

# DISSEISIN AND ADVERSE POSSESSION\*

PERCY BORDWELL

## CLAIM OF TITLE

Claim of freehold had no place in Littleton's definition of disseisin,<sup>86</sup> and Coke in his commentary mentions entry and a claimer, or taking of profits merely to emphasize that entry alone was not sufficient, but that there had to be an ouster also.<sup>87</sup> Claim of freehold might be important in turning into a disseisin what might otherwise be a mere trespass, such as the raising of crops on another's land<sup>88</sup> or an entry made in his absence,<sup>89</sup> but the importance of claim of freehold in this connection was rather to extend the scope of disseisin, than to limit it, and was much greater in the time when the line between trespass and the assize of novel disseisin was sharply drawn<sup>90</sup> than later.<sup>91</sup> That was the time however of Bracton and Britton and Fleta, and what they had to say on this was quoted by Coke,<sup>92</sup> and found its way in a free translation but as a quotation from Coke on Littleton into Croke's report of the case of *Blunden v. Baugh*.<sup>93</sup> There it was said "for, as Co. Lit. 153 b defines, 'A disseisin is where one enters, intending to usurp the possession, and to oust another of his freehold.'" According to this a disseisin, other than a disseisin at election, had to be intended; it could not be by ignorance or mistake. This found acceptance in the later cases,<sup>94</sup> but they were cases involving the invalidity of transfers by a disseisee and not the statute of limitations. It remained for the American cases to make the application to the statute.<sup>95</sup>

That no claim of freehold was necessary to the disseisor found expression in the maxim that a wrongdoer could not qualify his own wrong. Littleton indeed would not have made one a disseisor who of his own head occupied lands claiming to hold them at the will of the freeholder,<sup>96</sup> but Coke insisted that in such a case he was a disseisor if he *entered* of his own head and restricted Littleton's statement to the case

---

\* Continued from the November number, 33 YALE LAW JOURNAL, 1-13.

<sup>86</sup> Sec. 279.

<sup>87</sup> Coke, *Littleton*, \*181 a.

<sup>88</sup> Brac. fol. 161 b.

<sup>89</sup> Rolle, *Abridgement*, 659; 2 Preston, *Abstracts of Title* (2d ed. 1824) 292.

<sup>90</sup> See Ames, *Lectures on Legal History* (1913) 225.

<sup>91</sup> Ames, 3 *Select Essays*, 553, note 2.

<sup>92</sup> Coke, *Littleton*, \*153 b. The quotation is from Brac. fol. 216 b although Fleta 249 is almost identical with Bracton. See also 1 Britton (Nichols's ed. 1865) 342.

<sup>93</sup> (1632, K. B.) Cro. Car. 302.

<sup>94</sup> *William v. Thomas* (1810, K. B.) 12 East, 141, 155; *Jerritt v. Weare* (1817, Exch.) 3 Price, 575.

<sup>95</sup> *Infra* p. 148.

<sup>96</sup> Sec. 461.

of the hold-over tenant, the tenant at sufferance.<sup>97</sup> Nor did the fact that the wrongful possessor claimed a term for years, or a term for life or a fee tail, make him less a disseisor in fee simple,<sup>98</sup> unless possibly the limited estate which he claimed was in existence, although not belonging to him.<sup>99</sup> If the claim of less than a freehold had rendered the possessor nothing but a disseisor at election, this would have meant that he was a disseisor for the sake of the remedy only,<sup>100</sup> and would have been relatively unimportant, but he was not such to Coke,<sup>101</sup> and in his principal treatment of the matter was not such to Preston.<sup>102</sup> However, the cases where the maxim that the wrongdoer could not qualify his own wrong was applied to one claiming less than a freehold, other than where the remedy only was involved, usually concerned the sufficiency of a possession to support a release and like matters pertaining to the old conveyancing, and in no instance seem to have involved the statute of limitations.

If claim of freehold played little part in restricting the scope of disseisin, it was quite otherwise of the character in which the possession of the land had been taken. As long as the assize of novel disseisin had remained a popular remedy, the tendency had been to enlarge its scope and, although a statute was necessary to make this clear, a tortious feoffment by a tenant of less than a fee came to be regarded as a disseisin.<sup>103</sup> But the popularity of the assize ceased in the fifteenth century,<sup>104</sup> and the limitations that disseisin put on conveyancing and the hardship of one's entry being cut off by a descent cast reacted against disseisin. First, the hold-over tenant was made a tenant at sufferance, to distinguish him from a disseisor,<sup>105</sup> then a tenant at will who made a lease for years without any intention of ousting the freeholder was made a disseisor at election instead of an actual disseisor,<sup>106</sup> and this doctrine of disseisin at election was extended by Lord Mansfield to the bare possessor who made a tortious feoffment.<sup>107</sup> In fact Lord Mansfield would have made anyone a disseisor

<sup>97</sup> Coke, *Littleton*, \*271 a. That Coke interpreted Littleton too narrowly see 2 Preston, *Conveyancing* (1806) 304, 312.

<sup>98</sup> 2 Preston, *Conveyancing*, 313; 2 *ibid.*, *Abstracts of Title* (2d ed. 1824) 293; Hob. 323; *Norwich v. Johnson* (1683, C. P.) 3 Lev. 35.

<sup>99</sup> 2 Preston, *Conveyancing*, 315, 317 *et seq.*; *Norwich v. Johnson*, *supra* note 98.

<sup>100</sup> 2 Preston, *Abstracts of Title* (2d ed. 1824) 286, 389.

<sup>101</sup> Coke, *Littleton*, \*271 a. The very great extension of the doctrine of disseisin at election in modern times dates from the case of *Blunden v. Baugh* (1632, K. B.) Cro. Car. 302, and therefore is later than Coke.

<sup>102</sup> 2 Preston, *Abstracts of Title* (2d ed. 1824) 293 *et seq.* But see *ibid.* 390.

<sup>103</sup> 2 Pollock and Maitland, *History of English Law* (2d ed. 1899) 54.

<sup>104</sup> Sir Matthew Hale, *Common Law* (4th ed. 1792) 176.

<sup>105</sup> Bordwell, *Seisin and Disseisin* (1921) 34 HARV. L. REV. 592, 620.

<sup>106</sup> *Blunden v. Baugh* (1632, K. B.) Cro. Car. 302. See also Bordwell, *op. cit. supra* note 105, at p. 621.

<sup>107</sup> *Taylor d. Atkyns v. Horde* (1757, K. B.) 1 Burr. 60.

at election who was subject to ejectment without an actual entry, and confined actual disseisin to the case where one held under a proper fine with proclamations.<sup>108</sup> However this may have been, the possibility of disseisin by one who had entered as tenant, unless he had come to the tenancy by act of law,<sup>109</sup> seems to have been confined to the case of the improper delivery of the possession by the tenant to a stranger. He might subject his estate to forfeiture by matter of record as by denying his landlord's title or by attorning to a stranger,<sup>110</sup> but these acts do not seem to have been deemed disseisins.<sup>111</sup> The payment of the rent to a stranger might be a disseisin at the election of the lord, but that was all.<sup>112</sup> And the law applicable to tenants was applied to cases where the law made out a tenancy at will as in the case of the mortgagor,<sup>113</sup> the *cestui que trust*<sup>114</sup> and the feoffee who entered before livery.<sup>115</sup> Furthermore the doctrine of descent cast did not apply in the case of the younger brother who entered before the heir,<sup>116</sup> and for one owner in common to disseise another there had to be an actual ouster, a bare perception of the profits, and a denial of his moiety of them to the

<sup>108</sup> *Ibid.* 107-113. See also Bordwell, *op. cit. supra* note 105, at p. 621.

<sup>109</sup> Coke, *Littleton*, \*271 a. This was an adaption by Coke of the doctrine of *trespass ab initio* to disseisin.

<sup>110</sup> Coke, *Littleton*, \*251 a, b, \*252 a.

<sup>111</sup> *Doe v. Danvers* (1806, K. B.) 7 East, 299, 321; Lightwood, *Possession*, 50, 164.

<sup>112</sup> Secs. 588, 589; Lightwood, *Possession*, 51.

<sup>113</sup> *Smartle v. Williams* (1694, K. B.) 1 Salk. 245; *Leman v. Newnham* (1747, Ch.) 1 Ves. Sen. 51; Lightwood, *Possession*, 161.

<sup>114</sup> The law seemed somewhat more ready to find a disseisin by a *cestui que trust* of the trustee than by a mortgagor of the mortgagee in that an unauthorized lease for years by the former was held to be a disseisin (*Freeman v. Banes* [1670, K. B.] 1 Vent. 80) while perhaps nothing but a tortious feoffment would have been considered a disseisin on the part of the mortgagor (2 Preston, *Abstracts of Title* [2d ed. 1824] 365), but either of these cases involved an improper delivery of the possession to a stranger and although Lord Hardwicke was apparently willing to hold a *cestui* who had continued in possession and done "acts of ownership throughout" a disseisor (*Portsmouth v. Effingham* [1750, Ch.] 1 Ves. Sen. 430, 435), this was still doubtful in 1831 (*Fausset v. Carpenter* [1831, H. L.] 2 Dow & Cl. 232, 243).

<sup>115</sup> Littleton, *Tenures*, \*70. A difference was taken by Coke between "a grant made by agreement of the parties which stands not with the rules of law, and which never can by any subsequent act, as by livery, or attornment, be made good, and a grant good at the beginning, but to have its perfection by a subsequent ceremony." *Buckler's Case* (1598, C. P.) 2 Co. Rep. 55 a, 55 b. One entering under color of the former was a disseisor, under the latter a tenant at will. One entering under a conveyance invalid because of the statutes of frauds was also a tenant at will, (1677) 29 Car. II, c. 3, sec. 1. If long possession had counted for nothing in these constructive tenancies at will it is obvious that there would have been great hardship and so the law resorted to a presumption of a grant or reconveyance. In *Rees v. Lloyd* (1811, Exch.) Wightwick, 123, Macdonald, C. B., said that in his opinion livery should be presumed after twenty years on analogy to the statute.

<sup>116</sup> Littleton, *Tenures*, \*396.

other was not sufficient.<sup>117</sup> And although one owner in common entered claiming the whole he was said to be in by right rather than by wrong.<sup>118</sup> And while the *cestui que trust* was considered for some purposes as having an equitable seisin, Lord Hardwicke refused to consider one who entered claiming to be *cestui* as an equitable disseisor.<sup>119</sup>

The confusion into which Lord Mansfield had thrown the whole matter of disseisin by his sweeping extension of disseisin at election<sup>120</sup> is manifest in the writings of even so logical a thinker as Preston.<sup>121</sup> Had Lord Mansfield's doctrine been carried over in its fullness from the law of conveyancing to the limitation of actions and the statute of limitations of James I held not to run where there was merely a disseisin at election in his broad sense of the term, that statute might just as well have been wiped off the books as far as the limitation of entries on land was concerned and the field left for the statute of fines and the other statutes of limitations.<sup>122</sup> No doubt he had no intention of making any such radical change in the limitation of actions, but it is not surprising that when he offered adverse possession as a substitute for disseisin it should have been eagerly seized upon.

However, adverse possession might well have made its own way, even though disseisin had not been in such disfavor. It was the logical outcome of the change in the action of ejectment from an action based on an ouster to an action based on a detention of possession. In so far as ejectment remained a tort action at all, it was the withholding of possession that constituted the cause of action, and not the manner in which that possession was gained. Ouster no longer remained a principal fact except in so far as it remained such in connection with the statute of limitations.<sup>123</sup> The anomaly was presented of having the limitation of a cause of action depend upon the limitation of something quite remote from that cause of action. That the limitation of the action should have been more and more affected by the character which the action had now assumed would seem, as Langdell says, to have been almost inevitable.<sup>124</sup> It was much more natural to make the running

<sup>117</sup> *Reading v. Royston* (1702, Q. B.) 2 Salk. 423.

<sup>118</sup> *Smales v. Dale* (1614, K. B.) Hob. 120; but see Coke, *Littleton*, \*243 b.

<sup>119</sup> *Hopkins v. Hopkins* (1738, Ch.) 1 Atk. 581, 591; 2 Preston, *Abstracts of Title*, (2d ed. 1824) 368; but see *Llewellyn v. Mackworth* (1740, Ch.) Barn. C. 445, 449.

<sup>120</sup> Pollock and Wright, *Possession* (1888) 90; Maitland, *The Mystery of Seisin* (1886) 2 LAW Q. REV. 481, 488 note 3.

<sup>121</sup> For example, he gives Coke's man who "entereth into land of his own wrong . . . to hold it at the will of the owner" in one place (2 *Abstracts of Title* [2d ed. 1824] 294) as an example of a disseisor of necessity, while in another (2 *Conveyancing*, 304) he refers to him as a disseisor at election only. See also *ibid.* 311.

<sup>122</sup> Ballantine, *Statute of Limitations* (1812) 21.

<sup>123</sup> Pollock and Wright, *Possession* (1888) 85.

<sup>124</sup> *Equity Pleading*, sec. 123.

of the statute depend upon the withholding of possession for twenty years, than on an ouster which except for that statute had come to be a mere fiction. It would have been natural to have gone even further, and made any possession which would have subjected one to the action sufficient to have set the statute running, and this was what was done in *Doe d. Parker v. Gregory*,<sup>125</sup> but after all it was only indirectly that the statute of James I affected the action of ejectment and liability to an ejectment for twenty years had not become the accepted test for the running of the statute at the time of its repeal. Even Lord Mansfield could use disseisin in one breath and adverse possession in the other,<sup>126</sup> and the old law of disseisin in so far as it concerned the statute of limitation was not so much changed as stated in terms of adverse possession. Thus the possession of the younger brother was accounted the possession of the heir,<sup>127</sup> the possession of one co-owner accounted the possession of the others,<sup>128</sup> the possession of the tenant that of the landlord,<sup>129</sup> of the mortgagor that of the mortgagee,<sup>130</sup> of the *cestui que trust* that of the trustee.<sup>131</sup> The restatement of the law, however, was not without its effect. In the case of the mortgagor and the *cestui que trust* the inference that their possession was deemed to be that of the mortgagee and trustee was only a presumption that might be overcome by showing a repudiation of the relationship by the mortgagor<sup>132</sup> and *cestui*.<sup>133</sup> From then on their possession was adverse. And Lord Redesdale was of the opinion that the possession of a tenant might become adverse by notice brought home to the landlord of his attornment to a stranger.<sup>134</sup> In the case of the co-owner it was also held that his possession might become adverse by a refusal to pay the moiety of the profits to the other under claim of title to the whole.<sup>135</sup> In the case of the tenant *pur auter vie* holding over after the death of the *cestui que vie* Lord Mansfield made a square departure from the old law in holding that he might be an adverse possessor,<sup>136</sup> and this was followed in *Doe v.*

<sup>125</sup> (1834, K. B.) 2 Ad. & E. 14.

<sup>126</sup> *Fairclaim v. Shackleton* (1770, K. B.) 5 Burr. 2604, 2607.

<sup>127</sup> 1 Cruise, *Digest* (1st Am. ed. 1808) 14.

<sup>128</sup> This had been said of joint-tenants as early as 1704. *Ford v. Grey* (1704, Q. B.) 1 Salk. 285.

<sup>129</sup> *Saunders v. Lord Annesley* (1804, Ir. Ch.) 2 Sch. & Lef. 73, 98.

<sup>130</sup> *Leman v. Newnham* (1747, Ch.) 1 Ves. Sen. 51.

<sup>131</sup> *Pamfret v. Windsor* (1752, Ch.) 2 Ves. Sen. 472, 481.

<sup>132</sup> *Hall v. Doe* (1822, K. B.) 5 Barn & Ald. 687; *Doe v. Williams* (1836, K. B.) 5 Ad. & E. 291; Lightwood, *Possession*, 165.

<sup>133</sup> *Fausset v. Carpenter* (1831, H. L.) 2 Dow & Cl. 232, 243.

<sup>134</sup> *Hovenden v. Lord Annesley* (1805, Ir. Ch.) 2 Sch. & Lef. 607, 624; Lightwood, *Possession*, 166.

<sup>135</sup> *Doe v. Prosser* (1774, K. B.) 1 Cowp. 217; Lightwood, *Possession*, 166.

<sup>136</sup> *Ibid.* Lord Mansfield said: "A man may come in by a rightful possession, and yet hold over adversely without a title . . . For instance, length of possession, during a particular estate, as a term of one thousand years, or under a lease for lives, as long as the lives are in being gives no title; but if tenant *pur auter vie* hold over for 20 years after the death of the *cestui que vie*, such

*Gregory*<sup>137</sup> on ground so broad that it would have substituted liability to ejectment for disseisin as the test for the running of the statute. Adverse possession was also held to work in favor of one claiming an equity of redemption against the original mortgagor.<sup>138</sup> Whether this would have been extended to other equities than the equity of redemption was left unsettled by the House of Lords.<sup>139</sup>

The English Act of 1833<sup>140</sup> was strongest on its destructive side, the abolition of the old real actions with their varying periods of limitation,<sup>141</sup> the elimination of disseisin,<sup>142</sup> descent cast,<sup>143</sup> continual claim,<sup>144</sup> and the artificial character of right of possession and right of property which disappeared once the old system was gone.<sup>145</sup> On its positive side it was a composite of the views which had been expressed by Lords Mansfield, Redesdale and Sir Thomas Plumer and of the view expressed the following year by Lord Denman in *Doe v. Gregory*. It applied directly to the action of ejectment and ran whenever one had subjected himself to the action, but instead of making the withholding of possession the test of the running of the statute, it provided that the statute should run from the time of dispossession or discontinuance of possession, and hence continued the anomaly of making the limitation of a cause of action depend upon the limitation of something quite apart from that cause of action.<sup>146</sup> Furthermore in stressing the loss of possession rather than the withholding of possession it failed to grasp, or at least failed to adopt, Lord Mansfield's theory of adverse possession as a positive prescription.<sup>147</sup> It has accordingly been severely criticised.<sup>148</sup> But it had the merit of adopting in detail many of the suggestions made by the more progressive judges. It made the statute run wherever one had subjected himself to an action of ejectment.<sup>149</sup>

---

holding over will in ejectment be a complete bar to the remainderman or reversioner; because it was adverse to his title."

<sup>137</sup> (1834, K. B.) 2 Ad. & E. 14; Lightwood, *Possession*, 162.

<sup>138</sup> *Cholmondeley v. Clinton* (1820, Ch.) 2 Jac. & W. 1, 175 *et seq.* The Master of the Rolls, Sir Thomas Plumer, would have gone further than this and applied the same doctrine to equities in general. *Ibid.* 145 *et seq.*

<sup>139</sup> S. c. (1821, H. L.) 4 Bligh, 1. For a very clear account of the celebrated case of *Cholmondeley v. Clinton*, see Lightwood, *Possession*, 168.

<sup>140</sup> 3 & 4 Wm. IV, c. 27.

<sup>141</sup> Sec. 36.

<sup>142</sup> Dispossession was substituted for disseisin. Sec. 3.

<sup>143</sup> Sec. 39.

<sup>144</sup> Sec. 11.

<sup>145</sup> See Hammond's note 41, at p. 324 to 2 Blackstone, *Commentaries* (Hammond's ed. 1890) 195. See the earlier part of the same note for Hammond's argument that the terms right of possession and right of property may still be useful notwithstanding the loss of their old technical significance.

<sup>146</sup> This has been remedied somewhat by the courts in holding that the statute will not run unless there is someone in whose favor it can run. See *supra* p. 6.

<sup>147</sup> See *supra* p. 9.

<sup>148</sup> Langdell, *Equity Pleading*, sec. 125.

<sup>149</sup> *Ibid.*

It declared that the possession of the younger brother should not be deemed the possession of the heir<sup>150</sup> nor the possession by one co-owner of the entirety the possession of the other.<sup>151</sup> Tenancy at sufferance was no longer to stand in the way of the running of the statute and for this purpose a tenancy at will which had not sooner determined was deemed to have terminated one year from its commencement,<sup>152</sup> and a tenancy from year to year at the end of the first year or the last payment of rent.<sup>153</sup> That one had a right of action for forfeiture or breach of condition, however, was not to prevent the statute commencing to run again on the natural termination of the particular estate,<sup>154</sup> except where there was a written lease reserving a yearly rent of twenty shillings and the tenant paid this rent to a person wrongfully claiming to be entitled thereto. In such a case the statute commenced to run once and for all from the first payment of rent to the wrongful claimant.<sup>155</sup> The mortgagee was to be cut off twenty years after the last payment or acknowledgment.<sup>156</sup> Suits in equity were to be subject to the same limitation as actions at law.<sup>157</sup> The statute had the advantage of being definite and detailed on a great many points so that little was left to general theory. Moreover, the running of the statute was made to depend in general on facts that were fairly easy to ascertain, and the importance of the character in which or the intention with which possession had been taken was greatly diminished.<sup>158</sup> The statute would not run in favor of a servant or bailiff, and for this purpose a parent or other near relative entering on the land of an infant came to be regarded as a bailiff,<sup>159</sup> but this was merely to require the intention or character generally deemed essential to possession. And while no mere trespass would amount to a dispossession,<sup>160</sup> yet this was more a matter of ouster than of intent. Except for the delay in cases of concealed fraud,<sup>161</sup> therefore, the statute was admirably adopted for the cutting off of stale claims whatever its shortcomings as a statute of repose, and with little other change than the reduction of the term of limitation from twenty to twelve years has remained in force till the present time.

The ruthless cutting off of stale claims which marked the English Act of 1833 was in sharp contrast to the attitude taken by the early judges in the United States as to the running of the statute. The latter

---

<sup>150</sup> Sec. 13.

<sup>151</sup> Sec. 12.

<sup>152</sup> Sec. 7.

<sup>153</sup> Sec. 8.

<sup>154</sup> Sec. 4.

<sup>155</sup> Sec. 9.

<sup>156</sup> Sec. 40; (1837) 1 Vict. c. 28.

<sup>157</sup> Sec. 24.

<sup>158</sup> Pollock and Wright, *Possession* (1888) 90.

<sup>159</sup> Lightwood, *Possession*, 182.

<sup>160</sup> Pollock and Wright, *loc. cit. supra* note 158.

<sup>161</sup> *Ibid.*; Lightwood, *Possession*, 245.

were no less impressed by the obscurities of disseisin and disseisin at election<sup>162</sup> than the drafters of the English act, but the abundance of vacant land and the multiplicity of disputed titles inclined them to favor the regular title whether accompanied by possession or not, and they found a way out of the obscurities of the old law not by minimizing the character in which, or the intention with which the land was held, but by emphasizing and rationalizing it. Every presumption was indulged in favor of the owner<sup>163</sup> and the doctrine of *Reading v. Royston*<sup>164</sup> that "where two men are in possession, the law will adjudge it in him that hath right" was extended into the doctrine that possession follows title until an adverse possession is clearly made out.<sup>165</sup>

In England the doctrine of *Reading v. Royston* had applied where there was a struggle for the control of the premises and meant that where the physical control was in the balance the presumption was with the owner.<sup>166</sup> In New York, however, the mental element in adverse possession received little, if any, less attention than the physical. The importance of the *quo animo* was constantly reiterated<sup>167</sup> and Kent, C. J., took the doctrine of *Reading v. Royston*<sup>168</sup> to be the equivalent of the rule which he said had been frequently recognized by the New York court, "that an entry not appearing to be hostile, was to be considered an entry under the title of the true owner."<sup>169</sup> It became a commonplace in the New York decisions that possession was presumed to be in subordination to the true title<sup>170</sup> and the burden of proving it adverse

<sup>162</sup> See the remarks of Kent, C. J., in New York, *Smith v. Burtis* (1810) 6 Johns. 197; of Tilghman, C. J., in Pennsylvania, *Overfield v. Christie* (1821) 7 Serg. & R. 173; and of Shaw, C. J., in Massachusetts, *Summer v. Stevens* (1843) 6 Metc. 337.

<sup>163</sup> *Jackson v. Sharp* (1812, N. Y.) 9 Johns. 163; *Jackson v. Waters* (1815, N. Y.) 12 Johns. 365; *Rung v. Shoneberger* (1833, Pa.) 2 Watts, 23; *Lund v. Parker* (1824) 3 N. H. 49.

<sup>164</sup> (1702, Q. B.) 2 Salk. 423.

<sup>165</sup> *Jackson v. Sellick* (1811, N. Y.) 8 Johns. 202; *Van Brunt v. Schenck* (1814, N. Y.) 11 Johns. 377, 385; *Barr v. Gratz's Heirs* (1819, U. S.) 4 Wheat. 213; *U. S. v. Arredondo* (1832, U. S.) 6 Pet. 691, 743; *Hawk v. Senseman*, (1820, Pa.) 6 Serg. & R. 21.

<sup>166</sup> See Lightwood, *Possession*, 36, and Pollock and Wright, *Possession* (1888) 24.

<sup>167</sup> *Smith v. Burtis* (1812) 9 Johns. 174; *Jackson v. Thomas* (1819) 16 Johns. 293; *Jackson v. Newton* (1820) 18 Johns. 355; *La Frombois v. Jackson* (1826) 8 Cow. 589; *Livingston v. Peru Iron Co.* (1832, N. Y. Senate) 9 Wend. 511; *Humbert v. Trinity Church* (1840, N. Y. Senate) 24 Wend. 587, 611.

<sup>168</sup> Kent's reference to that doctrine is its statement by Holt, C. J., in *Anonymous* (1706, Q. B.) 1 Salk. 246, where the latter says:—"A bare entry on another without an expulsion, makes such a seisin only that the law will adjudge him in possession that has the right. . . ."

<sup>169</sup> *Smith v. Burtis* (1810) 6 Johns. 197.

<sup>170</sup> *Jackson v. Parker* (1802) 3 Johns. Cas. 124; *Jackson v. Bowen* (1803) 1 Cai. 358; *Jackson v. Todd* (1804) 2 Cai. 182; *Smith v. Burtis* (1810) 6 Johns. 197; *Jackson v. Sharp* (1812) 9 Johns. 163; *Jackson v. Waters* (1815) 12 Johns. 365; *Jackson v. Thomas* (1819) 16 Johns. 293.

was thrown on the claimant.<sup>171</sup> Kent's colleague, Spencer, seems to have gone somewhat further than Kent himself in this matter and to have insisted that to overcome the presumption it was necessary to show a claim of title or right inconsistent with the title of the true owner.<sup>172</sup> He sometimes used the expression 'claim and color of title.' What he had in mind apparently was a conflict between titles and an occupation under one of them, a real dispute as to the right to the land. He was probably not using color of title to mean a written instrument, but in Chief Justice Gibson's sense<sup>173</sup> of a *bona fide* claim of right. Spencer's successor, Savage, C. J., did go so far as to require good faith,<sup>174</sup> but, as we have seen,<sup>175</sup> a few years later, in 1840, the New York Court for the Correction of Errors definitely repudiated the requirement of good faith, but continued to insist on the necessity of a claim of right not "the intent to claim honestly; but the intent to claim at all, right or wrong, with or without knowledge that another has title."<sup>176</sup>

The influence of these early New York cases has been very great. Claim and color of title became claim or color of title and the requisites for adverse possession under each, with the presumption that possession is held in subordination to the true title, were embodied in the New York Revised Statutes of 1828<sup>177</sup> and have passed since into the statute law of ten states.<sup>178</sup> But more important than the influence of the New York cases on the statutory law<sup>179</sup> has been their influence on the law of the courts. The cases in Johnson's Reports were cited everywhere and were recognized as having the greatest authority.<sup>180</sup> In *Ricard v. Williams*, Mr. Justice Story took similar ground when he said that the law "will consider every possession lawful, the commencement and continuance of which is not proved to be wrongful. And this upon the plain principle, that every man shall be presumed to act in obedience to his duty, until the contrary appears. When, therefore, a naked possession is in proof, unaccompanied by evidence as to its origin, it will be deemed lawful, and co-extensive with the right set up

<sup>171</sup> In addition to the cases cited in the preceding note see *Brandt v. Ogden* (1806) 1 Johns. 156; *Jackson v. Sellick* (1811) 8 Johns. 202.

<sup>172</sup> *Jackson v. Todd* (1804) 2 Cai. 182; *Brandt v. Ogden* (1806) 1 Johns. 156; *Smith v. Burtis* (1812) 9 Johns. 174; *Jackson v. Thomas* (1819) 16 Johns. 293; *Jackson v. Newton* (1820) 18 Johns. 355.

<sup>173</sup> *M'Call v. Neely* (1841, Pa.) 3 Watts, 69, 72.

<sup>174</sup> *Livingston v. Peru Iron Co.* (1832) 9 Wend. 511.

<sup>175</sup> *Supra* note 78.

<sup>176</sup> *Humbert v. Trinity Church*, 24 Wend. 587, 610.

<sup>177</sup> Part III, ch. 4, tit. 2, art. 1, now ch. 4, tit. 1, C. C. P. 1912.

<sup>178</sup> California, Florida, Idaho, Montana, Nevada, North Dakota, South Carolina, South Dakota, Utah and Wisconsin.

<sup>179</sup> In North Carolina and South Carolina, however, the New York statute seems to have been received with reluctance and in Wisconsin to have been largely nullified. See cases cited *infra* note 182.

<sup>180</sup> See the remarks of Williams, C. J., in *Ives v. Hulet* (1840) 12 Vt. 314, 335, quoted in Wallace, *The Reporters* (4th ed. 1882) 579 note 1.

by the party.<sup>181</sup> With rare exceptions,<sup>182</sup> the presumption that possession is not adverse but is in subordination to the legal title has been accepted throughout the United States and the burden of proving possession adverse placed on the claimant.<sup>183</sup> In 1819, Washington, J., questioned the necessity of claim or color of title<sup>184</sup> and occasionally there has been a tendency to treat the statute as in England as running wherever one has subjected himself to an action of ejectment,<sup>185</sup> but even in Connecticut, where the necessity of claim of title has been expressly repudiated, it is rather the phrase "claim of title" that has been rejected than the thing it stands for elsewhere, for the Connecticut courts have insisted that for the statute to run the possessor must take possession of the land as if it were his own.<sup>186</sup>

The requirement that the possessor have the mind of the owner, the intention to hold as owner or to acquire ownership, in order that his

<sup>181</sup> (1822, U. S.) 7 Wheat. 59, 107.

<sup>182</sup> In view of the prevalence in the United States of presumptions of ownership and title and of seisin in fee in favor of the possessor as against a wrongdoer or a subsequent possessor, it is surprising but significant that these presumptions have prevailed so little where the statute of limitations has been relied on as against a prior possessor or the owner, for had they so prevailed, the presumption would be that possession is adverse and the path of the adverse possessor would be much easier. Tiffany indeed argues in favor of a presumption that possession is adverse and cites what authority there is in support of his position (2 *Real Property* [2d ed. 1920] 1934 note 53), but a number of his cases merely hold that possession for the statutory period, *apparently as owner*, makes out a *prima facie* case of adverse possession, and not that possession alone does so, while in five of the states whose decisions he cites (New York, North Carolina, South Carolina, Utah and Wisconsin), the provision of the New York Code that possession shall be deemed in subordination to the true title is in force. In North Carolina that provision is now definitely accepted by the courts (see *Monk v. Wilmington* [1904] 137 N. C. 322, 49 S. E. 345; *Land Co. v. Floyd* [1916] 171 N. C. 543, 88 S. E. 862), and the same thing appears to be true in South Carolina (see *Carr v. Mowson* [1910] 86 S. C. 461, 68 S. E. 661). In Wisconsin, on the other hand, the opinions of Marshall, J., have tended to make the New York provision practically meaningless (see *Illinois Steel Co. v. Budzisz* [1900] 106 Wis. 499, 81 N. W. 1027, 82 N. W. 534) although in one of the latest of these (*Ovig v. Morrison* [1910] 142 Wis. 243, 125 N. W. 449) claim of title seems to be required to make out even a *prima facie* case of adverse possession which would be in harmony with the ordinary acceptance of the provision in question. In the overwhelming number of cases in the United States the presumption has been in favor of the owner against the wrongful possessor. (See citations, *infra* note 183.)

<sup>183</sup> 2 C. J. 588 and notes. See also Tiffany, *Real Property* (2d ed. 1920) 1935 note 55.

<sup>184</sup> *Potts v. Gilbert* (1819, C. C. D. Pa. & N. J.) 3 Wash. 475.

<sup>185</sup> *Campau v. Dubois* (1878) 39 Mich. 274; *Illinois Steel Co. v. Budzisz* (1900) 106 Wis. 499, 81 N. W. 1027, 82 N. W. 534; *Rupley v. Fraser* (1916) 132 Minn. 311, 156 N. W. 350. And see Tiffany, *Real Property* (2d ed. 1920) 1937 note 60.

<sup>186</sup> *Bryan v. Atwater* (1811) 5 Day, 181; *French v. Pearce* (1831) 8 Conn. 439, 442; *Johnson v. Gorham* (1871) 38 Conn. 513; *Carney v. Hennessey* (1901) 74 Conn. 107, 49 Atl. 910. *Huntington v. Whaley* (1860) 29 Conn. 391, 398, in requiring that the possessor should *claim* the land as his own is criticised in *Johnson v. Gorham*, *supra*.

possession ripen into ownership by the lapse of time seems so natural from the point of view of affirmative prescription and the substantive law of property that once adverse possession is recognized primarily as affirmative prescription, rather than as a special phase of the limitation of actions, some such requirement as claim of title seems almost inevitable.<sup>187</sup> Thus when the contemporaries of Kent and Spencer in North Carolina had come to the conclusion that their act of 1715 was not like the Statute of James I but was in effect an act of prescription, they went so far as to require color of title to make the statute run.<sup>188</sup> But in the United States as a whole it was claim of title that preceded prescription and not prescription claim of title, or perhaps it would be better to say that claim of title was one of those underlying ideas of prescription that gained recognition in connection with adverse possession before the full prescriptive character of adverse possession was itself recognized and that it did much to bring about that recognition. It is significant that the leading case<sup>189</sup> in this country to require continuity of possession for the running of the statute and the earliest one commonly cited for the requirement of privity of estate in tacking<sup>190</sup> was also one of the first to require a hostile claim of title. The requirement of claim of title or right, however, was no conscious innovation. It was an attempt to analyze what was meant by the requirement that possession should be adverse. This might mean that the possessor himself was hostile and meant to oust the owner from the land, or it might mean that there were conflicting claims and that the possessor held under one of these. The former was negative, the latter was positive. It was the latter view that the American courts under the influence of the New York judges and Mr. Justice Story adopted,<sup>191</sup> but they flirted with the former and have yet cause to regret it.

---

<sup>187</sup> The statement of Holmes, J., in *Bond v. O'Gara* (1900) 177 Mass. 139, 58 N. E. 275, that "it is elementary law that adverse possession which will ripen into a title must be under a claim of right" shows the natural correlation between claim of right or title as an element of adverse possession and the acquisition of title by adverse possession, and this statement is typical of many others. See, for instance, the cases briefed in 15 L. R. A. (N. S.) 1209 *et seq.*

<sup>188</sup> The case of *Stanley v. Turner* (1804) 1 Murph. 14, definitely established it as law in North Carolina that seven years possession without color of title was not sufficient to bar the plaintiff in ejectment and this is said by the reporter to have been based on the observations of former Judge Haywood which are included in a note. After concluding that the statute was intended to cut off all claims, including the writ of right, and to vest in the possessor the absolute dominion forever (pp. 26-28), Judge Haywood argued that this could never have been intended of *naked* possessions, unaccompanied by deeds or grants (pp. 28-29).

<sup>189</sup> *Brandt v. Ogden* (1806, N. Y.) 1 Johns. 156.

<sup>190</sup> See Ames, 3 *Select Essays*, at p. 577 note 3.

<sup>191</sup> Tiffany concedes that "it has been asserted, by perhaps most of the courts in this country, that in order that the statute of limitations may run in favor of one in possession of land, the possession must be under claim of right or title." 2 *Real Property* (2d ed. 1920) 1936. See also 2 C. J. 125, and 15 L. R. A. (N. S.) 1208.

No one can help regret the vast amount of needless litigation over the title to boundary strips long held by the adjoining owner under a mistake as to the boundary line. Even in a single jurisdiction the cases are a source of confusion rather than of enlightenment. They furnish a striking example of the harm wrought by carrying over into a field where they have properly no application, principles which in their own field are sound enough. Bracton would have relieved from tort liability in novel disseisin one who had entered on another's land through inadvertence or mistake.<sup>192</sup> The judges in *Blunden v. Baugh*<sup>193</sup> were loath to invalidate family settlements where no disseisin had been intended. A similar motive led the judges in *Brown v. Gay*<sup>194</sup> to hold valid the transfer of a strip of land notwithstanding it may have been at the time inadvertently in the occupation of the adjoining owner. But none of these situations concerned the effect of long possession and to make a man benefit by the deliberate intention to oust another from his property and *a fortiori*, to make the possessor's acquisition of title depend upon such intention, is quite a different thing. Such was the result however where adverse possession under the statute was identified with disseisin, for it was these more enlightened authorities that were looked to as expressing the true doctrine of disseisin, and they required an express intention to oust the old owner.<sup>195</sup> Such an intent was a very proper element of a tort, but it was entirely out of place in acquisitive prescription. If honesty was not to be required for the latter, at least there was no reason for placing a premium on dishonesty. Accordingly it was soon seen that to deny the running of the statute wherever a boundary strip was held by mistake was going too far.<sup>196</sup>

<sup>192</sup> Brac. fol. 216 b.

<sup>193</sup> (1632, K. B.) Cro. Car. 302.

<sup>194</sup> (1824, Me.) 3 Greenl. 126.

<sup>195</sup> A belated example of making the old intention to disseise a requirement of adverse possession under the statute is afforded by the statement in *Ousts v. McKnight* (1920) 114 S. C. 303, 103 S. E. 561, that "adverse possession is hostile possession, and hostile possession is possession with intention to dispossess the owner. 3 Washburn (4th Ed.) p. 129." Perhaps the best known case expressing a similar view is *Grube v. Wells* (1871) 34 Iowa, 148. The cases showing the more immediate influence of disseisin are collected in 2 C. J. 139 note 62.

<sup>196</sup> Thus in *Worcester v. Lord* (1868) 56 Me. 265, it was said:—"An involuntary trespass may occur, but an unintentional disseizin is an anomaly. Yet, in saying this, we are not to be understood as laying down the doctrine that, to constitute a disseizin, the intention of the disseizor must of necessity, in all cases, be wrongfully to possess himself of property, known to him to belong to another. The *animus furandi* (if that phrase could properly be applied to a wrongful appropriation of real estate) or Ahab's wicked intention to seize as his own the vineyard of his neighbor, is not essential. Cases not unfrequently do arise where the disseizin is innocently committed under a mistake as to the validity of the title, but the title must be asserted. Cases may arise where a man may be under a mistake as to the true extent of his domain, yet, if he intentionally claims title to all which he has in possession, his neighbors may be barred, by lapse of time, from asserting their rights. The point is here,—a man

It was admitted that there might be claim of title notwithstanding a mistake, but it was said that there "must be an intention to claim title to all land within a certain boundary on the face of the earth, whether it shall eventually be found to be the correct one or not."<sup>197</sup> This is in effect to require a conditional intention to oust the true owner if a mistake shall appear. As such an intent is hardly likely to exist where no mistake is dreamed of, and is hypothetical where the fact of mistake has been raised but not settled, to make it material to the acquisition of title to property is merely to make a bad matter worse. Whatever the defects of requiring an absolute intention to disseise, such a requirement was at least workable. But either the absolute or conditional intent to oust the old owner would seem entirely non-essential to prescriptive acquisition. Both are directly traceable to the old disseisin and are the outstanding example of how badly the attempt to read disseisin into adverse possession works.

It is in the attempt to get away from these consequences of the old disseisin that the requirement of a claim of title for adverse possession has been subjected to its severest strain. Technically, title signifies the investitive facts of a right, such as a conveyance or a descent cast, rather than the right itself,<sup>198</sup> and if title were used in this sense in the expression claim of title, the claim would be directed towards some particular means of acquiring ownership, such as a deed or a will, and would only indirectly involve a claim of ownership. Claim of title would then mean claim of a title and that title would naturally be looked to to ascertain the extent of the titled possession. It is believed that the courts which have been led to indulge in the presumption that the claim of title is in accordance with the deed have been at least unconsciously influenced by this possible meaning of claim of title, and they have this in their justification that such was probably the sense in which claim of title was first used in connection with the statute of limitations.<sup>199</sup> In this sense it is hardly distinguishable from what we mean today by color of title. But claim of title soon got away from this meaning unless in connection with boundary disputes and came to mean claim of right or ownership, or the intention to acquire ownership, or to hold as owner,<sup>200</sup> and it is believed that it is this meaning that it should have

---

claiming title only to a specified line, capable of being ascertained, cannot, by ignorantly having possession up to another line, acquire a title by disseizin, to land lying between the two which he does not intentionally claim."

<sup>197</sup> *Preble v. Maine Central Ry.* (1893) 85 Me. 260, 27 Atl. 149. The trend of the more recent cases is noticed in 3 Gray, *Cases on Property* (2d ed. 1906) 65 note. For an exhaustive collection of cases showing the more modern tendency see 2 C. J. 141 note 68.

<sup>198</sup> Salmond, *Jurisprudence* (6th ed. 1920) 299.

<sup>199</sup> See the cases cited *supra* note 172.

<sup>200</sup> The change is seen in the New York cases, *supra* p. 148. And see Sedgwick and Wait, *Trial of Title to Land* (2d ed. 1886) sec. 756, quoted by Holmes, J., in *Bond v. O'Gara* (1900) 177 Mass. 139, 58 N. E. 275.

in boundary disputes as well. That claim of title does not necessarily mean an express assertion of title is generally agreed.<sup>201</sup> It has been said that here as elsewhere actions speak even louder than words.<sup>202</sup>

The question remains, however, which is the land the possessor claims and intends to hold as owner, the land described in the deed, or that which he is actually occupying. As long as the mistake continues, he is unaware that there is any difference between the two. There is a conflict in intentions and the law must choose between the two. It is here that Mr. Justice Holmes' suggestion is so helpful that the law should choose the intention directed towards the physical object rather than the intention to hold in accordance with the deed.<sup>203</sup> Even with this suggestion to guide us however, it is still necessary to determine what will be sufficient to indicate claim of title to the strip in question. A few courts apparently would hold that no further evidence of claim of title or intention to hold as owner is necessary than where the possessor is not an adjoining owner but is clearly an interloper,<sup>204</sup> but mistakes as to boundary are so natural and so frequent, and adjoining owners are so proverbially careless about them, that the great majority of courts in requiring something more than in the ordinary case would seem to be instinctively right. Where such an extreme act of ownership as the erection of a house is involved it would seem that it evidences a claim of ownership without cavil,<sup>205</sup> and so of a wall or fence elaborate enough to indicate that it is not likely to have been placed there unless it was distinctly claimed as the boundary line.<sup>206</sup> On the other hand the mere enclosure of a neighbor's strip with a make shift fence intended for the convenience of the builder and enough in the ordinary case to indicate adverse possession may well be held insufficient to indicate to a neighboring owner a deliberate intention to claim title to the disputed strip. Many of the courts which have been most inclined against finding adverse possession in these cases have tended to this result in holding that acquiescence in a line evidently intended as a boundary line for the statutory period will be conclusive,<sup>207</sup> although they have sometimes

<sup>201</sup> 2 C. J. 128.

<sup>202</sup> *Rude v. Marshall* (1917) 54 Mont. 27, 31, 166 Pac. 298.

<sup>203</sup> *Bond v. O'Gara*, *supra* note 200.

<sup>204</sup> See the cases cited in 2 C. J. 139 note 61. Possibly some of the cases cited in 2 C. J. note 68 might also be included. A number of them are so cited by 2 Tiffany, *Real Property*, (2d ed. 1920) 1946 note 90.

<sup>205</sup> See the cases cited in 33 L. R. A. (N. S.) 934 note. But see *contra*: *Wacha v. Brown* (1889) 78 Iowa, 432, 43 N. W. 269; *Winn v. Abeles* (1886) 35 Kan. 85, 10 Pac. 443; *Kirkman v. Brown* (1894) 93 Tenn. 476, 27 S. W. 709.

<sup>206</sup> The great extension of the doctrine that acquiescence in a boundary line for the statutory period will definitely establish it as the true line would seem to be a subconscious recognition of the fallacy lying behind much that has been said in denial of adverse possession by mistake.

<sup>207</sup> The authorities on acquiescence in a boundary line for the statutory period are collected in 2 C. J. 137 note 42.

distinguished this from adverse possession.<sup>208</sup> A tremendous amount of useless litigation would be swept away if the law on this matter were to be restated free from the complexities of secret intents derived from the law of disseisin and along the rational lines of claim of title. It is believed that the result would not be very far different from the law in force in most jurisdictions today,<sup>209</sup> but such a restatement of the law would be a guide whereas the law as at present stated is little more than a stumbling block.

A mistake of a different character is where one enters on what he supposes is government land with intent to acquire title under the land laws and later discovers that the title is not in the government but in a private individual. His holding is much more meritorious than if he had known the real facts and to hold that such a possession with the avowed intention of acquiring ownership should not be equally as effective in conferring title as if he had been an avowed usurper would be strange indeed. And such seems to be the trend of authority.<sup>210</sup> The difficulty lies in finding a possession that is adverse or a claim of title. There is clearly no intention to oust anyone nor is there a present claim of ownership against the whole world, but possession may be adverse without any consciously hostile intent and the intention to acquire title is probably the predominant intent in most cases of adverse possession. Claim of title is perhaps not a very happy phrase to express this intention but claim of title has been the phrase used by the American courts to indicate that the possessor must have the mind of the owner in order to acquire title and no greater violence is done to its natural meaning than is the case with most technical terms. The claim is in fact hostile to all other claims than that of the government, although not consciously so.<sup>211</sup>

This raises the question as to how broad the claim of title must be. Some of the courts which have been willing to admit the supposed entrant on government land an adverse possessor have made it a special case because of the fact that even if the possession had been adverse to the government the government's title would not have been affected;

---

<sup>208</sup> Iowa is a notable example of this. See (1921) 7 IOWA L. BULL. 135.

<sup>209</sup> The superabundance of cases arising out of long possession under mistake as to boundary may be seen by a glance at the many citations in 2 C. J. 137 note 42, 139 note 62, and 141 note 68. Only by comparing the cases from a single jurisdiction in all three notes can anything like an adequate idea of the law of that jurisdiction in this matter be obtained.

<sup>210</sup> 2 Tiffany, *Real Property* (2d ed. 1920) 1943; 2 C. J. 130.

<sup>211</sup> Ladd, J., in *Blumer v. Land Co.* (1905) 129 Iowa, 32, 105 N. W. 342, says:—"The character of the claim under a government entry does not appear to have been given due consideration. If effective, it is exclusive of others. It is an assertion of right to the land, which, if well founded, must defeat the claims of all others. It involves a right of possession as absolute as though the party owned the title. It purports to exclude everyone from its enjoyment, and even as against the government to assert the right to divest its title by compliance with the law."

and that therefore it was immaterial that the adverse claim did not include the government, and have intimated that the claim of title required in adverse possession must be against the whole world except the government.<sup>212</sup> This is either on the ground that possession to be adverse must be exclusive, and that the recognition of a right in another prevents it from being exclusive,<sup>213</sup> or that claim of title means claim of ownership, and that ownership necessarily means absolute ownership, that is, something good against the whole world.<sup>214</sup> This conception of ownership was that of the Roman law.<sup>215</sup> It is also the popular conception and is in accord with the views expressed by Langdell on prescription.<sup>216</sup> On the other hand, relativity of ownership or title has always had an appeal to the common law,<sup>217</sup> and there is considerable authority that it is sufficient for adverse possession that the claim be hostile to the other party to the controversy, whether the true owner or a prior possessor, though there may be a third party other than the government whose superior title is acknowledged, and against whom the holding is non-adverse.<sup>218</sup> Thus a lease from a third party might estop the possessor from claiming title against the lessor, while it would not be conclusive that he was not claiming the title as against somebody else.<sup>219</sup> But cases where A continues to claim the fee in his own right against B, after taking a lease from C, are not likely to be common.

It is often said that the claim of title in adverse possession must be in fee.<sup>220</sup> This has been due perhaps in part to the identification of claim of title with claim of ownership, but any such inference from such an indefinite term as "title" would be unwarranted and is avoided by using the alternative expression, "claim of title," or "right." It is true that there are many expressions in the older books that a disseisin was of necessity in fee,<sup>221</sup> and if this were so and the modern adverse possession were the equivalent of the old disseisin, there would be strong ground for saying that the claim of title in adverse possession must be in fee; for it was laid down by Judge Story in *Ricard v. Williams*<sup>222</sup> and has generally been accepted in the United States as applicable to the statute of limitations, that the law will not attribute to a

<sup>212</sup> *Lord v. Sawyer* (1880) 57 Calif. 65; *Northern Pac. Ry. v. Pyle* (1910) 19 Idaho, 3, 112 Pac. 678; *Blumer v. Land Co.*, *supra* note 211; *Maas v. Burdetzke* (1904) 93 Minn. 295, 101 N. W. 182.

<sup>213</sup> *Altschul v. O'Neill* (1899) 35 Or. 202, 221, 58 Pac. 95.

<sup>214</sup> See cases cited 2 C. J. 129 note 96.

<sup>215</sup> See Lightwood, *Possession*, 71.

<sup>216</sup> *Equity Pleading*, secs. 121, 125.

<sup>217</sup> 2 Pollock and Maitland, *History of English Law* (2d ed. 1899) 77.

<sup>218</sup> See cases cited in 2 Tiffany, *Real Property* (2d ed. 1920) 1932 note 47a, and in 2 C. J. 131 note 8.

<sup>219</sup> *Mitchell v. McShane Lumber Co.* (1915, C. C. A. 5th.) 220 Fed. 878.

<sup>220</sup> See cases cited in 2 C. J. 129 note 88.

<sup>221</sup> See 2 Preston, *Conveyancing* (1806) 313 *et seq.*, and 2 Tiffany, *Real Property* (2d ed. 1920) 1981.

<sup>222</sup> (1822, U. S.) 7 Wheat. 59, 105-108.

man a greater estate than he claims,<sup>223</sup> so that if the estate gained is necessarily a fee, the claim must be equally extensive. One difficulty with this argument is that it is by no means clear that a disseisin was of necessity in fee, and that in so far as it was of necessity in fee, this was the result of the rule that a wrongdoer could not qualify his own wrong, which was relegated by Judge Story to disseisin at election<sup>224</sup> and hence removed from the sphere of the statute of limitations and adverse possession.

That disseisin was not of necessity in fee was elaborately argued by Preston.<sup>225</sup> He considered it proved "that a person who enters, *claiming a term*, where there is such a term, or who enters claiming any particular estate, where there is such particular estate, may become tenant for that particular estate, by the dispossession of the termor or disseisin of the owner of the particular estate; without divesting the estate of the person, who has the reversion or remainder or committing any wrong beyond the particular estate."<sup>226</sup> Where there was no particular estate in existence, however, he would have applied the doctrine that a wrongdoer cannot qualify his own wrong.<sup>227</sup> He saw a distinction in the authorities between the disseisin or dispossession of a particular estate *in esse* and the creation of a particular estate *de novo*, but if as it has been attempted to show, the American doctrine of adverse possession is a doctrine of affirmative prescription, it would seem that there should be no more difficulty about the second case than about the first. In the old case of *Reading v. Royston*<sup>228</sup> it was said that "a man may be tenant in common by prescription, yet he may not be a tenant in common by wrong; nor can a man be disseised of an undivided moiety." If adverse possession is a positive title, it is not a case of an estate by wrong or of apportioning a wrong, but of allowing the creation of a limited estate by that title, in the same way as a tenancy in common or an easement.<sup>229</sup> There is adverse possession in such a case, but it is

---

<sup>223</sup> See *Jackson v. Porter* (1825, C. C. D. N. Y., Conn., & Vt.) 1 Paine, 457; *Bedell v. Shaw* (1874) 59 N. Y. 46; *Bond v. O'Gara* (1900) 177 Mass. 139, 58 N. E. 275; Tyler, *Ejectment* (1871) 71; Sedgwick and Wait, *Trial of Title to Land* (2d ed. 1886) 217; Ballantine, *Claim of Title in Adverse Possession* (1919) 28 YALE LAW JOURNAL, 220; 2 C. J. 127.

<sup>224</sup> *Ricard v. Williams*, *supra* p. 156.

<sup>225</sup> 2 *Conveyancing* (1806) 314 *et seq.*

<sup>226</sup> *Ibid.* 321.

<sup>227</sup> *Ibid.* 319, 322-323.

<sup>228</sup> (1702, Q. B.) 2 Salk. 423.

<sup>229</sup> As the only prescription known to the common law was immemorial there was no chance for a prescriptive right to be gained either for or against a term for years and in *Wheaton v. Maple & Co.* [1893, C. A.] 3 Ch. 48, it was held that no presumption of a grant or covenant would be indulged in favor of such limited right, but in *Wallace v. Fletcher* (1855) 30 N. H. 434, 453, it was said that "the tenant for life or years may grant easements, or permit them to be acquired by user, and they will be valid against himself and those who hold his estate during its continuance, and perhaps not afterwards, where the reversioner had

limited to the extent of the claim. This result would seem to be almost necessary from the abandonment of the doctrine that a wrongdoer cannot qualify his own wrong. If the one who is in wrongful possession for the statutory period claiming a term for years or a life estate is not to have the fee, it would be jumping to just the opposite extreme to give him nothing at all. The matter is of considerable importance in the case of a void lease for a long term of years or for life, and although the authority on the matter is slight it favors what would seem to be the logical result from the prescriptive character of adverse possession.<sup>230</sup>

(To be continued)

---

previously neither cause nor right to complain." It is submitted that with the American adoption of the theory of a limited prescriptive period there is now no difficulty in allowing the creation by prescription of easements for a limited time.

<sup>230</sup> *Brown v. Issaquena County Supervisors* (1876) 54 Miss. 230; *Jones v. Madison County* (1895) 72 Miss. 777, 18 So. 87; *Warren County v. Lamkin* (1908) 93 Miss. 123, 46 So. 497. One of the most valuable parts of Professor Ballantine's articles on adverse possession is his emphasis on this point, *Claim of Title in Adverse Possession* (1919) 28 YALE LAW JOURNAL, 222. See also NOTES (1908) 22 HARV. L. REV. 138, but see 2 Tiffany, *Real Property* (2d ed. 1920) 1983.