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## DISSEISIN AND ADVERSE POSSESSION

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No better illustration of the power of an apt phrase to make its own way is likely to present itself than the case of adverse possession. Apparently the first one to use it was Lord Mansfield in the great case of *Taylor d. Atkyns v. Horde*<sup>1</sup> but he was seemingly not conscious of phrasemaking for he did not use it in his onslaught on disseisin but incidentally in discussing the statute of limitations. The law had already become settled that not every wrongful possession would cause the statute to run and this had been placed on the ground that it required a disseisin to start the statute running,<sup>2</sup> but after the scorn Lord Mansfield had cast on the word disseisin,<sup>3</sup> he was evidently loath to use it in such a live matter as the running of the statute and hit on adverse possession instead. Its usefulness in that connection was so great that it was generally adopted and at the time of the reform legislation of 1833 a "mere adverse possession"<sup>4</sup> that would start the statute running was being distinguished from a technical disseisin.<sup>5</sup> Disseisin<sup>6</sup> and "non-adverse possession"<sup>7</sup> alike fell with the Real Property Limitation Act of 1833 and although the term adverse posses-

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<sup>1</sup> (1757, K. B.) 1 Burr. 60, 119.

<sup>2</sup> *Reading v. Rawsterne* (1702, Q. B.) 2 Ld. Raym. 829. See Lightwood, *Possession of Land* (1894) 160.

<sup>3</sup> *Taylor d. Atkyns v. Horde* (1757, K. B.) 1 Burr. 60, 110. See Bordwell, *Seisin and Disseisin* (1921) 34 HARV. L. REV. 592, at p. 621.

<sup>4</sup> *Doe d. Souter v. Hull* (1822, K. B.) 2 Dowl. & R. 38.

<sup>5</sup> *Doe d. Parker v. Gregory* (1834, K. B.) 2 Ad. & El. 14. See Lightwood, *Possession*, 160.

<sup>6</sup> Sweet, *Seisin* (1896) 12 LAW Q. REV. 239; *Title by Adverse Possession* (1907) 19 JURID. REV. 67.

<sup>7</sup> Pollock and Wright, *Possession in the Common Law* (1888) 90; Lightwood, *Possession*, 181.

sion still lingers in England it has little significance there.<sup>8</sup> In the United States its fate was quite otherwise. A great law teacher wondered at its displacement of disseisin.<sup>9</sup> Perhaps it will be worth while to attempt to show that the change was not one of mere words.

## RE-ENTRY

It is common knowledge that the owner of land does not cease to have legal possession by his moving off the land and allowing it to lie idle.<sup>10</sup> *A fortiori* was this true of the old seisin.<sup>11</sup> Nor under like circumstances did the disseisor lose his tortious seisin. He did not lose his seisin by an abandonment of the premises, nor was the seisin of the owner automatically restored. For this a re-entry or a continual claim was necessary.<sup>12</sup> No such re-entry is necessary in the United States in the case of adverse possession.<sup>13</sup> It was held at an early period that title draws to itself possession or seisin unless the land is in the adverse possession of another,<sup>14</sup> and this was applied not only to vest the possession in the owner before entry,<sup>15</sup> but to re-vest it in him after an adverse possession falling short of the period of the statute

<sup>8</sup> Lightwood, *Possession*, 81. "If we wish to know the result of a person acquiring title to land under the Real Property Limitation Act, we must look to the act, and to the act alone. . . ." Sweet, *Title by Adverse Possession* (1907) 19 JURID. REV. 67.

<sup>9</sup> "This substitution of the term 'adverse possession' for disseisin is one of the curiosities of our legal terminology." 1 Ames, *Cases on Torts* (3d ed. 1909) 278 note 1.

<sup>10</sup> Lightwood, *Possession*, 601.

<sup>11</sup> *Ibid.* 62.

<sup>12</sup> *Ibid.*; Challis, *The Squatter's Case* (1889) 5 LAW Q. REV. 185; Sweet, *op. cit. supra* note 6, at p. 249.

<sup>13</sup> 2 Tiffany, *Real Property* (2d ed. 1920) 1959; Ames, "Disseisin of Chattels," 3 *Select Essays in Anglo-American Legal History* (1909) 541, 577.

<sup>14</sup> *Van Brunt v. Schenck* (1814, N. Y.) 11 Johns. 377, 385; *Green v. Liler* (1814, U. S.) 8 Cranch, 229, 249; *Hawk v. Senseman* (1820, Pa.) 6 Serg. & R. 21; *Jackson v. Sellick* (1811, N. Y.) 8 Johns. 202; *Jackson v. Howe* (1817, N. Y.) 14 Johns. 405; *Rust v. Boston Mill Corporation* (1828, Mass.) 6 Pick. 158, 170; *Den ex dem. Saxton v. Hunt* (1845, N. J. Sup. Ct.) Spencer, 487, 491; *Cresap's Lessee v. Hutson* (1850, Md.) 9 Gill, 269, 276; H. B. and J. W. Wallace's Note in 2 *Smith Lead. Cas.* (5th Am. ed. 1866) 561; 1 Scribner, *Dower* (2d ed. 1883) 254; Freeman, 85 Am. Dec. 322, note; Ames, *Lectures on Legal History* (1913) 229.

<sup>15</sup> *Ibid.* It was English law that "general property in real estate does not draw to it possession, as that in personal property does" 5 Dane, *American Law* (1823) ch. 172, art. 7, 12. And such still seems to be the general rule in England, so that possession does not follow upon the acquisition of land without an entry. Lightwood, *Possession*, 65; Ames, *Lectures on Legal History* (1913) 228. For the influence of the law of chattels on the law of real property in this respect in the United States, see *Bush v. Bradley* (1810, Conn.) 4 Day, 298, 306; *Bird v. Clark* (1808, Conn.) 3 Day, 272, 277; *Merwin v. Morris* (1899) 71 Conn. 555, 573, 42 Atl. 855, 861.

of limitations.<sup>16</sup> Hence it is fundamental that adverse possession must be continuous.<sup>17</sup> A gap between adverse possessions starts the statute to running *de novo*.<sup>18</sup> Nor is re-entry in case of abandonment necessary under the modern English Real Property Limitation Acts. But the decision of the Privy Council<sup>19</sup> to that effect did not pass without a protest from Challis<sup>20</sup> and a comment from Lightwood,<sup>21</sup> that it was a departure from the old law of disseisin. Challis's protest was the occasion for Sweet's memorable reply<sup>22</sup> that the very object of the Real Property Limitation Act of 1833 had been to rid the law of actions from doctrines of seisin, disseisin and the like.

Neither in England nor in the United States is it apparent that the courts were conscious of departing from the old law in holding that in cases of abandonment no entry was necessary to restore the possession.<sup>23</sup> There was little or no attempt in either case to make out a constructive re-entry<sup>24</sup> or a remitter<sup>25</sup> as there probably would have been if the courts had thought of the right of the owner in terms of right of entry and disseisin. Their modes of thought had changed from the old ways. They were thinking in terms of ownership and possession and the result seemed to follow as of course.<sup>26</sup>

<sup>16</sup> *Louisville Co. v. Philyaw* (1889) 88 Ala. 264, 6 So. 837; *Brown v. Hanauer* (1887) 48 Ark. 277, 3 S. W. 27; *Costello v. Edson* (1890) 44 Minn. 135, 46 N. W. 299; *Malloy v. Bruden* (1882) 86 N. C. 251; *Cunningham v. Patton* (1847, Pa.) 6 Barr. 355, 358, 359; *Taylor's Devisees v. Burnsides* (1844, Va.) 1 Gratt. 165, 202; Ames, 3 *Select Essays*, 577.

<sup>17</sup> *Brandt v. Ogden* (1806, N. Y.) 1 Johns. 156; *Jarrett v. Stevens* (1892) 36 W. Va. 445, 450, 15 S. E. 177, 178; 2 C. J. 80.

<sup>18</sup> *Supra* note 17.

<sup>19</sup> *Trustees' Agency Co. v. Short* (1888, P. C.) L. R. 13 A. C. 793.

<sup>20</sup> *The Squatter's Case* (1889) 5 LAW Q. REV. 185, reprinted as App'x III, Challis, *Real Property* (3d ed. 1911).

<sup>21</sup> *Possession*, 62.

<sup>22</sup> *Seisin* (1896) 12 LAW Q. REV. 239, 248. See also Challis, *op. cit. supra* note 3.

<sup>23</sup> Nor does Ames seem conscious of this. See Ames, 3 *Select Essays*, 577.

<sup>24</sup> There is a dictum in *Malloy v. Bruden* (1882) 86 N. C. 251, 259, that would give to abandonment alone the effect of an actual re-entry, in making the revived possession of the owner relate back to the ouster, but this is opposed to the numerous American authorities which make relation back dependent on an actual re-entry (see 1 *Smith Lead. Cas.* [8th Am. ed. 1885] 1398, 38 Cyc. 1012; 19 C. J. 1236). The American courts have been just as loath to find a constructive re-entry as they have been ready to find a constructive possession incident to the title and a good statement of the latter doctrine is to be found in *Malloy v. Bruden* just preceding the dictum in question.

<sup>25</sup> Challis argues that the judges in *Trustees' Agency Co. v. Short* must have been inventing a new kind of remitter (*op. cit. supra* note 20); but the terms seisin, disseisin and remitter occurred neither in the arguments nor in the judgment (Sweet, *op. cit. supra* note 22).

<sup>26</sup> See Lightwood, *Possession*, 63; Sweet, *op. cit. supra* note 22; and the authorities cited *supra* note 13.

## TACKING

A more difficult question arises where instead of an abandonment by the first adverse holder and a resulting vacancy, we have him ousted by a second adverse holder who holds until after the statutory period has run from the first ouster. There is here no vacancy and as the land is at all times in the hostile possession of some one else, no proper place for the application of the rule that in general title draws to itself possession. In such a case, is the old owner's right to enter, his right to an action, his right of property, gone? On the other hand, what of the rights of the adverse holders? There have been three distinct solutions to these problems in the Anglo-American law; first, that of the statutes of limitations of 32 Henry VIII<sup>27</sup> and 21 James I<sup>28</sup> as read into the old disseisin; second, that of the Real Property Limitation Act of 1833; third, that of the American doctrine of adverse possession.

Read into the old scheme of disseisin, the statute of limitations of James I meant that the statute was added to descent cast as a means of tolling or cutting off the right of entry of the disseisee.<sup>29</sup> As the burden was on the plaintiff in ejectment to prove that he had at least a right of entry, the loss of the right of entry meant also the loss of the right to ejectment and in the ordinary case the resort to the old real actions until they were barred under the statute of Henry VIII.<sup>30</sup> But as the barring of the right of entry did not ordinarily mean the barring of the right to the real actions, so the barring of the real actions did not necessarily mean the barring of the right of entry.<sup>31</sup> More important than either statute in the clearing up of titles was the Statute of Fines (1487) 4 Hen. VII, c. 24, which unlike them was not directed at any particular remedy but in the proper case cut off all claims.<sup>32</sup> Despite these statutes, a saying current in Littleton's time that "a right cannot die" gained a certain authority as a maxim of the common law.<sup>33</sup>

<sup>27</sup> (1540) 32 Hen. VIII, c. 2.

<sup>28</sup> (1624) 21 Jac. I, c. 16.

<sup>29</sup> 2 *Smith Lead. Cas.* (8th Am. ed. 1885) 661-2; Langdell, *Summary of Equity Pleading* (2d ed. 1883) 142.

<sup>30</sup> Langdell, *op. cit. supra* note 29, at pp. 132 and 141.

<sup>31</sup> *Hunt v. Burn* (1702, Q. B.) 2 Salk. 422; Lightwood, *Possession*, 159; Finlason's note, 3 Reeves, *History of English Law* (2d Finlason's ed. 1869) 310; 2 Preston, *Abstracts of Title* (2d ed. 1824) 350; 1 *ibid.* 266.

<sup>32</sup> Lightwood, *Possession*, 156-158.

<sup>33</sup> Littleton, *Tenures*, \*478; Coke, *Littleton*, \*279 b; Butler's note, *ibid.* (1st Am. ed. 1853) \*278 b; 2 Preston, *Abstracts of Title* (2d ed. 1824) 333; Meredith, *A Paradox of Sugden's* (1918) 34 *LAW Q. REV.* 253. In Littleton's time there was much more reason for saying that "a right cannot die" than either at an earlier or a later period of the common law, for the Statute of Non-claim of (1361) 34 Ed. III, c. 16, had done away with the prescriptive effect of fines and the gradual lengthening of the periods of limitations to over 200 years had left the statutes of limitation without meaning. It does not appear that the maxim was current in Bracton's day. See 2 Pollock and Maitland, *History of English Law* (2d ed. 1899) 141. Its currency in Littleton's day was probably due to the influence of the Canon Law. See Maine, *Ancient Law* (3d Am. ed. 1864) 276.

Under both the statutes of Henry VIII<sup>34</sup> and James I<sup>35</sup> the burden of proving seisin or possession within the statutory period was on the old owner, although this burden must have been lightened by the presumption of their continuance.<sup>36</sup> The real issue was as to when that seisin or possession had ceased or as to whether it had been restored during the statutory period. It did not turn on the length of time there had been an action against any individual nor on the merit or demerit of the one in possession. It was immaterial therefore whether the disseisee had been kept out by a succession of disseisors or by persons with a continuous claim of title or by a single disseisor.<sup>37</sup>

The English Real Property Limitation Act of 1833, 3 & 4 Wm. IV, c. 27, unlike the statute of James I, was a direct limitation on the action of ejectment.<sup>38</sup> Moreover, with certain exceptions, it did away with the old real actions,<sup>39</sup> created one period of limitation for entries and actions alike,<sup>40</sup> and provided that at the end of the period of limitation the right and title of the party out of possession should be extinguished.<sup>41</sup> Further it eliminated descent cast<sup>42</sup> and any argument that the statute was to operate on analogy to the old descent cast by making the statute run from dispossession instead of disseisin.<sup>43</sup> It "changed the meaning of 'right of entry,' making it signify simply the right of an owner to the possession of land of which another person has the actual possession, whether the owner's estate is divested or not."<sup>44</sup> With "right of entry," now incident to ownership, instead of a technical right, distinguished from "right of property," which a plaintiff had had to prove to entitle him to ejectment, it might have been supposed that the burden of proof that the statute had run would have been shifted to the defendant,<sup>45</sup> but on the ground that the statute extinguishes the right as well as bars the remedy,<sup>46</sup> the burden of proving that his right has not been barred still remains with the old owner.<sup>47</sup> But wherever the burden of proof should have been it was expressly provided that the statute should run from "dispossession or

<sup>34</sup> Langdell, *op. cit. supra* note 29, sec. 122; Stearns, *Real Actions* (1824) 241.

<sup>35</sup> Lord Mansfield in *Taylor d. Atkyns v. Horde* (1757, K. B.) 1 Burr. 69, 119; Langdell, *op. cit. supra* note 29, secs. 116, 123.

<sup>36</sup> See Stearns, *Real Actions* (1824) 241, and *Cole v. Heydon* (1860, Q. B.) 1 L. T. R. 439.

<sup>37</sup> Langdell, *op. cit. supra* note 29, secs. 120 and 123.

<sup>38</sup> Sec. 2.

<sup>39</sup> Sec. 36.

<sup>40</sup> Sec. 2.

<sup>41</sup> Sec. 34.

<sup>42</sup> Sec. 39.

<sup>43</sup> Sec. 3.

<sup>44</sup> Langdell, *op. cit. supra* note 29, sec. 125.

<sup>45</sup> *Ibid.* sec. 126.

<sup>46</sup> *Ibid.* sec. 126; *Dawkins v. Penrhyn* (1877, C. A.) L. R. 6 Ch. 318, (1878, H. L.) L. R. 4 A. C. 51.

<sup>47</sup> 19 Halsbury, *Laws of England* (1911) 183.

discontinuance of possession"<sup>48</sup> so that, as under the older statutes, it is the time at which the possession is lost that is the material thing and not what happens to the property afterwards. So far was this carried at first, that a mere discontinuance of possession was held sufficient to set the statute running whether anyone else took possession or not,<sup>49</sup> but it was felt to be anomalous to have the statute run except in favor of someone and so the literal interpretation of the statute was abandoned.<sup>50</sup> It was under the influence of these later cases that the Privy Council reached its decision in *Trustees Agency Co. v. Short*.<sup>51</sup> Already however in *Doe in dem. Goody v. Carter*<sup>52</sup> it had been taken for granted by the court that the statute would continue to run notwithstanding there was no link to connect the possession of the defendant with that of her husband and with the stress that is laid on loss of possession by the statute this result is hard to avoid. The unfortunate consequence in such a case is that the old owner's title is lost and the ownership left for the time being in suspense.<sup>53</sup>

Instead of applying to the recovery of land the theory of the English statutes of limitation as outlined above, Professor Ballantine has suggested that the statute be made to run from the accrual of the cause of action, but that the accrual of the cause of action need not be fixed once and for all at the time of the original dispossession, that in fact where a second adverse possessor has ejected a first before the statute has run in the latter's favor, a new cause of action arises in favor of the owner against the second adverse possessor and that the statute commences to run all over again.<sup>54</sup> If the modern action for the recovery of land were in effect the old assize of novel disseisin there would be much to say for this view. The cause of action would be the disseisin committed by the defendant or by the one under whom he claimed, and a new disseisin would set the statute running anew. But if the modern action for the recovery of land be considered a tort action at all,<sup>55</sup> it would seem to be based on the withholding of possession from the one entitled rather than on an ouster, and a new cause of action would seem to arise with each successive holding whether in privity with the preceding holding or not. Logically Professor Ballantine's theory would prevent tacking in any case just as the English theory would allow it in all cases. Neither result is satisfying and the true explanation would

<sup>48</sup> Sec. 3.

<sup>49</sup> *Doe v. Bramston* (1835, K. B.) 3 Ad. & El. 63; Lightwood, *Possession*, 196.

<sup>50</sup> *McDonnell v. McKinty* (1847, Q. B.) 10 Ir. L. 514, 526; *Smith v. Lloyd*, (1854) 9 Exch. 562; Lightwood, *Possession*, 195.

<sup>51</sup> *Supra* note 19.

<sup>52</sup> (1847) 9 Q. B. 863.

<sup>53</sup> See Langdell, *op. cit. supra* note 29, sec. 125.

<sup>54</sup> *Title by Adverse Possession* (1918) 32 HARV. L. REV. 156.

<sup>55</sup> "Ejectment (notwithstanding its origin) is in substance purely *in rem* (the damages recovered being only nominal)." Langdell, *op. cit. supra* note 29, sec. 125. See also sec. 115.

seem to be that of Langdell, that the situation is primarily not one of remedy but of the acquisition of ownership.<sup>56</sup> It was in prescription and not in the limitation of actions that he saw the approved solution, but he failed to find prescription in the English law except perhaps under the Statute of Fines or the Real Property Limitation Act of 1833<sup>57</sup> and his study did not include the American authorities.<sup>58</sup> On the other hand, Ames thought he saw in the cases arising under the Act of 1833 and in the American authorities<sup>59</sup> a true prescription,<sup>60</sup> and this he read into the older law. In so far as the American authorities at least are concerned it is believed that Ames was right, but that because of his failure to distinguish between adverse possession and disseisin, he failed to notice the essentially positive character of the American doctrine as contrasted with the essentially negative character of the English,<sup>61</sup> and the resulting difference in the matter of tacking. A moment spent on this may not be out of place.

<sup>56</sup> *Ibid.* sec. 121.

<sup>57</sup> *Ibid.* sec. 122.

<sup>58</sup> *Ibid.* sec. 54, note 1.

<sup>59</sup> Ames, 3 *Select Essays*, 577.

<sup>60</sup> *Ibid.* at p. 567.

<sup>61</sup> It is still customary to treat the acquisition of incorporeal hereditaments by long user under the head of prescription, but not the like acquisition of title to the land itself. Hammond (in note 52 to Blackstone, *Commentaries* [Hammond's ed. 1890] bk. 2, ch. 17) has traced the maxim that "no prescription can give a title to lands" back from Blackstone to Saint Germain, *Doctor and Student* (1518) dial. 1, ch. 8, but shows that Littleton and even Coke applied prescription to corporeal and incorporeal hereditaments alike. It seems never to have been questioned that a tenancy in common might be prescribed for. Littleton, *Tenures*, \*310; Coke, *Littleton*, \*195 b. The singular doctrine came to be advanced that there was something about "lands and other corporeal substances" that made prescription inapplicable to them (2 Blackstone, *Commentaries*, \*264). To a considerable extent this was a matter of mere words, for Blackstone himself said that "actual possession . . . may, by length of time, and negligence of him who hath the right, by degrees ripen into a perfect and defeasible title" (2 *Commentaries*, \*196), and Lord Holt and Lord Mansfield declared twenty years possession a positive title equivalent to a descent cast. (See *infra* notes 74 and 76.) But neither statute of limitation was itself a bar to all right in the owner (see *supra* pp. 5, 6, *Doe v. Reade* [1807, K. B.] 8 East, 353, Pollock and Wright, *Possession in the Common Law* [1888] 99) and the maxim that a right cannot die still had currency. *Supra* note 33. Accordingly prescription as to incorporeal hereditaments was contrasted with limitation as to corporeal hereditaments but the analogy between them would not down and found expression in the application to the latter of the term "negative prescription" which Cruise (*Digest* [3d Am. ed. 1827] tit. XXI, ch. 1, secs. 5, 6, ch. 2) derived from the civilians (Hammond, *ibid.* note 53). The English Act of 1833 left no question about the extinguishment of all the old owner's right but it was in a most thoroughgoing manner an act of limitation rather than an act of prescription and still fundamentally negative. See Campbell's note, Austin, *Jurisprudence* (5th ed. 1885) 493, and Wharton, *Conveyancing* (1851) 537. In the language of Salmond (*Jurisprudence* [6th ed. 1920] 41) "the imperfect negative" prescription of the earlier period was replaced by the "perfect negative prescription" of the Act of 1833.

As a matter of fact the interaction between prescription for incorporeal hereditaments and the limitation of actions for the recovery of land, has always

Disseisin and the English Act of 1833 were alike in stressing the loss of seisin or possession. Under disseisin indeed the loss of seisin was very serious even though the statute had not run. Gradually the position of the old owner became worse and worse until finally only the shadow of a right remained.<sup>62</sup> With the rise of the use the days of the "beatitude of seisin" had ceased and it was the disadvantage of its loss rather than the advantage of its presence that became conspicuous under the general head of disseisin. Disseisin was as negative as its name and the same thing was true of dispossession which took its place under the Act of 1833. Both looked to the demerit of the one out of possession, rather than to the merit of the one in possession. Both stressed the laches or acquiescence of the old owner rather than the possible quieting of title in a new owner.<sup>63</sup> Langdell on the other hand argued

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been very active. 2 Tiffany, *Real Property* (2d ed. 1920) 2028. And in the United States the tendency has been to favor the analogy of the statute rather than any theory of a lost grant. *Ibid.* 2030. Furthermore the treatment of "prescription" and "adverse possession" in the United States has developed along similar lines. In an early case, *Hawk v. Senseman* (1820, Pa.) 6 Serg. & R. 21, it was held that for the statute to operate there had to be "an actual, continued, visible, notorious, distinct, and hostile possession." Compare this with the requisites which Reeves gives for both adverse possession and prescription. 2 Reeves, *Real Property* (1909) sec. 1028. The best discussion of prescription in its wider aspect in the Anglo-American law is that by Hammond in his notes to 2 Blackstone, *Commentaries* (Hammond's ed. 1890) ch. 17.

<sup>62</sup> Maitland, "Mystery of Seisin," 3 *Select Essays in Anglo-American Legal History* (1909) 591, 593.

<sup>63</sup> Ames, 3 *Select Essays*, 567. Whether the tolling of a right of entry should depend on the merit of the possessor or the demerit of the one out of possession varied at times in the English law. At first a delay of only a few days tolled the entry. Maitland, *The Beatitude of Seisin* (1888) 4 *LAW Q. REV.* 24, 31. Then the time was extended. *Ibid.* 286, 296. Then the emphasis shifted to the possessor and he must be in by title and not by tort (*ibid.*) until the only kind of a title that would toll an entry was a descent cast. *Ibid.* 298. Then the statute of James I was passed and Holt, C. J., likened a possession for twenty years to a descent cast (*Stokes v. Berry* [1699, K. B.] 2 Salk. 421). But descent cast depended upon a previous divestment of the freehold, whether by a disseisin, an abatement or an intrusion, and although mistake might prevent an unlawful entry from amounting to one of these (*Blunden v. Baugh* [1632, K. B.] Cro. Car. 302) the general rule was that the wrongdoer could not qualify his own wrong. *Infra* inst. 2. In so far therefore as the statute of James I depended on one of these acts, the fact of disseisin and the delay in bringing the action therefore were the important considerations and not the merits of the possession. The shift from disseisin to adverse possession as the basis for the running of the statute showed a tendency to look to the one in possession, but this shift never got far in England and the Act of 1833 went even further than the old disseisin in minimizing the importance of the intention with which or the character in which the possession was held. Pollock and Wright, *op. cit. supra* note 61, at p. 90. It further emphasized the importance of acquiescence by providing that in cases of concealed fraud the statute should not run until the discovery of the fraud or until with reasonable diligence the fraud might have been discovered. Lightwood, *Possession*, 245.



that "the thing to be looked at is the possession of the defendant—not the want of possession in the plaintiff"<sup>64</sup> and while admitting that the Statute of James I did not depart from the traditional English view of negation, could yet say of it that "the courts came naturally and inevitably to regard the defendant's position as the important consideration; and hence out of this statute has grown the doctrine of adverse possession."<sup>65</sup> Adverse possession was therefore fundamentally opposed to disseisin in being affirmative and in the United States it had its chance to work out its destiny as a true prescription.

All three of the English types of statutes of limitations for the recovery of land have been common in the United States, but the courts have felt singularly free from the language of the statutes<sup>66</sup> and from theories of limitation of actions. On the principle that ownership or title drew to itself possession until an adverse possession was clearly shown,<sup>67</sup> the burden of the statute was removed from the old owner and placed on the adverse claimant.<sup>68</sup> The statute became an affirmative defense as urged by Langdell,<sup>69</sup> although except under reformed legislation it did not have to be pleaded.<sup>70</sup> Furthermore although few of the statutes had anything to say about title,<sup>71</sup> adverse possession was held to affect the right and not merely the remedy,<sup>72</sup> and indeed it was on this ground that it was held that the statute did not have to be pleaded.<sup>73</sup> In Lord Mansfield's original statement of the doctrine of adverse possession he had stated that twenty years adverse possession was a "positive title" to the defendant in ejectment and took away the "right of possession" of the plaintiff.<sup>74</sup> He said that twenty years adverse possession is a positive title and not that it *gives* a positive title,

<sup>64</sup> Langdell, *Equity Pleading*, sec. 121.

<sup>65</sup> *Ibid.* sec. 123.

<sup>66</sup> 2 Tiffany, *Real Property* (2d ed., 1920) 1918.

<sup>67</sup> *Jackson v. Sellick* (1811, N. Y.) 8 Johns. 202, 208; *Lund v. Parker* (1824) 3 N. H. 49; cases cited *supra* note 14.

<sup>68</sup> *Shearman v. Irvine's Lessee* (1808, U. S.) 4 Cranch, 367; *Hawk v. Senseman* (1820, Pa.) 6 Serg. & R. 21; *Rung v. Shoneberger* (1833, Pa.) 2 Watts, 23; *Brown v. King* (1842, Mass.) 5 Metc. 173; *Herbert v. Hanrick* (1849) 16 Ala. 581, 594; *Edmonston v. Shelton* (1857) 49 N. C. 451; H. B. and J. W. Wallace's note in 2 *Smith Lead. Cas.* (5th Am. ed.) 566; 2 C. J. 262.

<sup>69</sup> *Equity Pleading*, sec. 126. Langdell's argument concerned the English Act of 1833 but is even more pertinent to acts of limitation in the United States.

<sup>70</sup> 2 C. J. 258; 21 Ann. Cas. 1244 note; 4 Am. St. Rep. 382 note.

<sup>71</sup> Exceptional statutes in this regard are: Hemingway's Miss. Code, 1917, sec. 2458; 3 N. J. Comp. Sts. 1911, 3172; R. I. Gen. Laws, 1909, ch. 256; S. C. C. C. P. 1912, sec. 134; Complete Tex. Sts. 1920, art. 5679.

<sup>72</sup> Ames, 3 *Select Essays*, 569; 2 Tiffany, *Real Property* (2d ed. 1920) 1978; 2 C. J. 251.

<sup>73</sup> *Trowbridge v. Royce* (1772, Conn. Super. Ct.) 1 Root, 50; *Hill v. Bailey* (1879) 8 Mo. App. 85; *Sutton v. Clark* (1901) 59 S. C. 440, 38 S. E. 150; 2 C. J. 258.

<sup>74</sup> *Taylor d. Atkyns v. Horde* (1757, K. B.) 1 Burr. 60, 119.

but it was easy to slip from the one expression to the other,<sup>75</sup> and with the single period of limitation which had come to prevail in most of the United States long before the Act of 1833, it was easy to identify the positive title thus gained with ownership. We may almost say it was inevitable.<sup>76</sup> The burden of proof henceforth was on the one who wished to take advantage of the statute of limitation to show that a good title had been gained by adverse possession and if he failed to do so the old title remained and with it the remedies incident to title.

In the United States therefore the emphasis is not on the one out of possession but on the one in possession.<sup>77</sup> Good faith aside,<sup>78</sup> it has

<sup>75</sup> The shift is seen in the quotation from Sir Thomas Plumer, Master of the Rolls, in *Cholmondely v. Clinton* (1820, Ch.) 2 Jac. & W. 1, 156, which Ames gives immediately after the quotation from Lord Mansfield. 3 *Select Essays*, at p. 568. See also Runnington, *Ejectment* (1st Am. ed. 1806) 58, and *Pederick v. Searle* (1819, Pa.) 5 Serg. & R. 236.

<sup>76</sup> In *Stokes v. Berry* (1699, K. B.) 2 Salk. 421, Holt, C. J., had said that twenty years possession is a "good title." This with Lord Mansfield's statement and the statements of Blackstone, *supra* note 61, and Butler in his note to Coke, *Littleton*, \*239 coupled with uniform periods of limitation and the prevalent application in the United States of notions of ownership and possession to land made way for the instantaneous and practically universal recognition of the positive acquisition of ownership by adverse possession, once it was stated. That an "indefeasible" or "perfect" title could be gained under the statute was stated by Gibson, C. J., and his Pennsylvania colleagues in the forties (see *Gregg v. Blackmore* [1840] 10 Watts, 192; *Watson v. Gregg*, *ibid.* 289; *Graffins v. Tottenham* [1841] 1 Watts & Serg. 488; *Leeds v. Bender* [1843] 6 Watts & Serg. 315), but the first adequate statements of the modern American doctrine seem to have occurred in 1850 in *School District No. 4, in Winthrop v. Benson* (1850) 31 Me. 381, and *Biddle v. Mellon* (1850) 13 Mo. 335. The opinion of Wells, J., in the Maine case was quoted by Washburn, 3 *Real Property* (3d ed. 1868) 145, and has become a classic.

<sup>77</sup> The danger is not that the possession of the defendant will be lost sight of but that the fact that statutes of limitation are involved will be overlooked. It is apt to be stated that adverse possession for the statutory period will give a good title without qualification whereas the period is likely to be extended greatly through disability of the old owner or the existence of future estates. The great extension of the statutory suit to quiet title (see 4 Pomeroy, *Equity Jurisprudence* [4th ed. 1919] sec. 1396) is but a natural outcome of looking at the matter from the point of view of the one that is in possession, rather than from the point of view of the one that is out.

<sup>78</sup> The conflict in the matter of good faith as a requisite of the adverse possession which will set the statute of limitations running is more apparent than real. The leading case to require good faith of an adverse possessor independently of statute was *Livingston v. Peru Iron Co.* (1832, N. Y. Senate) 9 Wend. 511, and that case involved the validity of a conveyance by the real owner and not the statute of limitations at all as did *Moore v. Worley* (1865) 24 Ind. 81, *Pennington v. Flock* (1883) 93 Ind. 378 and *Woodward v. McReynolds* (1849, Wis.) 2 Pinn. 268, which followed it. There has doubtless been an undercurrent of feeling that it is bad morals if not bad law (*May v. Dobbins* [1906], 166 Ind. 331, 77 N. E. 353) to allow a possession commencing in fraud or dishonesty to ripen into title (*Waterhouse v. Martin* [1824, Tenn.] Peck, 374, 409) and where color of title is material there is considerable authority that

been a question of whether the one in possession should have acquired title rather than whether the one out of possession should have lost it.<sup>79</sup> It has been a question of quieting the title that deserves it rather than of penalizing an owner who has slept on his rights.<sup>80</sup> It has been a

a dishonest or fraudulent deed is not even colorable (see note to *State v. King* [1915] 77 W. Va. 37, 84 S. E. 902, L. R. A. 1918 E 1049), but in *Humbert v. Trinity Church* (1840, N. Y. Senate) 24 Wend. 587, Cowen, J., pointed out that in *Livingston v. Peru Iron Co.*, *supra*, the statute of limitations was not involved and denied that the requirement of good faith should be read into the statute where the recovery of land was involved any more than in cases of contract or tort, or the efficacy of the statute would be seriously impaired. A like view has been taken in other jurisdictions (*Smith v. Roberts* [1878] 62 Ala. 83; *May v. Dobbins*, *supra*; *Dawson v. Falls City Boat Club* [1904] 136 Mich. 259, 99 N. W. 17; *Love v. Love's Lessee* [1829, Tenn.] 2 Yerg. 288; *Lampman v. Van Alstyme*, [1896] 94 Wis. 417, 69 N. W. 171) where a tendency towards a requirement of good faith had at some time shown itself. See the Indiana, Tennessee and Wisconsin cases cited *supra* and *Abercrombie v. Baldwin* (1849) 15 Ala. 363 and *Campau v. Lafferty* (1880) 43 Mich. 429, 431, 5 N. W. 648. Only in Iowa (*Jones v. Hockman* [1861] 12 Iowa, 101; *Goulding v. Shonquist* [1913] 159 Iowa, 647, 141 N. W. 124), and perhaps Washington (*Ramsey v. Wilson* [1909] 52 Wash. 111, 100 Pac. 177; *Skansi v. Novak* [1915] 84 Wash. 39, 146 Pac. 160), does the general requirement of good faith seem to be established apart from statutory enactment. 2 Tiffany, *Real Property* (2d ed. 1920) 1940.

<sup>79</sup> This is manifest in the identity of the requisites of adverse possession and "prescription" (*supra* note 61) and especially in the requirement of claim of title and of privity of estate in tacking. The requirement that the possession shall be open and notorious ensures that the acquisition of another man's land by means of the statute shall at least be made openly and not by stealth.

<sup>80</sup> Statutes of limitation, *per se*, look to the cutting off of stale claims rather than to the quieting of title in the defendant. This was rationalized by Gibson, C. J., in his catchy statement that "the statute protects the occupant, not for his merit, for he has none, but for the demerit of his antagonist in delaying the contest beyond the period assigned for it, when papers may be lost, facts forgotten, or witnesses dead." *Sailor v. Hertzogg* (1845, Pa.) 2 Barr, 182, 185. There is much in the English Act of 1833 to justify his brilliant rhetoric (*supra* note 63), and the requirement of the American cases that the possession be open and notorious is commonly placed on the ground that without knowledge or means of knowledge on the part of the true owner, he cannot be said to acquiesce or be guilty of laches and so should have his action. It is believed however that this rationalization has been greatly overworked. Lord Blackburn showed this to be true in the case of "prescription" in *Dalton v. Angus* (1881, H. L.) L. R. 6 A. C. 740, 817, and it would seem in the limitation of actions also that while acquiescence may serve as a moral justification to those who make a fetish of the right of the individual, it is not the only principle nor even the chief principle involved. If it were, the statute would not run in cases of concealed fraud (see *Humbert v. Trinity Church*, *supra* note 78, at p. 606), and the law of intervening and successive disabilities would have to be made over, see *Griswold v. Butler* (1819) 3 Conn. 277. In so far as the cutting off of stale claims is the object of statutes of limitation neither the moral guilt of the defendant nor of the plaintiff would seem to be the vital consideration, but the public weal. That the cutting off of stale claims rather than the quieting of title in the possessor should have characterized the older English statutes of limitation may be accounted for by the fact that the great method of quieting titles was not the statutes of limitation but the fine. The statutes of limita-

question of right or title first, and of remedy afterwards.<sup>81</sup> If a new title is created the old is gone and with it the old remedies. Such is the American doctrine of adverse possession. It is a doctrine of affirmative prescription read into the statutes of limitation by the courts, a doctrine of inchoate title<sup>82</sup> ripening into ownership with the aid of the statute.

Whether American adverse possession meets the requirements of a true affirmative prescription is put to the test where the time of successive adverse possessions must be tacked to make up the full statutory period. If the prescription is negative, as under the English Act of 1833, the extinguishment of the old title has logical priority to the creation of the new and the first question to ask is whether the old title is extinguished. If the prescription is positive the creation of the new title has logical priority and the first question to ask is whether a new title has come into being. If this be so, the old inconsistent title is destroyed.<sup>83</sup> If the first question is that of the destruction of the old

tion were relatively unimportant. 2 Preston, *Abstracts of Title* (2d ed. 1824) 333. In the United States, however, the fine was almost unknown (Bordwell, *Seisin and Disseisin* [1921] 34 HARV. L. REV. 717, 726), and adverse possession under the statute took its place. Chief Justice Marshall's statement that "the statute of limitations is intended, not for the punishment of those who neglect to assert their rights by suit, but for the protection of those who have remained in possession under colour of a title believed to be good" (*McIver v. Ragan* [1817, U. S.] 2 Wheat. 25, 29), demanded more of the adverse possessor than does the present law in requiring color of title in good faith, but it is believed to have expressed the prevalent attitude of the American courts from the beginning that the statutes of limitation of actions for the recovery of land have been not in the nature of penal statutes but of statutes of repose. See Ballantine, *Title by Adverse Possession* (1918) 32 HARV. L. REV. 135, but see also 2 Tiffany, *Real Property* (2d ed. 1920) 1920.

<sup>81</sup>Of course, if it is clear that the statute has not run, there can be no question of title in the adverse possessor, but in doubtful cases, and it is in these that theory makes a difference, the American courts have made the loss of the action depend upon the acquisition of the new title and not the other way around. A good example of this is to be found in the law of disclaimer, *infra*. The difference between adverse possession in England and the United States at the present time would seem to be that in England adverse possession depends upon the running of the statute, in the United States the running of the statute depends upon adverse possession.

<sup>82</sup>The doctrine of disseisin was a doctrine of seisin, defeasible at first but becoming more and more difficult to defeat, until finally it became indefeasible. The doctrine of adverse possession is a doctrine of possession ripening into ownership.

<sup>83</sup>This is well expressed by Salmond. He says:—"In many cases the two forms of prescription coincide. The property which one person loses through long dispossession is often at the same time acquired by someone else through long possession. Yet this is not always so, and it is necessary in many instances to know whether legal effect is given to long possession, in which case the prescription is positive, or to long want of possession, in which case the prescription is negative. I may, for example, be continuously out of possession of my land for twelve years, without any other single person having continuously held

title, the loss of possession for the statutory period or the fact that during that period the land has always been in the hands of an adverse possessor, although not of the same adverse possessor, nor of adverse possessors holding under the same claim, may well be all-sufficient. But if the first question is that of the creation of a new title, then it will be necessary that the adverse possessors should hold under the same claim, and in order that this claim and the rights acquired by one adverse possessor should pass to his successor, it is necessary that there should be what for lack of a better name may be called privity of estate.<sup>84</sup> American adverse possession does meet this test of positive prescription<sup>85</sup> and that the requirement of privity of estate was generally recognized even before the acquirement of good title under the statute was, shows how naturally the American courts took to the prescriptive acquisition of title to land and explains the immediate and practically universal acceptance of that doctrine once it was stated.

(To be continued)

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possession of it for that length of time. It may have been in the hands of a series of trespassers against me and against each other. In this case, if the legally recognized form of prescription is positive, it is inoperative, and I retain my ownership. But if the law recognizes negative prescription instead of positive (as in this case our own system does) my title will be extinguished." *Jurisprudence* (6th ed. 1920) 409.

<sup>84</sup>The statement in *Illinois Steel Co. v. Paczocha* (1907) 139 Wis. 23, 119 N. W. 550, that it is merely the possession that is transferred and not the possessory title, would make the requirement of privity meaningless (see Ballantine, *op. cit. supra* note 80, at p. 149) and accordingly we find the same court in *Illinois Steel Co. v. Budzisz* (1900) 106 Wis. 499, 515, 81 N. W. 1027, treating it as an arbitrary requirement read by the courts into the statute, but the late views of the Wisconsin court are those of negative and not affirmative prescription, and their views as to privity are the logical consequence of their general theory. That the adverse possessor "acquires something which he may transfer to another" was laid down by Tilghman, C. J., in *Overfield v. Christie* (Pa.) 7 Serg. & R. 173, as long ago as 1821.

<sup>85</sup>That the requirement of privity is almost universal, see Ballantine, *op. cit. supra* note 80, at p. 147; 2 Tiffany, *Real Property* (2d ed. 1920) 1971; 2 C. J. 84. A few early cases, of which *Fanning v. Wilcox* (1808, Conn.) 3 Day, 258, and *Shannon v. Kinny* (1817, Ky.) 1 A. K. Marsh, 3, are the most conspicuous, followed the negative rule of the English law, but the view that is generally accepted in the United States to-day was adopted as early as 1806 in New York (*Brandt v. Ogden*, 1 Johns. 156; *Jackson v. Thomas* (1819) 16 Johns. 293), 1821 in Pennsylvania (*Overfield v. Christie, supra* note 84), and 1828 in Massachusetts (*Ward v. Bartholomew*, 6 Pick. 409). Under the apparent influence of Ames the Massachusetts court showed somewhat of a leaning towards the English doctrine in *Wishart v. McKnight* (1901) 178 Mass. 356, 59 N. E. 1028, but contented themselves with repudiating the case of *Potts v. Gilbert* (1819, C. C. D. Pa. & N. J.) 3 Wash. 475, which had been frequently cited in the earlier Massachusetts cases and which had intimated that an adverse possessor had nothing he could transfer. *Potts v. Gilbert* is largely responsible for the notion of a constructive gap where there is no privity. This notion of a fictitious gap has done much to obscure the whole subject. For a thorough examination of the authorities, see Ballantine, *op. cit. supra* note 80.