court, because of the enactment of N.J.S.A. 2A:35-1 (jurisdiction in real property possessory action) in 1948 — the common-law action for ejectment was (without general recognition by bench or bar) superceded — rendering N.J.S.A. 14-6 and -7 also superceded, and consequently without future force and effect as a statute of limitations:

We hold, therefore, that because N.J.S.A. 2A:35-1 contains no specified time in which proceedings must be instituted thereunder, its practical effect is to supercede those provisions in N.J.S.A. 2A:14-6 and -7 that create repose for common-law ejectment actions after twenty years. If we have misperceived the Legislature's intended scope of N.J.S.A. 2A:35-4, or any other statute we have interpreted in this opinion, the Legislature is of course free to correct our interpretation.

Because N.J.S.A. 14-6 and -7 pertain to common law ejectment actions, and because N.J.S.A. 2A:35-1 supercedes the common-law, there is nothing left for N.J.S.A. 14-6 and -7 to be applied to.

Prospective Application

The Supreme Court's interpretation of N.J.S.A. 2A:35-1 and its superceding

effect on N.J.S.A. 2A:14-6 and -7 — is really a "shocker." Such supercession has escaped the attention of both bench and bar alike for more than 50 years since the enactment of L.1948 c. 373 (entitled "An Act concerning civil actions for possession of land, superceding actions of ejectment").

Being mindful, however, that its decision has disrupted more than a half century of accepted law, and in seeming deference to both bench and bar, the Supreme Court has made its decision in *J&M* prospective and not retroactive:

To avoid confusion or create a cloud on any title, we make our decision applicable to the present case and any case that has not been decided in the trial court. We do not make our decision retroactive because stability and predictability in real property law are extremely important.

It has been said that the financial health of a great portion of our economy depends on the simple fact that one wishing to invest in real estate, or finance such an investment, must be able to ascertain beyond peradventure the true state of land titles. See 13A New Jersey Practice (Lieberman, *Abstract and Titles*), §1581 at 103.

Hence, the law of real property has remained fairly static, being grounded on decisions and enactments made in generations past. Because of the need for stability and predictability in land titles, changes in property laws are predictably few.

However, as of Feb. 27, 2001, a stolid rule of real property law has been rewritten by the Supreme Court and any claim for adverse possession (or prescriptive easement) yet undecided in the trial courts of this state are bound by the holding in *J&M*: "We hold that title does not vest in an adverse possessor until the passage of thirty or sixty years and that neither the adverse possessor nor the owner of record determines which statute controls."

The Supreme Court has, by its *J&M* decision, rewritten a chapter in that rather old book known as the real estate law. ■