



Aida Montano

*Bill Analysis*  
Legislative Service Commission

## **H.B. 425**

123rd General Assembly  
(As Introduced)

**Reps. Carey, Vesper, O'Brien, Householder, Evans, Netzley, Terwilleger,  
Winkler, Britton, Ogg**

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### **BILL SUMMARY**

- Tolls or suspends the 21-year period of limitations that applies to actions to recover title to or possession of real property during each period of time for which the person entitled to bring the action has paid property taxes due on the property after the cause of action accrued and before the action is brought.
- Generally prohibits the granting or recognition of a claim of adverse possession or prescription of real property or an interest in real property in any action in which title to or possession of the property is at issue if, during the 21-year period asserted to establish the adverse possession or prescription, the party holding the title to or an interest in the property has paid property taxes due on the real property.
- Exempts from the above prohibition the granting or recognition of a claim of adverse possession of certain streets or alleys dedicated for but not opened to public use.
- Applies the bill's provisions to relevant actions or proceedings brought on or after the bill's effective date.

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### **CONTENT AND OPERATION**

#### **Background law--adverse possession and prescription**

Under the common law doctrine of adverse possession, title to real property is acquired by a trespasser and correspondingly lost to the owner of the property after certain judicially established elements have been satisfied over a period of at least 21 years. The 21-year period is the statutory period of limitations for actions to recover the title to or possession of real property set forth in R.C. 2305.04. To

acquire title by adverse possession, the party claiming title must prove by clear and convincing evidence "exclusive possession and open, notorious, continuous, and adverse use" of the real property for a period of 21 years. *Grace v. Koch* (1998), 81 Ohio St.3d 577, 579, motion for reconsideration denied (1998), 82 Ohio St.3d 1444 (see **COMMENT 1**).

Prescription relates to incorporeal rights (rights to intangibles), such as easements, while adverse possession applies to an interest in the legal title to real property. A prescriptive right is acquired by open, notorious, continuous, and adverse use for a period of 21 years. Title to real property by adverse possession depends upon all of those elements with the additional element of exclusive possession. *Pennsylvania Rd. Co. v. Donovan* (1924), 111 Ohio St. 341, 349-350.

### **Statute of limitations for actions to recover title to or possession of real property**

#### **Existing law**

Under the existing Limitations of Actions Law, an action to recover title to or possession of real property must be brought within 21 years after the cause of action accrued. This 21-year period of limitations is tolled (suspended or stopped temporarily) if a person entitled to bring that type of action was, at the time the cause of action accrued, within the age of minority (under 18 years of age) or of unsound mind. After the expiration of 21 years from the time the cause of action accrued, that person may bring the action within ten years after the disability of minority or of unsound mind is removed. (R.C. 2305.04.)

The running of the 21-year period of limitations for actions to recover title to or possession of real property and the respective periods of limitations for other types of actions generally is tolled under the following circumstances:

(1) If a cause of action accrues against a person, if the person is out of the state, has absconded, or conceals the person's self, the period of limitation for the commencement of the action as provided in R.C. 2305.04<sup>1</sup> to 2305.14, 1302.98, and 1304.35<sup>2</sup> does not begin to run until the person comes into the state or while the person is so absconded or concealed. After the cause of action accrues, if the person departs from the state, absconds, or conceals the person's self, the time of absence or concealment is not computed as any part of a period within which the

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<sup>1</sup> *Action to recover title to or possession of real property.*

<sup>2</sup> *Examples of other types of actions under these sections are actions upon a contract, tort actions, product liability actions, malpractice actions, actions for assault or battery, actions on an official bond, and generally all other actions for relief.*

action must be brought. (R.C. 2305.15(A)--not in the bill but referred to in the bill.)

(2) Unless otherwise provided in R.C. 1302.98, 1304.35, 2305.04 to 2305.14, or 2744.04 of the Revised Code, if a person entitled to bring any action mentioned in those sections, unless for penalty or forfeiture, is, at the time the cause of action accrues, within the age of minority or of unsound mind, the person may bring it within the respective times limited by those sections (ten years in the case of an action to recover title to or possession of real property under R.C. 2305.04 as described above), after the disability is removed. If the interests of two or more parties are joint and inseparable, the disability of one inures to the benefit of all. After the cause of action accrues, if the person entitled to bring the action becomes of unsound mind and is adjudicated as being of unsound mind by a court of competent jurisdiction or is confined in an institution or hospital under a diagnosed condition or disease that renders the person of unsound mind, the time during which the person is of unsound mind and so adjudicated or so confined is not computed as any part of the period within which the action must be brought. (R.C. 2305.16--not in the bill but referred to in the bill.)

### **Operation of the bill**

The bill specifies that an action to recover title to or possession of real property must be brought within 21 years after the cause of action accrued, *subject to sections 2305.15 and 2305.16 of the Revised Code* (added by the bill; see paragraphs (1) and (2) above in "**Existing law**"). (R.C. 2305.04.) As in existing law described above, the bill tolls the period of limitations if a person entitled to bring that type of action was, at the time the cause of action accrued, within the age of minority or of unsound mind (R.C. 2305.04(A)). The bill additionally tolls the period of limitations for an action to recover title to or possession of real property if, after the cause of action accrued and before the action is brought, the person entitled to bring the action has paid property taxes due on the real property in question. In that case, each period of time for which the property taxes have been so paid is not to be computed as any part of the period within which the action must be brought. (R.C. 2305.04(B).) (See **COMMENT 2**.)

### **Adverse possession or prescription claims in actions relating to real property**

The bill generally prohibits the granting or recognition of a claim of adverse possession of real property or of adverse possession or prescription of any interest in real property in any action to recover the title to or possession of real property, or in any other action or proceeding in which the title to or an interest in real property is at issue under a claim of adverse possession or prescription if, during the 21-year period that is asserted as establishing the necessary duration of the

adverse possession or prescription, any party to the action who has title to or an interest in the real property that is the subject of the claim has paid property taxes due on that real property (R.C. 5303.41(A)).

The bill provides that this prohibition against granting or recognizing a claim of adverse possession or prescription of real property or an interest in real property does not apply regarding a claim of adverse possession of certain real property dedicated to public use under existing law as described in the following sentence (R.C. 5303.41(B)). If a street or alley, or any part of a street or alley, which is laid out and shown on the recorded plat of a municipal corporation, has not been opened to the public use and occupancy of the citizens of the municipal corporation, or other persons, has been enclosed with a fence by the owners of the inlots, lots, or outlots lying on, adjacent to, or along that street or alley, or part of it, and has remained in the open, uninterrupted use, adverse possession, and occupancy of those owners for the period of 21 years, and if that street, alley, inlot, or outlot is a part of the tract of land so laid out by the original proprietors, the public easement in the street or alley or part of it must be extinguished and the right of that municipal corporation, its citizens, or other persons, and the legislative authority of that municipal corporation and its legal authorities to use, control, or occupy so much of that street or alley that has been fenced, used, possessed, and occupied, must be barred, except to the owners of those inlots or outlots lying on, adjacent to, or along those streets or alleys who have occupied them in the manner as described above (R.C. 2303.05--not in the bill but referred to in the bill).

### **Registration of tax deed**

#### **Existing law**

The existing Land Title Registration Law precludes the registration of any title derived from any tax sale or tax deed unless it appears that either of the following applies (R.C. 5309.07):

(1) Title under that tax sale or tax deed has been established and confirmed, or acquired, by a valid judgment or decree of a court of competent jurisdiction.

(2) The applicant and those from whom the applicant claims title have been in the actual, undisputed, and adverse possession of the land under that title for at least 21 years and have paid all taxes and assessments legally levied on the land for at least ten successive years next preceding the filing of the application.

### **Operation of the bill**

The bill precludes the registration of any title derived from any tax sale or tax deed unless it appears that either of the following applies (R.C. 5309.07(A) and (B)):

(1) Title under that tax sale or tax deed has been established and confirmed, or acquired, by a valid judgment or decree of a court of competent jurisdiction.

(2) The applicant and those from whom the applicant claims title have been in the actual, undisputed, and adverse possession of the land under that title for at least 21 years and have paid all taxes and assessments legally levied on the land for at least ten successive years next preceding the filing of the application, *and the bill's prohibition as described above in "Adverse possession or prescription claims in actions relating to real property" does not bar the granting or recognition of the claim of adverse possession of the land and its title* (added by the bill).

### **Application of the bill**

The bill provides that R.C. 2305.04, 5303.41, and 5309.07, as amended or enacted by the bill, apply regarding all actions and proceedings that are of a type described in the provisions of those sections and that are brought on or after the effective date of the bill (Section 3).

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## **COMMENT**

1. In support of its holding regarding the elements of adverse possession, the Supreme Court in *Grace* cited *Pennsylvania Rd. Co. v. Donovan* (1924), 111 Ohio St. 341, 349-350; *State ex rel. A.A.A. Invest. v. Columbus* (1985), 17 Ohio St.3d 151, 153; *Gill v. Fletcher* (1906), 74 Ohio St. 295, paragraph three of the syllabus; and *Dietrick v. Noel* (1884), 42 Ohio St. 18, 21.

In *Gill v. Fletcher, supra*, the Supreme Court held that the possession of the real property must be *actual, open, notorious, continuous, exclusive, and adverse*, shown by *overt acts of unequivocal character* which clearly indicate an assertion of ownership of the premises to the exclusion of the rights of the real owner.

The very essence of an adverse possession is that its holder claims the right to possession, not under, but *in opposition* to the title to which possession is alleged to be adverse. Possession is not adverse if it is held by agreement with the true owner. *Dietrick v. Noel, supra*, at p. 21. Adverse possession is commonly denominated as *hostile* to the rights of the owner of the real property. To establish

hostility "it is not necessary to show that there was a heated controversy, or a manifestation of ill will, or that the claimant was in any sense an enemy of the owner of the servient estate." *Kimball v. Anderson* (1932), 125 Ohio St. 241, 244. According to the Supreme Court in *Kimball*, the facts that prove hostility may greatly differ in different cases, and it has been held in many cases that it is sufficient if the use is *inconsistent* with the rights of the title owner and not subordinate or subservient to those rights.

Each case of adverse possession is based on its peculiar facts. The rules of construction regarding adverse possession reflect the view that adverse possession is a recognized, but *not* a favored, procedure for obtaining title of land. Any claim based on adverse possession is construed strictly in favor of the owner of the title to the real property. There are no equities in favor of a person who seeks to acquire the property of another by an adverse holding. *Montieth v. Twin Falls United Methodist Church, Inc.* (CA 9th Dist., Summit County, 1980), 68 Ohio App.2d 219, 224, citations omitted. See also *Grace v. Koch, supra*, in which the Supreme Court declared as follows:

A successful adverse possession action results in a legal titleholder forfeiting ownership to an adverse holder without compensation. Such a doctrine should be disfavored, and that is why the elements of adverse possession are stringent. See 10 Thompson on Real Property (Thomas Ed.1994) 108, Section 87.05 ("there are no equities in favor of a person seeking to acquire property of another by adverse holding"). We believe that the burden of proof should be equally rigorous. A substantial majority of our sister states agree and already apply the clear and convincing evidentiary standard, or a variant thereof, to adverse possession claims. We hold that to acquire title by adverse possession, a party must prove, by clear and convincing evidence, exclusive possession and open, notorious, continuous, and adverse use for a period of twenty-one years. (At pp. 580-581, footnote omitted.)

2. Under some state statutes, the payment of taxes by an adverse claimant is a requisite to establishing title by adverse possession. 3 *American Jurisprudence 2d*, "Adverse Possession," section 166.<sup>3</sup> However, there is no

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<sup>3</sup> Footnote 20 of 3 *American Jurisprudence 2d*, "Adverse Possession," section 166, lists cases from the following states that appear to have statutes requiring the payment of

statutory requirement of that nature in Ohio. Paying taxes is not itself sufficient to constitute adverse possession. But the uninterrupted payment of taxes on a particular property for 24 successive years is powerful evidence in support of a claim of adverse possession based on a claim of right to the property. *Ewing's Lessee v. Burnet* (1837), 36 U.S. 41, 54, affirming *Ewing v. Burnet* (Circuit Ct., Dist. of Ohio 1835), 8 F.Cas. 931, No. 4591. Payment of taxes, if accompanied by other acts, such as the making of improvements, enclosure of the property, or cultivation, may support a claim of title to the property by adverse possession. 2 *Ohio Jurisprudence 3d*, "Adverse Possession," section 54.

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## HISTORY

ACTION	DATE	JOURNAL ENTRY
Introduced	08-19-99	p. 1190

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*taxes to acquire title to real property by adverse possession: Alabama, Arizona, Arkansas, California, Florida, Idaho, Illinois, Montana, Nevada, and Utah.*

