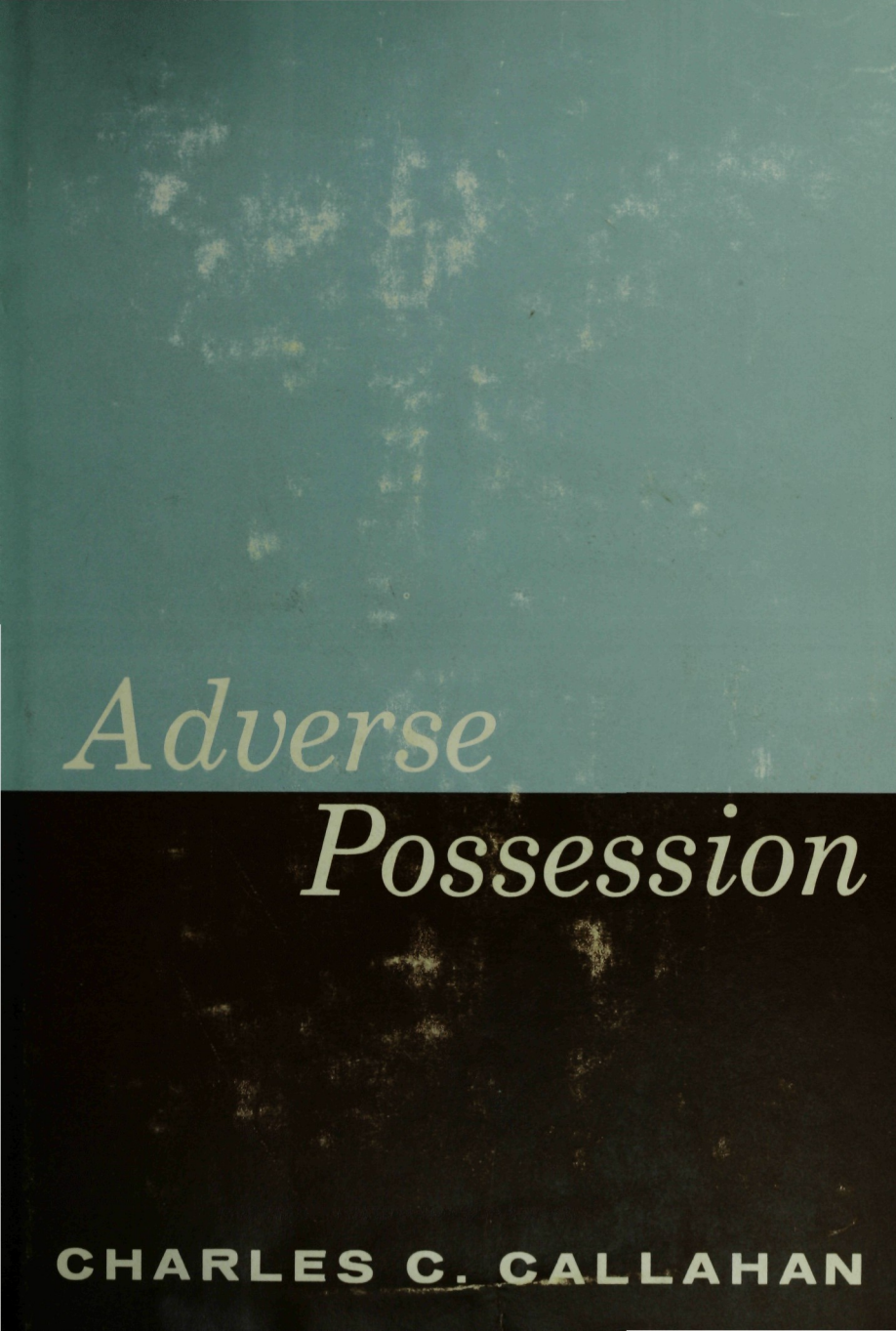
Adverse
Possession
CHARLES C. CALLAHAN

$3.00

ADVERSE POSSESSION

Charles C. Callahan

All branches of the law have seen the disappearance of certain legal doctrines and the merger of others. Property law is no exception. Its simplification has been brought about by statute, by extended analysis, and, negatively, by the increasing pressure of day-to-day business.

The evolution of property law has been very slow. "Inertia, mistakes, a mixture of contradictory theories . . . Adverse Possession may have had more than its fair share."

In a remarkably lucid and readable essay, Mr. Callahan relates the doctrine of Adverse Possession

(continued on back flap)

LAW FORUM SERIES

College of Law, Ohio State University

ADVERSE POSSESSION

Adverse Possession

by

CHARLES C. CALLAHAN

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Introduction

LAW FORUM is an annual lecture series founded to provide an appropriate forum for scholarly analysis and projected solution of legal problems of lasting interest and importance. It is a tribute to the maturity of the student body of the Ohio State University College of Law that this type of lecture series was conceived and promoted by students, and that in substantial part it is financially underwritten by the Student Bar Association of the College. Other financial support is provided through the Ohio State University Development Fund. Lectures which make a significant contribution to a clearer understanding of the law merit preservation to ensure availability to the largest possible audience. Publication by the Ohio State University Press is the ideal medium for casting the spoken word into the printed record. The College expresses to the University Press, to the Development Fund and its donors, and to the Student Bar Association its warm appreciation of their combined support of LAW FORUM.

It was altogether fitting that the initial lectures of LAW FORUM should be given by one of the College's ablest graduates. Since graduation in law in 1934, with the honors degree of Doctor of Jurisprudence, Charles Clifford Callahan has with profit to all pursued the life of the scholar, first in pioneering legal research at Yale in collaboration with Professor Underhill Moore, and, for the past seventeen years, as a teacher of law in The Ohio State University. Possessed of an enviable orderliness of mind, Professor Callahan has a unique ability to "unwind" the difficult in law, whether of thorny theory or of unruly fact. Possessed of an equally enviable keenness of intellect, his insight into the dynamics of legal institutions and operations lays bare for ordinary understanding the darkest corners of the law. His masterful exposition of Powers of Appointment in *American Law of Property* is now matched by an unforgettable illumination of the formerly ill-understood domain of property law known as Adverse Possession.

FRANK R. STRONG,
Dean, College of Law,
The Ohio State University

Preface

THESE LECTURES, with only very slight changes, are printed as they were presented at the Ohio State University College of Law on March 27, 28 and 29, 1960. The notes have been added, not with any intent to document the material, but rather to avoid—so far as one can avoid—taking credit for the ideas of others. They have been placed at the back so as not to intrude, inconveniently, upon the reader's attention.

There may be those who will expect some word of explanation, if not an apology, for the subject matter as disclosed by the title. I offer none. The fact that a subject cannot qualify as the legal matter-of-the-moment does not mean that it is unworthy of attention; and that a question has arisen repeatedly over a couple of hundred years does not mean that it has been answered satisfactorily. I do not suggest, of course, that there are satisfactory answers in these lectures. What I do suggest is that there is justification for detailed and continuing

consideration of even such subjects as adverse possession.

Thanks are due to the American Law Institute and to the *Yale Law Journal* for permission to use material which I have quoted, as well as to the numerous people who, knowingly or otherwise, have supplied ideas.

Columbus, Ohio CHARLES C. CALLAHAN
October 7, 1960

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ADVERSE POSSESSION

I

Property, Policy, and Possession

IN 1952, halfway between the explosion of the first atomic bomb and the first successful pot-shot at the Moon, the Court of Appeals of New York decided a case entitled *Van Valkenburgh* v. *Lutz*.[1] These three events are not of equal significance. The contrast is great, not only in significance but also in the precision of technique by which the three results were obtained. I do not propose to make these lectures an extended case note on *Van Valkenburgh* v. *Lutz*, but it will serve perhaps as a setting.

The recorded history of William Lutz begins in 1912 when, newly married, he moved to Yonkers from New York and bought lots 14 and 15, block 52, in a then largely unimproved subdivision known as the Murray Estate. Immediately adjoining was a triangular tract of land formed of lots 19, 20, 21, and 22, which tract is the subject of the litigation. Living elsewhere in Yonkers, Lutz and his brother Charlie cleared the land, including a considerable part, if not all, of the triangular tract which he didn't

own. From that time on the Lutzes paid little attention to lot lines. In 1917 Lutz began the construction of a house, on a do-it-yourself basis. The family moved into the house in 1920 when it was nearly completed, and continued to live there until 1948 when Lutz died. His wife still lived there at the time of the action. Five Lutz children grew up in this house and most of them left it for a wider world. The house stands entirely on lots 14 and 15, the property owned by Lutz. As early as 1914, Lutz began cultivating the triangular tract. Fruit trees were planted on it and a garden was begun. This gardening appears to have gone on throughout the entire period, the Lutzes raising, according to several witnesses, "all kinds of vegetables." Between 1919 and 1923 Lutz built a one-room structure wholly on the triangular tract which he did not own. This structure, known to the neighbors as "Charlie's House," was just that; and Charlie still was living in it at the time of the action. At about the same time, they also built a garage. The garage, for the most part, was on the property owned by Lutz; but concededly there was an encroachment onto the triangular tract.

In 1928, a private pipe line which Lutz had installed was broken by road contractors. Lutz, who was working at the time in New York, had to come home to fix the line. As a result he lost his job and, somehow, never got another. He was, as one witness

testified, "usually always at home," tending the garden, selling vegetables, doing odd jobs.

The triangular tract was used by the Lutzes for purposes other than gardening and Charlie's residence. Chickens were raised—sometimes they had as many as 200—and these were kept in coops on the tract. The land was also used as a depository for what was variously described as "junk," "rubbish," "debris," and "father's personal belongings." This consisted of cast-off furniture, salvaged building materials, and sundry automobile parts. In addition, the Lutzes and others used a well-defined strip referred to as the "traveled way," which crossed the premises in question and terminated at Lutz's garage.

In 1937, Joseph D. Van Valkenburgh built a new house, within sight of the property in dispute. In 1946, some trouble arose between Lutz and Van Valkenburgh, as a result of which Lutz was arrested. In 1947, the Van Valkenburghs bought several lots from the City of Yonkers in proceedings to foreclose tax liens; these were not *in rem* proceedings. The Van Valkenburghs' purchase included the four lots forming the triangular tract which the Lutzes had been using since 1912. Soon after this purchase the Van Valkenburghs put a fence across the "traveled way." More trouble. Lutz brought an action and Van Valkenburgh was enjoined from

maintaining the fence.[2] In that action Lutz testified that he knew all the time that Charlie's House was built on someone else's land, but that he thought he was building the garage wholly on his own land.

In August, 1948, William Lutz died. In October, 1948, Van Valkenburgh brought an action to compel the removal of the garage, shack, chicken coop and other things from the triangular tract and to compel delivery of possession of the land to the plaintiff. At the trial before a referee, in 1951, the testimony of William Lutz, given in the earlier action, was introduced along with other testimony, totaling some 250 pages. There were 56 exhibits, consisting of deeds, surveys, and photographs.

The referee found that Lutz had acquired title to the triangular tract by adverse possession, at least by 1935 (the New York Statute of Limitations is fifteen years), and, on this finding, judgment was entered for the defendant, Mary Lutz. This judgment was affirmed by the Appellate Division.[3]

The Court of Appeals, by a four to three vote, reversed and ordered judgment for the plaintiff for the relief prayed for in the complaint, subject to the existing easement over the "traveled way."

The majority opinion may be summarized as follows:

1. Under New York law, to acquire land by adverse possession not founded on a written instrument there must have been an actual occupation

under claim of title. Only the premises actually occupied are held adversely. In order to show actual occupation it must be proved either that there was a substantial enclosure or that the premises were usually cultivated or improved.

2. Concededly, there is no proof that the premises were protected by a substantial enclosure, and the proof of cultivation fails to show that the garden utilized the whole of the premises claimed. This lack cannot be supplied by inference from the cultivation of an ill-defined smaller area.

3. As to the question of improvements, I quote:

> The proof fails to show that the premises were improved. According to the proof the small shed or shack (about 5 by 10½ feet) . was located on the subject premises about 14 feet from the Lutz boundary line . and, as Lutz himself testified, he knew at the time it was not on his land, and his wife, a defendant here, also testified to the same effect.
>
> The statute requires as an essential element of proof, recognized as fundamental on the concept of adversity since ancient times, that the occupation of premises by 'under a claim of title' . in other words, hostile, and when lacking will not bar the legal title no matter how long the occupation may have continued.
>
> Similarly, the garage encroachment, extending a few inches over the boundary line, fails to supply proof of occupation by improvement. Lutz himself testified that when he built the garage he had no survey and thought he was getting it on his own

property, which certainly falls short of establishing that he did it under a claim of title hostile to the true owner.

Lutz's position that the triangular tract belonged to Van Valkenburgh was made clear, the court said, by his bringing of the former action to establish an easement by prescription over it in favor of himself.

There was a considerably more lengthy dissenting opinion which, for our purposes, may be summarized as saying that all this is wrong.

I do not propose to go into all the questions raised by the case at this point. I'd like, however, to make some comments:

1. All this disagreement over a relatively simple case makes it clear that there's a lot here that hasn't been resolved in more than three hundred years. We are not going to put any legal Sputniks into orbit with the kind of tools we are working with.

2. It's possible to say, and it may be perfectly correct to say, that all the talk in the opinion between the statement of facts and the decision has very little to do with the actual *reasons* for the decision. As students love to say, it's just a "peg" on which to hang a decision already reached by undisclosed devices. Lutz's actions according to the brief of the plaintiff, "were typical of an irresponsible squatter, guided by motives of pure expediency. [He] did nothing to improve the land but littered the woods around his house with filth and junk, brought

in by scavenging the dump. On the other hand the plaintiff is trying merely to obtain the normal rights of ownership and to protect his home by cleaning up the neighborhood." [4] The defendants brief looks at the matter differently: In their view, the plaintiff, "obviously manifesting his self-proclaimed superiority to poor people, means to clear the neighborhood of the Lutz family who were born, nourished and grew into manhood and womanhood there long before Van Valkenburgh took it upon himself to attempt, at all costs, to drive them out." [5] Is the disagreement over these considerations, or others like them? If we believe it is, shouldn't we attempt to fit them into some orderly pattern? This sort of thing is too easily used as the basis for a nothing-to-worry-about-because-nothing-we-can-do-about-it attitude. If we are going to talk about the judge's breakfast, and that thing is still appearing in print in 1960,[6] then we'd better be prepared to analyze it. And while we're at it, we'd better include lunch and dinner too; not all judicial decisions are made in the morning. If it's true that the "stuff" of judicial decision is merely a "peg," then it may even be worthwhile to improve the pegs.

3. It's true that some of the requirements of adverse possession which the New York Court relied upon are statutory. The requirement that the occupancy be under a "claim of title" is in a statute.[7]

So is the requirement that the potential claimant must show either a substantial enclosure or that the premises were usually cultivated or improved.[8] But this makes no difference. It won't do to say that we don't have to consider this question because it has already been decided by the legislature. Statutes and judge-made law should, it seems to me, have the same basic purpose. Both can be made; both can be changed; and one should be no less subject to examination than the other.

4. The elements of the opinion in the *Lutz* case which have to do with the state of Lutz's mind as to the ownership of the land are not atypical of adverse possession cases. This has been one of the main difficulties. It is unusual, perhaps, for the facts to fall in such a way that both sides of the matter are presented in one case. Prowling around in Lutz's head produced a result which, superficially at least, is remarkable. Lutz was not an adverse possessor with respect to Charlie's shack because he knew it was on someone else's land. He was not an adverse possessor with respect to the garage because he thought it was on his *own* land. I'm always a little suspicious of my logic in these matters; but if you compare this with a list of the possible states of mind you may conclude that the only true adverse possessor is one who, with respect to the title to the land, has no views whatever. Now, this may be what we want, but I should think the burden is on the proponent.

The decision in *Van Valkenburgh* v. *Lutz* is within the area of law commonly referred to as Adverse Possession, which is the subject of these discussions. It is difficult, at the outset, to resist the temptation to plunge at those two words, tear them syllable-from-syllable, and invite you to view the emptiness which remains. I hope I can resist that temptation. The words have a history of long and widespread use which carries a presumption of usefulness and which entitles them to some respect from the likes of me. If I were to spend all my time attacking them, you might well question, at the conclusion, where the emptiness really lies. I shall not attack; but I shall question. If any of my questions implies criticism, it is criticism of myself. At some time or other in the past, I must have undertaken voluntarily to work in the property field. I don't recall that it was forced on me, although certain events may have slipped my mind after twenty years or so.

I suppose there is no one here who has not heard repeatedly the assertion that the law, and the study of law, is not the same as it was when the speaker was in law school, or when the speaker first started his practice fifty years ago next summer. Wide new fields have opened up: a large proportion of a lawyer's practice is before administrative agencies; labor law and international law are very important; taxation, which thirty years ago was just a puppy of

constitutional law, is now an overgrown mastiff whose shadow darkens all other legal fields. There can be no question that all this is true; and there can be no question that excitement is there. These subjects are riding the cow-catcher of the law; each curve brings new views, and each station a new edition of the *New York Times*. All of this newness must be assimilated rapidly—seminared, conferenced, instituted, round-tabled, law reviewed, and loose-leafed. I do not mean to disparage this. It is good, as well as unavoidable. I merely wish to point out that here we are dealing, largely, with the other end of the train. I invite your attention to the situation in the caboose.

If this analogy were to be carried further, and perhaps it would be best not to do so, it could be suggested that it is common experience that both ends of a train generally move at the same speed, that for each new vista revealed at the front, one disappears at the back. That has not, I suppose, been the experience of the law; but I submit there is more to the point than one may, at first, suppose. It is not true that the entire body of the law has been increased by the sum of the quantities added to it in the last five, twenty-five, fifty, or a hundred years. A subtractive process has been operating at the same time. Doctrines, rules, and problems have been disappearing; other doctrines, rules, and problems, once treated separately, have merged so that

only one grows where two grew before. No one would assert that the net result of this addition and subtraction is zero, so as to maintain a constant quantity of law with a continually changing content. Difficult as it is for many of us to embrace a new idea, it is much easier than to discard an old one. But it is a mistake to overlook the fact that old ideas *are* being discarded; it is a mistake to assume that the amount of the discard is not substantial; and it is a mistake to assume our legal processes are such that somehow, automatically, the best and most useful ideas will be retained while only the legal chaff will be blown away. The devices by which legal doctrines are consigned to oblivion are much too haphazard to produce such results.

It must be true that change, involving the disappearance of some legal doctrines and the merger of others, has been going on in all branches of the law. I do not speak to all branches of the law; but I can assert that it is true of the law of property. It may even be that the total volume of property law, so far as concerns basic concepts, is shrinking and will continue to shrink. If those of us who teach it are concerned that we will have less and less to teach, we may take comfort in the knowledge that we will have less and less time available in which to teach it.

It would be something more than obvious to say that, in the law of property, change of any kind comes slowly. You may have heard the rumor that

it comes more slowly here than in any other branch of the law, and I rather believe it's true. Once a rule of property is established, under a general system like our present one, we almost never can get completely free of it. Chains of title to land depend on the law in force at the time each link was added. The rule requiring words of inheritance to be included in a deed to an individual grantee or grantees in order to transfer an estate in fee simple has been abandoned nearly everywhere. In Ohio this was accomplished by statute thirty-five years ago.[b] Nevertheless, deeds delivered before 1925 appear in the chain of title to nearly all of the land in the state. Those deeds are subject to the rule, the question may still be raised, and the rule will be applied.[10] The Rule in Shelley's Case is applicable to deeds delivered before 1941.[11] The Statute of Descent and Distribution has been changed a number of times, but it is still necessary, on occasion, to go back to one of the former statutes. Such instances could be multiplied. As time passes, people die, limitation periods of one sort or another expire, and the likelihood that an old rule will come back to haunt us diminishes virtually to zero, although it may be, at least in theory, that some rules will never disappear completely.

Of course, the fact that it may take a very long time to put a change completely into effect is no reason for refusing to make it if the change seems expedient; but it may, to some extent, dull the mo-

tive to do so. Temporarily it will be necessary to treat one case under one rule and the next under another, a complication which most of us like to avoid. More important, perhaps, if it appears that a proposed change cannot effect a substantial cure within the immediate future, many who are along in years will feel less compelled to make it. This, for want of a better term, is just human nature; and it means that some who are best able to effect a change are least inclined to do it.

Another factor which slows evolution in the law of property is the reputation which has become attached to that law and to those working directly with it. Nothing much is expected of us. It is understood that we have a license not to make sense. When we don't, which is frequently enough, those who know tolerate it because they have come to expect it. Those who don't know must assume our validity. After all, you can't laugh off an incorporeal hereditament when you don't know what it is.

I should like to examine briefly some of the devices by which the law of property has shrunk, and is shrinking. This is a sampling; I do not propose a complete survey, nor a thorough examination of any instance.

Change in Property Law

No doubt there are many ways in which changes in law come about; and no doubt any given change can be traced to more than one cause. I'd like, how-

ever, to consider three aspects of the matter as though they were separate. The order suggests no ranking as to frequency or importance.

1. One device which I think is operating to a considerable extent in the law of property is simple lack of understanding. I know that may sound harsh and I don't mean it to be. I'm not even suggesting that it always works out badly, although the chance of it's working out well in a particular instance would seem to be random.

By lack of understanding I don't mean lack of capacity to understand, but rather a lack of time, and perhaps motivation, to make a thorough inquiry into any particular point. No one who reads many court opinions of a hundred, or even fifty, years ago can fail to conclude that life at the bar and on the bench must have been very different then. Those opinions, if anything, suffered from an excess of scholarship. The report of *Ex Parte Bushnell,*[12] an Ohio case, concededly an important case politically, is 263 pages long. *Teaff* v. *Hewitt,*[13] another Ohio case, for better or for worse, has become the leading case in the country on the law of fixtures. It has no discernible political aspects. Yet the opinion occupies 33 pages, all of which are original writing, not quotation from others. When one considers that these opinions were written without law clerks and without typewriters, and were set in type by hand, it is apparent that there must have been more

time to get things done. There was more time to read and consider cases, and many, many fewer cases to read and consider. There was time to read Littleton and even, apparently, time to read Minor's Institutes. Anyone who has tried the latter must agree that it takes some doing. One gets, from the old opinions, a feeling of long, leisurely summer afternoons with plenty of time to engage in the legal whittling which fashioned some of our property concepts.

Whether the results of this quill-pen jurisprudence were good is certainly questionable; but the immediate point is that there is not, and cannot be, any more of it. The pressure of day-to-day business is said to be, and undoubtedly is, considerable. Even the ivory tower of the teaching profession is beginning to look suspiciously like stainless steel. Teachers, lawyers, judges—we are all, I believe, moving away from the scholarly tradition. Again, I don't complain about this; I merely suggest that it's so.

Accordingly, many of the niceties of property law are disappearing, not through the deliberate choice of anyone, but rather because of the lack of time to master them in the face of the demands made by what may be conceded to be more signficant matters. To my mind this process is rather clearly discernible in the law of Future Interests, especially that part of it which deals with the presumably historic classification of those interests and the conse-

quences which attach to each class. Much of the significance of the classification has been relegated to the history books by various and widespread statutory enactments. The cases in which it really matters whether a particular interest is a remainder or an executory interest, or whether it is a possibility of reverter or a power of termination, are now rather rare. The lawyer in the street, if we may so designate him, feels, with considerable justification, that he does not need to know the differences; and he takes full advantage of this freedom. The courts do the same. They are likely to refer to a given future interest by any name which approximates the convention. One of our local cases,[14] for example, referred to the interest taken by the grantee of a deed as

> a determinable, base, or qualified fee simple estate, or more specifically speaking, it was a fee simple on express condition subsequent.

and the interest retained by the grantor in the same deed

> has been variously designated as the right of reversion, the possibility of reverter, the possibility of forfeiture, the right of entry or re-entry, and the right to declare a forfeiture for condition broken.

With enough of this going on, the time will come when there will be, in fact, *no* discoverable distinctions. If anyone were to ask whether that is a desira-

ble end, in this instance, I'd say yes, I believe it is. If, by some miracle which we all dream of at times, we were able to start over on the whole matter, and provide for such future interests as we believed were needed, I shouldn't think that anyone would seriously propose that there should be as many as five principal classes. Perhaps some would campaign for three and some for two. Conceivably, if we really were to start over, it might not occur to anyone that we needed more than one. But the question is not whether the number of future interests should be reduced to four, or three, or two, or one. The question is whether the reduction should be allowed to come about in this hit-or-miss fashion without any real attention to the merits.

The appearance of the Property Restatement has, I believe, slowed temporarily this process of merging the future interests through complacent confusion. The part of the Restatement which deals with Future Interests is, as many of you know, long, detailed, and probably as accurate as a project of that kind could be. The major question of policy—is it a good idea to attempt to restate the existing law and thus perhaps freeze it—is one which can be, and has been, answered in both ways. The reference to the Future Interests Restatement as "a superb inventory of the Augean stables" [15] reflects both its strength and its weakness. The Restatement has, I believe, done quite a bit by way of clarification; but

where the need for simplification is felt it is likely to be attained, if need be, by confusing the clarification.

2. I do not propose to consider at any great length the simplification of property law which has been brought about by statute. But it should not be overlooked. I have referred to statutes eliminating the requirement of words of inheritance to pass a fee by deed. This is a sensible change, more so than is at once apparent because it also eliminates a lot of nonsense about the distinction between exceptions and reservations in grants. The elimination of the Rule in Shelley's Case will ultimately relieve us of quite a lot of law, and the abolition of the doctrine of the destructibility of contingent remainders has thrown a large chunk of abstruse learning into the discard, for practical purposes. The phrase "for practical purposes" must be added, in recognition of the tendency that many of us have to hang onto these beautifully senseless bits of ancient lore. We have, in the academic tradition, a fundamental aversion to statutes. Somehow they are not as worthy of consideration as the basic common law, even though the statutes may be wholly in control of the situation. The academic law of personal property goes on with its foxes, deer, and fish, in blissful disregard of the game laws.[16] We don't disregard statutes declaring contingent remainders indestructible, but they annoy us some because they interfere with the

proper teaching of the doctrine. Very likely I'm being a little unfair here. There are excuses. We say we teach the foxes and fish, not for love of the animals themselves but to introduce the concept of possession. We teach the destruction of contingent remainders because it is a good device for distinguishing contingent remainders from executory interests. But we should be careful with the excuses; if a concept finds its chief justification in the resolution of issues which are largely dead, is not the utility of the concept itself in question?

Unwillingness to get into the spirit of statutory change is not confined to the teaching profession. Some courts, for example, seem not quite ready to believe in the free alienability of future interests, despite statutes which clearly were designed to effect that result.[17]

I think it's worth noting that our situation with respect to the statutory modification of property law is vastly different from that of the English. Almost from the beginning we have been wearing the cast-off "property" of our older English brothers. Real Property Commissioners were appointed in England as early as 1829. Although they reported that their law appeared "to come almost as near to perfection as can be expected in any human institutions," [18] they nevertheless had some suggestions for changes. The English have been at it fairly regularly ever since; and in 1925 they enacted seven sep-

arate statutes, running to some seven hundred pages, which can be described as a truly sweeping revision of their law of property.[19] Compared to that, anything which has been done in this country is mere fiddling with detail. The object of the English Acts was to make land as freely transferable as personal property. While they did not, and probably in the nature of things could not, get that result, they apparently did succeed in freeing land from a lot of the historical rigmarole which had impeded its transfer. It is a little difficult for us to imagine there being only one legal freehold estate in land—the fee simple—with such things as life estates and future interests relegated to the status of equitable rights only, but that has been the case in England for more than a generation.

It is remarkable, but perhaps not strange, that so little attention has been paid to that legislation in this country. After a short flurry in the law reviews at the time of its adoption, little more has been heard of it. I suppose, with fifty separate jurisdictions to contend with, anything like that may be overambitious.

3. A third process by which property law is being simplified, a process less obvious than statutory change but nevertheless effective, is simply further analysis. Someone perceives that two or more doctrines, previously treated as separate, are essentially the same thing; or that some set of rules, customarily

stated in a complicated way, can be more easily, and perhaps more effectively, stated in a simpler way; or that certain black-letter statements, generally regarded as rules of law, should be abandoned altogether as a hopeless attempt to handle some aspects of the construction of instruments; or that some supposed rule has been completely swallowed by its generally recognized exceptions. Having come to a conclusion of this kind, the discoverer asserts it, in a judicial opinion or elsewhere. If he's right, and if his analysis is read by enough people, it may, after many years, catch on.

This kind of thing has happened several times in the law of property, as I suppose it has elsewhere. And it is continuing. One may cite, as a very generalized example, the progressive integration of the law of real and personal property. Virtually all of the current casebooks are labeled simply "Cases on Property." The degree of integration inside the covers varies considerably. The merger, to the extent that it is possible, will have to be, it seems to me, on a fairly high level of principles; it will have to rest on the realization that basic concepts of ownership, and basic devices by which ownership is transferred from one person to another, are the same, whether the object is something which we can move about more or less at will, or is space on the earth which moves only according to the laws of the universe. Land and automobiles can never be

made identical; and, because of the obvious differences, it is likely that each will continue to present its peculiar problems. There are, however, basic identities in the realm of legal theory. It is profitable to assert these identities as an end in itself, quite apart from any consideration of the crowded condition in the curricula of law schools. The process of the merger of the law of real and personal property would be greatly facilitated if we could ever bring ourselves really to bury the forms of action. Why, after more than a hundred years, do we continue to talk about trover and trespass? Why do we recover the "possession" of personal property in an action in "replevin" and of real property in an action in "ejectment?" There are answers to these questions. One may be that it's not conventional to bury people who aren't dead, and these gentlemen are not. The Ohio Code, for example, after stating that "there shall be but one form of action, to be known as a civil action," now adds, "this section does not affect any substantive right or liability, legal or equitable." [20] This disclaimer was not in the section as originally enacted.[21] To one for whom the distinction between substantive rights and procedural remedies has become rather thoroughly blurred, this section now seems to announce that there will be a funeral which will not be held. Probably I'm being unfair again, and I'd better leave this matter to someone who knows more about it.

A less ambitious instance of the reduction of the volume of property law by analysis can be found in that branch of it which relates to the so-called "incorporeal hereditaments." This, for practical purposes, now means easements, profits, and the like. One doesn't have to look far, especially in the older cases, to find a series of dogmatic pronouncements relating to the assignability and divisibility of these interests: an easement in gross is not assignable; [22] a profit a prendre is assignable but not divisible; [23] an exclusive profit is both assignable and divisible.[24] It doesn't take a very searching examination of these cases to discover that what those rule makers were engaged in was a process of exaggerated overgeneralization. The failure of a red-haired plaintiff to recover in an action for personal injury does not justify a statement that a red-haired person cannot maintain a civil action, or even that he cannot maintain an action for personal injury. If one were to ask whether a particular red-haired person can maintain an action for a particular injury, the answer would have to be "it depends." It seems clear that a similar answer must be given when a question is raised as to the general transferability of one of these incorporeal interests. In some thirty pages the Property Restatement makes that answer: The assignability or divisibility of such an interest depends, in its words, on "the manner or terms of its creation." [25] It gives some recognition to the old

rules by way of presumptions. Notice that the result of this analysis was not only to simplify the statement of the law, it also points out the essential difficulty of the problem. It says: "In order to answer this question you must look the instrument which created the interest fairly in the face and decide what it means. That may be hard to decide, but you can't avoid it by hiding from it."

While analyzing these matters, those who drafted this part of the Restatement made a related discovery. It is reported in a special note at the beginning of the volume:

> Interests of the sort here discussed under the title "Easements" have traditionally been discussed under the separate titles of "Easements" and "Profits." In phrasing the rules applicable to each of these interests it has been found, however, that in no case was there a rule applicable to one of these interests which was not also applicable to the other . . and since the rules with respect to both "easements" and "profits" can be stated in identical terms, it is much more convenient to use a single term to designate both interests. [26]

At the general meeting of the Institute which considered this matter, only one mild voice appears to have been raised in behalf of the profit a prendre, that of Henry Upson Sims of Alabama, who described himself as tending "to be a fossiliferous lawyer." [27]

It is unfortunate, perhaps, that the Restaters felt their mandate did not permit them to discard the entire classification of interests as being either corporeal or incorporeal. They did go so far as to state, by way of comment, that the separation could not be defended on analytical grounds.[28] I shall have more to say about that.

The law of Bailments has been the subject of so much joking reproach I hesitate to say anything about it. It is the Brooklyn of the Law. At the beginning of the century it weighed slightly less than four pounds in printed form; [29] but its structural defects are now generally recognized, I believe. It's not unfair to designate it as a hodge-podge of unrelated questions which scholars, out of love for the Roman Law, attempted to hold together by confused concepts and proliferated truisms. When I rent a floor sander I'm engaged in a *locatio et conductio rei* bailment. I'm not certain it's even nice to know that.

All of this may have been over long; and, you may properly think, not very closely related to the subject. I can only say in defense that it seems to me one cannot adequately consider any particular problem of property law unless he understands that he is stepping into an evolutionary process which has been very slow and which, at least to an outsider, would appear to be almost without sensible direction. Inertia, mistakes, a mixture of contradictory

theories—these are to be expected. Adverse possession may have had even more than its fair share.

Ownership

The "bundle-of-sticks" theory of property, or of ownership, has not been challenged seriously, so far as I know, by anyone who has been exposed to it. It's hardly a theory at all, in the sense of being an intellectual *tour de force* which will lead to more and more new answers. It's not relativity or evolution. It's hardly more than an obvious statement of what we are doing.

According to this notion, the concept of private property which exists in relation to some physical entity is just the totality of all the legally enforceable rights which a person, or persons, has with respect to that entity. Wesley N. Hohfeld didn't invent that idea; it was in current use long before his time.[30] But he certainly perceived it clearly. I shouldn't want to get into an argument with you, or Hohfeld, or anyone else, about my use of the word "rights" in this connection. Hohfeld's analysis, as you know, has a terminology which includes "rights," "privileges," "powers," "immunities," "no-rights," and such like. Many people have found the detailed application of these terms helpful. Whether they are or not makes no difference here. I don't believe my point requires that degree of precision. So I ask you to allow me to use the word

"rights" for the whole string of them. If you wish to pursue the distinctions you can substitute the proper term in the proper place. Apparently there is no single term which very well embraces them all and I don't want to keep repeating "rights, privileges, powers and immunities" every sentence or so.

The nature of what I'll call the Hohfeldian concept of ownership is indicated by the following, which is not a quotation from Hohfeld at all, but rather from Walter Wheeler Cook: [31]

> Even in the work on Jurisprudence itself Salmond completely fails in certain chapters to show an appreciation of the meaning of these fundamental conceptions. Consider, for example, the following passage from the chapter on "Ownership":
>
> "Ownership in its most comprehensive signification, denotes the relation between a person and any right that is vested in him. That which a man owns is in all cases a right. When, as is often the case, we speak of the ownership of a material object, this is merely a convenient figure of speech. To own a piece of land means in truth to own a particular kind of right in the land, namely the fee simple of it."
>
> From the point of view of one who understands the meaning of the eight fundamental legal concepts, it would be difficult to pen a more erroneous passage. To say that A owns a piece of land is really to assert that he is vested by the law with a complex—exceedingly complex, be it noted—aggregate of legal rights, privileges, powers and im-

> munities—all relating of course to the land in question. He does not *own* the rights, etc., he *has* them; because he has them he "owns" in very truth the material object concerned; there is no "convenient figure of speech" about it. To say that A has a fee simple in a piece of land is, therefore, to say not that he owns *a* particular kind of *right* in the land but simply that he has a very complex aggregate of rights, privileges, powers and immunities, available against a large and indefinite number of people, all of which rights, etc., naturally have to do with the land in question.

I'd like to say a few things about this. I'd like to say them as preparation for consideration of the concept of possession:

First: To get the most out of the "bundle-of-sticks" idea it is important to note, as Cook did in the quotation above, the tremendous complexity of the rights involved. If we pose the case of a man who owns a house and lot in fee simple, the number of things he can do in relation to the house and lot, each one of which the law protects, is limited only by his imagination—or perhaps, in this discussion, by ours. The sticks in his bundle are very, very numerous. He can sit in the living room, he can snooze on the terrace, he can play the hi-fi within the limits of nuisance—and on, and on, and on. Further, after all of those specialized sticks have been enumerated, the total number must be multiplied by the number of segments of time between now

and eternity—for remember, our friend has a fee simple and, as every schoolboy knows, those things are durable.

All of the sticks he has represent rights against other persons. That means that no one else can lawfully do a single one of those things at any time from now on, unless he has somehow acquired a particular stick from the former "haver." If our friend, who still holds the stick representing snoozing on the terrace, comes home and finds someone else snoozing there he will know that there has been an infringement of a right and that the law makes remedies available to him.

Second: This bundle-of-sticks notion has the decided advantage of taking away from the concept of ownership the mystic quality that might otherwise be imparted to it, and frequently is imparted to it. A can recover a car from B because he owns the car. X can recover land from Y because X has the title. This is pure tautology. Since ownership *means* the right to recover, it's saying that A can recover from B because A can recover from B, and X can recover from Y because X can recover from Y. Similarly, the maxim of the common law, so frequently found in property cases, sometimes even in Latin, that one may not use his own property to the injury of any legal right of another is merely saying that one may not do what he may not do. Once this tautology is removed there is no hiding from

the fact that a policy decision has been made. Somehow it has been determined that certain persons have certain rights with respect to certain things. We have the institution of private property. The problem is to determine what the rights are.

Third: The simple idea that ownership is nothing but a large number of separable rights which we have chosen to bestow on certain persons, however obvious it may be, has not been accepted readily. We can read it, or listen to it, and agree with it; but when the opportunity arises we are very apt to revert to a more conventional and fuzzier usage, to our considerable analytical disadvantage. We yield to the feeling that ownership is a single thing which must be found in a single place. We don't "own" the house we live in; Jones "owns" it, we "rent" it. Such popular usage in everyday affairs may be defended, of course; but the tendency to think that way has not been confined to the man in the street. The law is full of it. The Property Restatement, after adopting the Hohfeldian terminology with great precision at the beginning of Volume I,[32] tells us, in Volume V, that "incorporeal interests such as easements are rights in the land of another." [33] Williston defines a bailment as "the rightful possession of goods by one who is not the owner." [34] Holdsworth, writing ten years after Hohfeld, says there are many cases in which the possessor of property is not the owner and this is, in part, because "persons lend, or let, or

deposit their things." [35] Clearly these statements assume either that ownership is a single stick, or that it is a bundle so tightly bound it cannot be opened.

Fourth: The theory that property, or ownership, consists of rights which have somehow been conferred on persons with respect to certain objects or areas seems adequate for its limited job. Given what I have called the policy determination as to what the rights shall be, we can take care of the technical details by keeping a sharp eye out for the location of each of the sticks at any particular time. But there is an interloper here, another candidate for conceptual recognition. His name is "possession" and we have seen examples of his capacity for interference in the quotations just given. It may be that historically possession was in command of the field, and ownership was the interloper. In any event the fight has been on for some time.

Possession

Holmes began his rather famous lecture on Possession with a typical pronouncement: "Possession is a conception which is only less important than contract." [36] Salmond went one step further: "There is no conception more difficult than that of possession [and] its practical importance is not less than its difficulty." [37] These gentlemen were not talking in the vein of the popular saying that possession is nine points of the law, which, I take it, re-

fers to the fact that a person who has the burden of changing things is at a disadvantage; they were talking, rather, about a full-blown philosophical concept.

There is no doubt of the difficulty involved in the concept of possession; and if the criterion were the weight of the literature on the subject, one might well conclude that Holmes and Salmond were right as to its significance. If you will go through the "Special Note on Possession" in Brown's excellent little book on Personal Property [38] and look up all the works he cites, then look up all the works cited in the works he cites, you will have some understanding of the quantity of thick-lensed scholarship that has gone into this matter. There is something about the word "possession" that is like the mountain that is there to be climbed; we just *have* to have a go at it. The Romans did it, the English have done it, and the Germans have had more fun than anybody. For fifty years or so after Holmes's lecture there was much of it in the American law reviews. Bingham, Bordwell, and Ballantine, the three B's of the subject, accounted among them, for many, many pages of really admirable analysis published in the ten years between 1915 and 1925.[39] Bordwell and Ballantine should perhaps be segregated since their concern was with adverse possession rather than with the pure subject. For Bingham I shall always have a special fondness for having come up with the term "possessorship."

I have no ambition to add anything to the literature on possession; and I suppose we cannot subtract from it directly, although the processes of discard to which I referred earlier are operating upon it. Nevertheless, we are still in the hands of the philosophers. In particular, we are in the hands of Holmes, to a greater extent than most of us realize.

"The business of the jurist," Holmes says, "is to make known the content of the law; that is to work upon it from within, or logically, arranging and distributing it, in order, from its *summum genus* to its *infima species,* so far as practicable." [40] "The first call of a theory of law is that it should fit the facts." [41] Accordingly, the problem is to take the "legislation," which means the statutes and decided cases, and fit them into a generalized pattern revealing what has happened and what will happen. With this goal Holmes looks at the possession cases and defines the concept in a way which he believes best fits the facts. He observes that the law has protected possession; that is, it has allowed possessors to maintain actions against others without regard to whether the possessor was also owner. To the German philosophers this was because the ultimate end was the vindication of the free will of man, and when a man willed to exercise control over an object that will was to be enforced. So, for them, the important ingredient of possession was the intent on the part of the possessor to make the object his, the intent to deal with it as owner. Thus, with an assist from a

unitary notion of ownership, the German theorist, in two short steps, gets from the free will of man to the conclusion that a bailee does not have possession.

This, for Holmes, won't do. The theory must fit the facts and his facts are the English common law. The law enables the possessor to prevent interference by others, so the intent which is required for possession is the intent which parallels the operation of the law, i.e., the intent to exclude others. The common law protects a person who has the intent to exclude others because people are just born fighters. Holmes puts it this way:

> It is quite enough . for the law, that man, by an instinct which he shares with the domestic dog, and of which the seal gives a most striking example, will not allow himself to be dispossessed, either by force or fraud, of what he holds without trying to get it back again. Philosophy may find a hundred reasons to justify the instinct, but it would be totally immaterial if it should condemn it and bid us surrender without a murmur. As long as the instinct remains it will be more comfortable for the law to satisfy it in an orderly manner, than leave people to themselves.[42]

So—and these are my words, not Holmes's—the law wants to prevent ruckuses; therefore, it extends its protection to the man who would otherwise create a ruckus, namely, the man who is in control of something with the intention to exclude others.

Therefore, possession, as an organizing concept, means a physical control with the intent to exclude others.

Section 7 of the Restatement of the Law of Property is as follows:

> A possessory interest in land exists in a person who has . . a physical relation to the land of a kind which gives a certain degree of physical control over the land, and an intent so to exercise such control as to exclude other members of society in general from any present occupation of the land.

Holmes wrote it, you see, in 1881. This section of the Restatement was among his posthumously published works.

Now, one doesn't set up the pins in the alley without rolling a ball or two, and I intend to do so. One can point out that the extensive generalization of the term "possession" must result, inevitably, in leaving out the really significant factors bearing on any particular case. You cannot successfully lump together the capture of whales, the commission of larceny, and the maintaining of an action in ejectment. Any concept which purports to do so is certain to be almost without meaningful content. Professor Shartel made this point admirably in a paper delivered at a meeting of the Association of American Law Schools in 1931.[43] It can also be pointed out, as Shartel did, that even in a narrower field none

of the generalized theories of possession really does fit the facts, in Holmes's sense. A servant who has goods of his master's, and who belligerently intends to exclude others, does not have possession by the common law; and Holmes is forced to explain this as historical accident.[44] However, the basic quarrel with the possession theorists seems to me to be on a broader front. They have made the concept respectable, when, as an analytical tool, it doesn't deserve to be.

Possession, as an organizing concept, is simply a primitive form of the concept of ownership. It has been pointed out repeatedly that this is so.[45] Ownership is a little difficult to handle when people generally cannot read and write. Possession is an obvious answer. What we have of possession in our present law is vestigial; it is the tailbone of property. It doesn't aid the concept of ownership, it disturbs it. It is responsible for the distinction between corporeal and incorporeal interests, which is wasted effort; ownership could handle the matter without the distinction. It has led to some fantastic results, such as the rule, now happily well along toward oblivion, that an owner of land cannot transfer it while it is in the adverse possession of someone else. It forces us to secure obvious results by devious and almost laughable means, such as saying that X is in "constructive" possession of a tract of land when actually he is not there and all that differentiates X

from the rest of the world is that he happens to own the land. It enables the American Law Institute to produce the phrase "non-dispossessory trespass." [46]

In nearly all cases, analysis could have proceeded much more expeditiously, it seems to me, if we hadn't constantly stumbled over "possession." There is, of course, one class of cases which ownership won't explain. If one believes the black-letter type, the law protects pure possession, unrelated to ownership, against intrusions by anyone except the owner. These cases are the ones, of course, on which the possession theorists feasted. As to these, I ask two questions: First, to what extent do we *really* protect pure possession? *Second,* to the extent that we do, why do we want to do it?

The first question I raise merely to point out that some cases, such as those of the foxes, deer, and fish, and most bailees, can be handled on ownership grounds. How many thieves recover for conversion by other thieves? How many adverse possessors actually become successful plaintiffs before the statute has run? Concededly, some have. I have made no counts, I merely ask the questions.

To whatever extent we do protect pure possession, divorced from ownership, we do it, I believe, not because we want to but because we simply haven't taken the trouble to stop. Holmes's notion that we do it to prevent dog fights may be questionable on logical grounds; but, in any event, it's

hardly a compliment to the modern police department.[47] The idea that we do it in order to protect real owners by relieving them of the necessity of proving their titles may have more to it, but the loss of that advantage would be a small price for relieving the rest of the law.

Possession, as an organizing concept, is on the way to oblivion. Likely we'll all get there first; but I, for one, would be glad to give it a ride if I could.

II

Adverse Possession: The Law

ADVERSE POSSESSION is a traditional, and still common, subdivision of the book-law of property. Although its relative bulk in the legal literature is small, there is not sufficient time, in a presentation such as this, to attempt a full-scale traditional consideration of it; nor would it be appropriate to do so. But it will be useful, I believe, to examine briefly the major outline of the law of adverse possession, noting, as we go along, some of the processes by which this law has been developed and some of the divergence and confusion which these processes have produced.

In the first part of this discussion it was suggested that possession, as an organizing concept in property law, is more of a hindrance than an aid and, accordingly, we would be better off without it. This, of course, referred to the "possession" of the legal theorist, the combination of *corpus* and *animus* which may have been of better service to the Romans than it is to us. It had nothing to do with the

corpus alone, the observable fact which occurs when a person goes upon land, puts a twelve-foot fence around it, digs up every square foot of it for the cultivation of gourds, and constantly patrols the fence, rifle in hand. Physical events involving a person and land are bound to happen; if they did not there would be nothing for us to talk about. Further, it is going to happen that some persons will do some things with respect to some lands, which things, under our convention of ownership, they have no right to do. In this sense there will always be possession and adverse possession; but this means only that, in the property field, as elsewhere, people will be doing what they have a right to do and also, sometimes, what they have no right to do, an observation which is not likely to shock anyone.

Dealing with people who have done, or are doing, what they have no right to do is one of the common aspects of the law's business. Since ownership of land means, among other things, rights to use it presently, the person who makes use of land, without having the right, may find the forces of the law thrown against him. He may find himself liable for damages; he may find himself removed from the land; he may face an order to stop doing what he has been doing. All this is basic operation to which a law student becomes accustomed in a few days. When he discovers that the law, by statutes of limitations, and other devices, places time restrictions

on its operation, he is likely to accept it without much disturbance. He can satisfy himself as to the reason, if indeed he feels the need of any, by repeating some meaningless phrase such as "the rejection of stale claims." After all, it crops up everywhere and it must be right. But it would be quite a tribute to the imperturbability of anyone if he could accept the subject of *adverse* possession without wondering what is going on. We have a statute limiting the bringing of a cause of action for slander to one year after the cause of action accrues; [48] but we don't have whole chapters in texts and casebooks and whole titles in legal encyclopedias to explain it. We just have it, and that's that. Why are things different when we are concerned with the recovery of property? Why the heading, "Adverse Possession"? When we move into the chapter or the title, we find that the material there, while constantly referring to the statute of limitations, appears most of the time to be talking about something else. While stating that the doctrine is fundamentally based on the operation of the Statute in limiting actions to recover the possession of land to twelve, or fifteen, or twenty years after the cause of action arose, the law appears to be that the statutes do not mean what they say. When they do operate, they do not merely bar the cause of action, in the legal way of saying things; they go further and give the possessor "title" to the land. But this will not occur, nor will the

cause of action be barred, unless the activities of the wrongdoer have conformed to a list of explosive adjectives. In order to ripen into title, we are told, the possession must be open, notorious, continuous, hostile, and adverse. To the uninitiated this must sound more like grounds for divorce than property law. Sometimes it is added that it also must be under claim of right, claim of title and color of title. Having been told that all this notorious hostility is required, the student will be further puzzled when he encounters an early American case holding, in effect, that Indians were incapable of exercising it.[49]

Superficially, anyway, the books seem to be saying that the statute doesn't mean what it says; there may be cases in which a cause of action has existed for longer than the period stated in the statute, and still not be barred. And this seems to be true. In *Van Valkenburgh* v. *Lutz,* the case detailed earlier,[50] it must be that there was a cause of action against the Lutzes from 1912 on; yet in 1952 they were ordered to clear out. A full hundred years before the Lutzes built "Charlie's House" John Marshall said: "One of [the rules] which has been recognized in the courts of England, and in all others where the rules established in those courts have been adopted, is that possession, to give title, must be adversary. The word is not, indeed, to be found in the statutes;

but the plainest dictates of common justice require that it be implied." [51]

Why so? Why should so many legislatures have omitted a point so plain?

It is possible to take the position that the whole matter really *is* nothing but the operation of the Statutes of Limitations, as written; that there *is* nothing else; and that the trouble comes largely from gratuitous statements in the cases. This position is essentially that taken in the section dealing with adverse possession in the American Law of Property, which is perhaps the best over-all recent analysis of the subject.[52] On the other hand, it is possible to contend that the injection of the Statute of Limitation into the subject has just confused things. Thus, in a note appearing in the Property Restatement, it is said: "It is an anomaly of the law that a doctrine whose chief importance is the creation of interests by adverse possession should be couched in terms of extinguishment of remedies. It is significant that this branch of the law is commonly described and indexed as 'adverse possession.'" [53]

Each of these positions can call upon history for support; and each of them must explain certain cases either as "erroneous," or, like Holmes, as "historical accidents." For the most part, the courts and the text writers have not taken either position explicitly, nor have they recognized the divergence.

The law of adverse possession is taken as an established unit; and, in deciding questions one at a time, or in treating them textually one at a time, the question of internal consistency is not raised. Further, the divergence of view leads to differences only on certain questions; on others there is harmonious concert.

In one of the works to which I have just referred the statement is made, with reference to the doctrine of adverse possession, that, "here, as in all law, the true approach is the historical one." [54] A statement of this kind always is a little puzzling. If A says, "What is the explanation of such-and-such a rule?", and B says, "The explanation is historical," B may be perfectly correct; and, in that sense, he may be making the "true approach." What he is saying though, when he says the explanation is historical, is that the rule was designed for conditions which no longer exist, and has no present justification. Thus, he can hardly say that the rule now represents the "true approach" to the problem. No one would say, in so many words, that a rule is good because it once was so, although some of us come perilously close to it at times. If, on the other hand, what is meant by the assertion that the historical approach is the true one, is that some inquiry into the rule's past may give a better basis for judging its present worth, then one can't quarrel seriously with the statement. There is nothing to lose but the time

spent in making the inquiry. With that understood, and with no pretence to write the history of the doctrine, let's make a spot check on it.

Some History

It is common to begin discussions of adverse possession with the English Statute of Limitations of 1623, adding fleeting reference to a couple of temporary acts which preceded it.[55] This, in itself, reflects our innate conviction that possessory rights are one thing and non-possessory rights basically something else. Adverse possession is one thing; prescription is another. This obscures the close, and somewhat instructive, relation between the two.

Prescription, if not as old as sin, is as old as anyone could wish. The Romans had it, and it appeared in England at least by the Twelfth Century.[56] It, too, is a product of the dominance of the concept of possession. With respect to land, at least, possession was represented by the concept of seisin. Possession and seisin are synonymous. Maitland says so; [57] Holdsworth says so; [58] and I accept it, although there are dissenters.[59] Seisin was transferred by the familiar livery of seisin, the symbolic delivery of a clod or other thing representing the land. It was a unitary concept; a person either had it or he didn't. Nevertheless, there were situations in which one person wished to transfer to another a right to make some minor use of his land, such as a right of way. This

could not be done by livery of seisin, which would have passed the whole thing; it had to be accomplished by "grant" which, in the peculiar way of Twelfth Century Englishmen, was regarded as a device by which the person seized set up a little body of law for the government of his land.[60] Accordingly, we have the familiar proposition that corporeal interests lie in livery, but incorporeal interests lie in grant. If a person was in fact making use of a way, or engaged in some similar activity, and his right to do so was challenged, he could defend by showing a grant, or by showing a general custom in the community to make use of it, or, alternatively, he could "prescribe," that is, he could show that he or his predecessors had used the way for a period extending beyond the time of legal memory. The beginning of memory came to be established at the year 1189, the beginning of the reign of Richard I. To "prescribe" meant merely to claim on long usage. As things went along, two things happened to this theory: First, the law's memory became too long and courts began to adopt other periods by analogy —at first the periods of the temporary statutes relating to the time within which seisin could be asserted, and later the period of the Statute of Limitations. Second, under the notion that incorporeal interests lay in grant, the theory came to be that the process of "prescribing" amounted to an assertion that there *had been* a grant. After the necessary

lapse of time there was a presumption that it had been lost. The courts may well have been entirely honest about this. There were no vaults or microfilms; old scribblings likely were thrown away by those who couldn't read; and it was conventional for the whole town to burn down at intervals. At any rate, it was a rebuttable presumption. Evidence could be produced to show that, in fact, there had *been* no grant. A showing that the use of the way had been furtive, or that the user had in some other manner indicated that he had no right, tended to show there had been no grant. Accordingly, the rule, which it is said Bracton copied from the Roman Law,[61] came to be that a right could not be acquired by prescription unless the long use had been open and as of right.

All of this was established by the time of the enactment of the Statute of Limitations in 1623.[62] The theory of the statute, which related to actions to recover the *possession* of land, was not that there had been a livery of seisin and, after a lapse of a period of time, it would be presumed that the evidence was lost; it was rather that the person who in fact had the seisin, whether he had acquired it rightfully or wrongfully, would be protected by the lapse of time from an action to recover it. The statute barred the remedy; there was no presumption of right involved. Indeed it appears that for a considerable time after the enactment of the statute,

the "true" owner, if he managed to reacquire possession of the land, could retain it against the person in whose favor the statute previously had run.[63] But this view changed, and in 1833 the Real Property Limitation Act [64] provided that the running of the period of limitation should extinguish the right as well as the remedy of the previous owner. The same provision is included in the English Limitation Act of 1939.[65]

The term "adverse possession" seems first to have been used by Lord Mansfield in 1787.[66] No great blame should attach to him for this. It is an obvious phrase, especially when used, as Mansfield did use it, to indicate merely that the Statute of Limitations does not run in favor of a person who has a *right* to do what he is doing. The phrase has become statutory in England and appears in the present legislation; [67] but it seems clear that it carries little more meaning than that originally attributed to it by Lord Mansfield and it has been said that, while it has introduced some circularity in thinking, it has not proved troublesome in practice.[68]

In America, however, the adjectives and phrases qualifying the nature of the possession required in order to work the magic, appeared at an early date. In 1715 the colonial legislature of North Carolina passed an act which, in its first two sections, validated certain irregular deeds, and, in its third sec-

tion, provided that no person should recover the possession of lands except within seven years after the right accrued.[69] A controversy arose as to whether the seven-year limitation applied to everyone or, in view of the first two sections of the act, only to those who entered under some sort of deed. When it is remembered that North Carolina then extended to the Mississippi, it can be seen that they may well have had some problems. In 1797 an act was passed to settle the controversy, the effect of which act was that the seven-year limitation was available only to those who entered under color of title, that is, some sort of purported conveyance. In the 1820's Marshall, as noted above, referred to the requirement that the possession must be "adversary," [70] and during the same period Judge Duncan, in Pennsylvania, appears first to have strung the adjectives together:

> The act of limitations does not prevent the entry of the owner of the land, and bringing an ejectment at any time, unless where there has been an actual, continued, visible, notorious, distinct, and hostile possession for twenty-one years.[71]

In the same case the trial court had referred to "adversary possession" and a "claim of right." It seems, however, that these Pennsylvania judges, as well as Marshall, were presently concerned, as was Lord

Mansfield, with the proposition that the statute would not run in favor of a man who had a right to be on the land in the first place.

In 1828, the phrase "adverse possession" and the stipulation that in order to qualify as such a particular holding must have been under "claim of title" were incorporated into the New York statutes,[72] and the "claim of title" concept has since appeared in the statutory law of ten other states.[73] This New York statute was the one which rose to plague the Lutzes in 1952. "Color of title" also appears rather frequently in American statutes, usually in connection with a provision shortening the statutory period in cases where such "color" exists.[74]

It has been surmised that the tendency of the early American law makers, judicial as well as legislative, to heap more and more burdens on the possessor—requirements which he must satisfy before gaining title—can be attributed to large quantities of vacant land, large numbers of questioned titles, and a desire to support the latter.[75] Like many such speculations, there may be something in it; but it is well not to be led into the belief that phenomena of this kind have a simple, single explanation. We have to add, at least, confusion with the rules of prescription, failure to read statements in context, and overexposure to the philosophical theories of intent as an element of possession. In any event, and for whatever reason, an extensive use of modifiers rela-

tive to wrongful possession did come about, and the modifiers continue to appear in judicial opinions, often without any relation to the question to be decided.

The periods of limitation prescribed by the statutes vary widely, and there has been a tendency to shorten them. The English statute, which originally provided for a twenty year limitation on actions to recover land, is now twelve years.[76] In New York the period was reduced from twenty to fifteen years.[77] The Ohio limitation, on the contrary, was increased at an early date from twenty to twenty-one years.[78] The obsession with the figure twenty-one continues to intrigue me.

"Title"

The things which have gone on with respect to the effect of adverse possession on the so-called "title" to the land involved represent, I should say, property law at its worst. Theories of possession and ownership have become involved in a brawl, the dust from which obscures any real question which may be present.

How can a statute which merely purports to bar the remedy of a plaintiff give title to a defendant? It should be noted that there is no disagreement at all on the outcome. Where land is held by an adverse possessor, however he is defined, and the period of the statute of limitations has run, the ad-

verse possessor *does* have "title" to the land; he "owns" it and there's nothing the former owner or anyone else can do about it. It is not a "derivative" title, it is an "original" one. On the one hand, the attitude is that this is a mystery; it is something the courts have done by applying their own doctrine of adverse possession in the interpretation of a statute which says nothing about it; it is an extension of the statute. In the words of one writer, the statute has been "construed to transfer the title to the adverse possessor so as to enable him to assert his ownership against the world, including the original owner." [79] On the other hand, it is asserted that there is no mystery about it; the answer is to be found in history, which is the true approach; a wrongful possessor of land *is* the owner—he has the seisin and can hold it against everyone except the true owner, who has only a cause of action. When that cause of action is eliminated by the running of the statute of limitations there is then nothing which can interfere with the enjoyment of the land by the former adverse possessor and the game is simply over.[80]

All of this, in my view, comes to nothing. On some basis, a decision has been made that a person who occupies another person's land for ever-so-many years shall own it. That decision is virtually on a level with the decision that enabled anyone to own it in the first place. If I can use that "word" again, it is a "policy" decision. No amount of examining the

tools, such as "ownership" and "possession" by which we hope to put our policy decisions into effect is going to explain the basic decision; such an examination only turns up defective tools.

As mentioned earlier, the English have handled this matter in a way which puts it in its true place. The statute of 1833 simply provided that after the running of the period of the statute of limitations the *right* of the adverse possessor, as well as his remedy, is barred.[81] Now it's *obviously* a policy decision and they don't have to worry about how it can be. It should be added that there are a considerable number of statutes in this country which do the same thing in so many words—more than some of the theorizers lead us to believe.[82]

On another point involved in this "title" squabble, the results themselves have not been entirely uniform nor happy. If possession is ownership—and, to paraphrase the seisin proponents, "has it ever been doubted that it is?"—then it follows that the adverse possessor, wrongful though he may be, is the owner. It also follows that the "true owner" is *not* the "owner." From that it follows that a conveyance by the "true owner" is ineffective because he had nothing to convey. At an early period in England, it was a fact that a person whose land was being held adversely by another could not make a conveyance. The conveyance would have had to have been by livery of seisin and one couldn't trans-

fer seisin when he didn't have it. It is true that the owner could have resorted to the courts, while the statute had not yet run, and recover the possession; but this right was not a title, it was a right of entry, a mere cause of action. A cause of action could not be assigned.[83] Supposedly there was a reason for this beyond mere word-tossing and confusion as to ownership. According to Coke, "great persons," by which I think he meant persons who had the power to influence the courts and were willing to do so, had formed the practice of buying up "pretended" claims and enforcing them in the courts to the disadvantage of the "weak." [84] In our terms, they had started a racket. So the English law went further and made this sort of thing a crime. We have here the origin of Champerty and Maintenance.

None of this rigmarole bothered the English after 1845. They applied the usual remedy, at least so far as concerned the title to the land— a statute which made the interest of an owner out of possession alienable.[85] But we have behaved in our usual way too; we have dragged our feet.

If a student wants an answer to a point of law he asks the professor, or, better still, another student who has already had the course. He seldom looks it up. This habit of oral research is a bad one; it leads to the accumulation of inaccurate information. Can an owner who is out of possession make a valid conveyance? Let's look it up:

Of the three principal student texts on the law of Real Property, the first, in order of publication, says that in most states there are no restrictions on the power of such a dispossessed owner to effect a transfer.[86] The second text says the general rule in this country is that a conveyance by an owner is ineffective if, at the time of the conveyance, the land is held adversely by another person.[87] The third says such a conveyance can be made, but that this answer is an arbitrary one, there being many cases to the contrary.[88]

The result of this bit of intensive scholarship is not to be attributed merely to a miscount of noses by one or more of the writers. The reason is our reluctance to pay any attention to statutes and the felt need to state the law of fifty or so jurisdictions in one sweeping sentence. The writer who asserted that an owner out of possession cannot make an effective conveyance, cited cases from four states; in two of them statutes making such conveyances valid had already been enacted.[89] The fact is that there are now six states in which these conveyances are declared by statute to be invalid.[90] I do not know whether the jails in these states are filled with champertors, but I doubt it. When New York abandoned a similar statute in 1941, there had not been a recorded prosecution for champerty in the state since 1830.[91] In approximately thirty-five states the rule that there can be no effective conveyance by

an owner out of possession has been abrogated, sometimes by decision, but mostly by statute.[92] This leaves ten states, or so, unreported. If we must state the American law, and I see no real need to do so, why can't we put it that way?

Ohio is one of the unreported states, and I shouldn't want to be the first person in more than a hundred and fifty years to raise the question. Virtually the same question has been raised, but not answered with respect to the alienability of the other type of right of entry—the right of entry for condition broken, which is the interest retained by a person who creates a fee simple with condition subsequent. Exactly the same senseless reasons for its being inalienable can be argued; and the fact that they are senseless may not be, and perhaps should not be, controlling for the careful lawyer.

In at least one other type of problem the obsession with "title" has impeded sensible reasoning. If A enters land belonging to B and damages it, say by removing valuable substances from it, he is, of course, liable to B. Suppose this activity continues until the statute of limitations has run so as to confer title to the land on A; is A thereafter liable to B for the damage done while he, A, was an adverse possessor and, as yet, had no title? The tendency has been to attempt to answer this by the perfectly vacant assertion that title, once acquired by the adverse possessor, relates back to the time of his en-

try; hence he was the owner all the time, and violated no rights of other people in treating the land as he did.[93] It is obvious that if the answer is to be "no liability," nothing is added to the answer by adding "because of relation back." One could just as easily say that there *is* liability because there is *no* relation back. Things that happen on Saturday do not, in fact, happen on the preceding Tuesday. It may be permissible to pretend that they did for some good reason; but the fact that we are so pretending is scarcely a reason that can be offered for the pretense. If we don't know the reason for giving title to the adverse possessor in the first place, we can scarcely know whether he should be held liable to the owner for interim damage to the land.

Actual, Open, and Notorious

So far as I know, no one has ever contested the proposition asserted in almost every adverse possession case in the books that such possession, in order to ripen into title, must be actual, open, and notorious. If the proposition were that the possession would suffice even if it were phony, furtive, and in secret, it would be surprising. But one needn't be flip to assert that the words actual, open, and notorious add virtually nothing to the analysis and might just as well be scuttled.

When I say that the words add nothing I do not mean that there is no problem suggested by them,

but merely that they don't supply the answer. Given a rule that adverse possession for a period of time produces such-and-such a result there obviously *is* a problem, not only of when possession is adverse, but also when possession *is*. The word "actual" means real, rather than potential; and it's clear we would be in quite a situation if potential adverse possession for, say, twenty-one years gave a title. So, on that basis, the requirement that the possession must be actual means only that the possession must be possession. If the statement is taken to mean that the possession must be actual as opposed to constructive then we are in two difficulties. In the first place, it seems to me that analysis of the phrase "constructive possession" will bring you to the conclusion that it means either no possession or just plain possession. If it means "no possession" then the principal proposition reads, "the possession must be possession and not no possession." If "constructive possession" means "possession" then we have the proposition "the possession must be possession and not possession." That was all "in the first place" and probably is confusing if not fallacious. In the second place, if I'm wrong, and constructive possession means something which is neither ordinary possession nor no possession, then the proposition that adverse possession, to be effective to create a title, must be ordinary possession, and not constructive, is simply not true. It is generally recog-

nized that if X is in ordinary possession (whatever that means) of a part of a tract of land which belongs to someone else, and has an ineffective deed, i.e., color of title, to the entire tract, his adverse possession is good for the entire tract; he has, they say, constructive possession of it.[94]

If you will concede the point that the word "actual" adds nothing here, and I'm sure you will to avoid another go-round like that, the question nevertheless remains as to what possession is in this context. And that is not an easy one. If we can imagine a movie camera trained on the piece of land in question and running continuously for twenty-one years, and then the processed film run off before a jury for another twenty-one years, what would we tell them to look for?

The New York legislature tried to answer this question, you remember, by the statutory requirement that there be either a finding that the premises were substantially inclosed, or that they were usually cultivated or improved.[95] That's one of the things that defeated Mr. Lutz, although you may question the decision, as the dissent did. Several other states have copied those provisions,[96] but most statutes offer no guides at all. In the absence of such a statute, the courts frequently say that those things —inclosure, cultivation, improvement—are *evidence* of possession, but not requisites. The best anyone has been able to do by way of generalization,

is something like "the actual degree of control ordinarily exercised over such property by the average owner of it." [97] If you lie awake nights you may want to try constructing some thought twisters out of that. I'll refrain for fear someone might ask me to do better.

One more question: If a person lives on a portion of a tract of land and has a fence around the entire tract we'll assume, for immediate purposes anyway, that he has possession of the whole. Suppose he lives on the same portion and has no fence but has a deed for the entire tract; is the deed a fence? Does it make any difference if he is the only living person who knows about the deed? Are we back probing into his intent again on this "constructive possession" problem? I said one more question; there are three. I offer the other two in lieu of an answer.

The possession must be "open and notorious." These two terms usually are used as though they were one word, in the way certain swear words are thrown together to form a single epithet. It's barely conceivable that a case might be made for the retention of the word notorious, on a ground which I shall consider later; but I know of no case which has been decided on the point that a particular possession, though open, was not publicly or generally known, which is the usual connotation of "notorious." So let's discard it.

Does the word "open" help us? If a particular

possession meets the test of being a possession—in the sense that we have just discussed it and vague as that test is—then it's difficult to see how it could avoid being "open." If we were to take the twenty-one year movie, as we supposed, and the entire film showed nothing but desolate land, with no movement other than that of the changing seasons and an occasional rabbit, we would say that there was no possession. It would take an extremely cautious person to conclude that if there was possession it was not open.

Sometimes the requirement that the possession be open has been used, purportedly anyway, to decide cases involving operations underground—not only mining, as you might think, but also exhibition caves.[98] For the most part I believe those cases are faulty in analysis. The possession was open enough and the owner of the land knew about it. What he didn't know was that it was on his land; and that's part of another story which can occur on the surface as well. There's something about property law which makes it go crazy when it gets underground, to say nothing of its behavior in the air.

The problem of the possession being open, even if that means something, is not the same here as it is in prescription. Even if it is conceded that a certain *possessor* is not being "open" in his behavior, we can't pounce on that as evidence that he is doing something he has no right to do, and so rebut the

presumption of a lost grant. Adverse possession does not operate on that presumption; it assumes that the possessor *has* no right to be there.

So I'm here: To say that possession must be actual, open, and notorious is to say no more than that there must be possession. That in itself poses a problem, but the modifiers do not answer it.

Continuous

No doubt has been expressed by anyone that a possession, in order to evolve into ownership of the land in question, must be "continuous" for the period of the statute. If A behaves in such a way that we will say he is in possession of B's land, and continues such behavior for, say, two years, and then stops, B's cause of action to recover the possession of the land has come to an end. If A, or for that matter someone else, should later begin the same behavior all over again, we would say, in the technical jargon of the law, that B now has a new cause of action and that the statute must begin running all over again. Absent an acceptance of any clear functional mission of the general doctrine, this technical reasoning has been accepted, and the possession must be "continuous."

Quite a bit of litigation, and considerable "put-casing" has occurred over the so-called question of "tacking." Under what circumstances can the possession of one person be added to that of another in

order to make out the period of the statute and produce the magic result? Here again the skirmish had to be on technical grounds; and almost uniformly the American cases have held that two or more successive adverse possessions can be added together if there is "privity"—meaning a transfer—between the parties.[99] So long as the possession is withheld from the owner as a result of the same ouster his cause of action continues and it makes no difference that the potential defendants may be different persons. However, if there is no privity between the first adverse possessor and the second, then the second adverse possessor has committed a new ouster; this gives rise to a new cause of action and the statute begins running afresh. It has been the English position, and Professor Ames believed them right,[100] that no privity is necessary in order to add successive possessions—all that is necessary is a continuous possession in point of time so as to prevent "constructive" possession from re-attaching to the owner at the time of a break. It is said to be the usual, although not universal, rule in this country that the requisite privity may be attained by any of the devices recognized as effective to transfer ownership, but it also exists when there has been an oral transfer of the possession—a sort of present-day livery of seisin.[101]

When the question is prescription, rather than adverse possession, the "privity" matter is in a dif-

ferent light. It may be said that prescription demands privity in order to tack successive interests, since its basic theory, by presumption of a lost grant, is that the user is acting rightfully.[102]

It is not likely that all this would be designated social engineering by anyone.

Hostile–Claim of Right

The supposed requirement that possession, in order to become a title, must be hostile, and the supposed requirement that it must be under a claim of right, may seem antithetical. Whether they are or not depends, of course, on the meaning that is attached to them. It is convenient, in any event, to treat them together.

A word, first, about the frequency with which these stated requirements appear. The adjective "hostile" appears in virtually all of the adverse possession cases there are in the country. This is a sweeping statement but I believe the facts will come close to bearing it out. By "appears" I mean that the word can be found, in some combination with others, describing the type of adverse possession which will be effective; I do not mean that it has any bearing on the decisions, explicitly or otherwise. Writers may separate it, but they have some trouble putting much separate content into it. The vice, if it be such, of its constant appearance is that somehow it suggests the significance of a belligerent frame of mind

on the part of the possessor, and this *has* played some part in the cases.

The phrase "claim of right," on the other hand does not appear so frequently. As we have seen, it appears in some statutes; and occasionally it will appear, without the inducement of a statute, in the list of modifiers compiled by a court. When the last is the case it may be taken seriously, or it may be just part of the verbal ritual. The phrase "claim of right" also can suggest a state of mind, although not necessarily so.

Either of these expressions—hostile or claim of right—may be taken to mean nothing more than that the claimant is in possession of the land, acting like an owner, and apparently not in subordination to anyone else, such as a landlord or an employer. As so viewed, the words add nothing to the meaning of the phrase "adverse possession." If the occupier is there under someone else, then he has a right to be there, and, in theory at least, there should be no problem. If, on the other hand, he is acting like an owner, but has no right to do so, then, in the sense just mentioned, he is "hostile" and "claiming a right" in himself. This, I suppose, may be designated an "objective" view of the matter, although I'm never quite certain what that word means. That view frequently has been taken, even where some such phrase as "claim of right" is included in an applicable statute. It is a view which, prior to the

decision in *Van Valkenburgh* v. *Lutz*, had been said to prevail in New York, for example.[103]

Those who favor the strict Statute of Limitations approach to the whole problem would like us to accept this objective view. Where A is on B's land, without any right, it would be ridiculous, they say, to contend that B has no cause of action unless A, the trespasser, has the proper frame of mind. A is there; B has a cause of action; and what goes on inside A's head has nothing to do with it. Since B has a cause of action, and the statute says it will be barred after a length of time, it *will* be barred after that time and the job is done. This position has the appeal of simplicity of statement and relative ease of application. It is, I believe, essentially the English position; and it may reasonably be contended that many, if not most, courts in this country have come out that way in fact. But certainly many have not; and possibly because of that, and possibly also because of the amount of loose and contradictory talk to be found in the cases of almost every state, there has been what has been described as a regrettably vast amount of litigation about it.[104]

An interesting little example of the divergence of views on the question of the relevance of the state of mind of the adverse possessor occurred in Ohio a hundred or so years ago.[105] In an adverse possession case before the Supreme Court of the State the question was whether there was error in the trial

court's charge to the jury. A portion of the charge was as follows:

> An entry of one man on the land of another is an ouster or not, according to the intention with which it is done. By the law, the intention guides the entry and fixes its character.

The Supreme Court said there was error—that, in effect, the intention of the possessor had nothing to do with it. One can't avoid feeling some sympathy for the trial judge, for he had taken his idea, and the quoted two sentences verbatim, from the opinion in a case arising in Ohio and decided thirty years earlier by the Supreme Court of the United States.[106] The latter case involved grantees of the renowned Judge John Cleves Symmes, who operated a wholesale land business in the Cincinnati-Dayton area during territorial days, and who, though said to be "not intentionally dishonest,"[107] nevertheless had a distinct tendency to convey the same land twice.

While sympathizing with the trial judge, one must also feel sympathetic with the position of the Ohio Supreme Court. The theory which was offered to the jury, that an entry is a disseisin or not depending on the intention with which it is done, has been used in some adverse possession cases to produce results so fantastic that one is inclined to say they were not decided but perpetrated. Identifying the adverse possessor as a disseisor invests him

with all the use and misuse of the doctrine of seisin. It had been held, for example, that a disseisin in order to amount to a tort must be intentional; and a case or two had held that a temporary and inadvertent disseisin did not call into operation the doctrine considered earlier so as to prevent a conveyance by the true owner.[108] Now we move this into the case of the real adverse possessor and say that, before his occupancy of the land will amount to a disseisin—that is, before it will be adverse possession—it must be intentional, not inadvertent.[109] Accordingly, a person cannot acquire title by adverse possession unless he intends to take the other fellow's land away from him. If you want to get along in this world you have to be a crook. Is this the doctrine which required the Lutzes to remove their garage, or a part of it, after more than thirty years? You will recall that the court said in that case:

> Lutz himself testified that when he built the garage he had no survey and thought he was getting it on his own property, which certainly falls short of establishing that he did it under a claim of title hostile to the true owner.[110]

As is suggested by what has just been said, the question of hostility and claim of right—and the whole question of whether we are going to inquire into the intent of the adverse possessor—has been fought out principally in the cases of mistaken

boundary lines. A's fence is actually encroaching on B's lot and A treats the strip involved as his for the period of the statute. Both A and B believe the fence is on the true line—at least there is nothing to indicate the contrary. *Does* the strip now belong to A? Under the one view, the fact that it is a mistake makes no difference, since that view does not go into the working of A's mind at all; A was there, there was a cause of action against him, and that does it. Under the other view, A does not acquire title to the strip because he did not have the required grasping state of mind. How could A have ousted B, an intentional act, when A, through mistake, thought he was on his own land?

In what was perhaps an effort to soften the brazen character of the latter view, the opinion in a leading Maine case suggested that if the possessor had intended to claim up to the fence whether the fence was on the true line or not, his possession would come up to scratch and so he would acquire title.[111] This compounding of the felony has been pounced upon in some later cases.[112] Now we have something much worse, in a sense—it's unmanageable. It is assumed that we have a case of a mistaken boundary, and so the adverse possessor believed that the land in question was his. We are going to inquire whether, despite the fact that he thought it belonged to him, he nevertheless entertained the intent to claim the land even if he was wrong. It's

conceivable that, over the course of twenty-one years, some people may have the time to think such thoughts about their fences; I doubt if many of us do. What it comes to is the testimony which is given at the trial of the case; and the cases show that lawyers have discovered the proper question to ask on cross-examination: "Mr. A, you say you thought the fence was on the correct line—would you have claimed this land if you had known that you were mistaken?" For some reason people don't like to answer yes to that question.

In our trip through the mind of the adverse possessor we have taken a wrong turn somewhere. What started out as a requirement of a claim of right, and took away Charlie Lutz's house, has ended as a requirement of a claim of wrong, which took away Mrs. Lutz's garage because it was believed to be wholly on the builder's own land. Faced with results such as this, the urge to stop prying into the possessor's intent is very strong. The immediate job of application is much simpler if we do not; and, if we do not, we can consign to the ash can, which is clearly the proper depository, a few adjectives and a couple of hundred years of legal funny-business. Left alone, I believe this will happen, in the slow evolution of property law, which is somewhat comparable to geologic change. The American emphasis on the adverse possessor himself, which likely had its origin in pioneer conditions,

affection for Civil Law writers, and downright trouble with the concept of seisin, is, I believe, in the process of giving way to the theory that the entire matter is simply one of the application of the statutes of limitations. The results of the Ohio cases, as distinct from the verbiage found in the opinions, can, I believe, be analyzed as following from the principle of barring a cause of action; [113] and the same is true in some other states. New York was believed to be in this category, despite the wording of its statutes, until *Van Valkenburgh* v. *Lutz* raised some doubts.[114] The vigorous advocacy of the Statute of Limitations approach which appears in the article on Adverse Possession in the American Law of Property [115] likely will have some effect.

But neither the fact that life would be easier if we paid no attention to the intent of an adverse possessor, nor the conviction that the reasons which courts have advanced for inquiring into his intent are silly, and I can think of no more fitting word, can mean that we *should* not take intent into account. The question, I should think, is open.

Instances in Which the Statute Does Not Run

Perhaps a little should be said about kings, convicts, and remaindermen—that is, instances in which, because of some peculiar situation of the owner, the statute either does not run or its running is prolonged. These matters may actually be more

significant than the others we have been considering; but, because there is no substantial contest over them, they rate less space in the daily press of property law. All of them clearly are controlled by the theory that the Statute of Limitations bars the successful assertion of a cause of action after the prescribed period.

Statutes of limitations do not run against the sovereign. A state cannot make one applicable to the federal government. It can, of course, make one applicable to itself; but this intent must clearly appear in the statute, for the presumption is otherwise.[116] Sometimes it is said that it is necessary to preserve this attribute of sovereignty in order to protect the state from the carelessness of its servants.[117] This may be a way of saying that the state makes the rules and we don't suppose it meant to make them in such a way as to lose by them. Occasional statutes do subject state land to the doctrine of adverse possession, sometimes with a longer period being applicable. You will be glad to know, for example, that you can get title to the English foreshore, which otherwise is in the Crown, if you're willing to occupy it adversely for 60 years.[118] I don't believe that anyone with a pet project to urge before the legislature should count on being able to get through a provision waiving the state's immunity to the Statute of Limitations. Legislators are not likely to regard a vote to give away state property as good politics.

So much for the king—now the convicts. The English statute of 1623, which is the prototype of all our statutes, provided for an extension of the period in the case of certain disabilities existing at the time of the accrual of the action. The disabilities were infancy, insanity, coverture, imprisonment, and that condition known to the English as being "beyond the seas." [119] Infancy and insanity continue as disabilities everywhere. One can return from "beyond the seas" in a hurry these days, so that is largely gone as a disability. Coverture may still have its disabling features, but they have nothing to do with capacity to sue in most states, so that is largely gone. Imprisonment is said still to be a disability in sixteen states; Ohio is one. In nearly all of the statutes the disability is handled in the same way: The statutes provide that, if a disability exists at the time a cause of action accrues, the disabled person need not bring his action within the generally prescribed period of the statute, but may bring it, thereafter, so long as he does it within a stated period, frequently ten years, after the removal of the disability. Under most statutes, disabilities arising after the cause of action has accrued are irrelevant. Without meaning to suggest an answer, I ask the question: What harm would be done if these disabilities were eliminated altogether?

Our remaindermen, and for that matter the holders of other types of future interests, are under an-

other kind of disability. They have no cause of action, since, by definition, they are not entitled to the possession of the land. Accordingly, the statute of limitations does not begin to run against them until they cease being the holders of future interests and become possessory owners.[120] As in the case of the convict, this disability has been said to be irrelevant if it arises after the adverse possession has begun. That is, if A takes adverse possession of land owned by B, and B thereafter splits up the ownership so as to create say a life estate and a remainder, A will nevertheless acquire title to the land when the basic period of the statute has run.[121] There is little on this last point, and you will observe that it is tied in with a matter previously discussed—the capacity of an owner out of possession to make a conveyance.

I think it is worth noting that the immunity of the state to adverse possession, the matter of the statutory immunities, and the fact that adverse possession will not operate against the holder of a future interest, are all consequences which flow from the basic notion that the matter is governed by the Statute of Limitations. If the theory were really founded on the acquisition of title by the possessor, or even the "presumption of a lost grant" which is supposed to govern prescription, the position of these matters, logically, might be quite different.

This, then, is some account of the law of adverse possession, and some account of how it came to be that way. There is virtually nothing in the books that bears on whether it *should* be the way it is; or, for that matter, whether it should be at all. This branch of the law is suffering, as are some others, from a fundamental difficulty: how can a particular question be answered intelligently without some fairly explicit assumption as to the more general task to be accomplished? How can I sensibly consider whether to take Route 40 or Route 23 when I don't know where I'm going? For the most part we seem to be able to immerse ourselves in the details of a problem to such an extent that they consume our entire attention and energy. There are more motels on Route 40; it is four-lane for longer distances; its surface is safer when the weather is bad—enough of this sort of thing and we shall have convinced ourselves that we should take Route 40. But do we want to go to Wheeling or to Toledo? If the answer is Toledo, then the considered judgment of thousands of motorists that Route 40 is the better road, however convincing within its own limits, is irrelevant.

III

The Question of Purpose

THE DOCTRINE of adverse possession, like other aspects of property law, is in a process of change—a process that is almost unbelievably slow, that is subject to diversion by almost irrelevant factors, that moves in fits and starts, and is not especially susceptible to forecast. If there is any discernible trend it appears to be in the direction of simplifying things, a trend which, although perhaps desirable in itself, is forced upon us by the insistent press of other, and more significant, matters. This process of change is such that it has been, and, if left alone, will continue to be, accomplished without much conscious reference to any particular purpose except immediate expediency.

I have headed this part of the discussion "The *Question* of Purpose" deliberately and out of a large measure of doubt and humility. I wish to raise the question; I do not wish to pontificate about the direction things should take. I am not a high

priest of progress. In my case it would be pointless to argue whether I *should* be.

I say this more as a warning to myself than otherwise. Once one raises the question of the purpose of anything he is in grave danger. He is likely, if he is not careful, to be led to wider and wider speculations until he finds himself sitting in his office with a towel around his head and unable to do anything. The temptation to fit things into a grand philosophical scheme is undeniable, but those of us who cannot qualify as a Genius First Class had best resist it. Failure to resist has, I believe, deprived us of the benefit of some thinking which, had it been contained within manageable limits, might have been quite useful. If, by chance, you *are* a genius, then you have nothing to worry about; or, to put it another way, there is nothing that can be done for you.

This feeling of hesitancy to venture into a line of thought which may end in a tail-spin must, I'm sure, be shared by many people. Otherwise it is difficult to account for some of the things which have happened and are happening in the field of property law. The intercontinental ballistic missile and the right of entry for condition broken just do not seem compatible. We are, I believe, a long way removed from any age of "nuclear" law, or anything like it. At the same time, I don't quite see how, in all conscience, we can continue to purport

to answer some of our particular questions in the property field without a more explicit reference to some rational purpose.

We have been considering here, in a superficial way, some particular questions in a particular, and perhaps peculiar, part of property law known as "adverse possession." Is it necessary that an adverse possessor have, or at least enter the land with, some special state of mind in order to acquire title at the end of the statutory period? If so, what state of mind? Should we allow successive periods of adverse possession by different persons to be added together to total the period of the statute? What should the period of the statute be? Should the state be immune to the operation of the doctrine? Should the doctrine operate to bar the right of a holder of a future interest?

How can we possibly answer any of those questions without inquiring as to our purpose? How can we have the nerve to assert that an adverse possessor cannot acquire title to land unless he occupied it under a claim of right, and, at the same time, virtually admit, when pressed, that we don't know what we're trying to do in the first place?

Of course, there's nothing new about the position I'm taking. And I must say my feeling is that other parts of the law have perhaps done a better job. Little as I know about contracts and torts, I somehow feel that those subjects include a greater

content which may be described as implementation of a purpose. Perhaps I'm wrong. On the other hand I have the feeling that criminal law has suffered from inability to make up its mind where it wants to go. Perhaps I am wrong again. In any event there is no need to accuse the neighbors; our own back yard, *feodum simplex* that it is, has enough trash in it.

So—and not without qualms—I raise the question: Why, after certain circumstances have persisted for a certain length of time, do we take one man's land away from him and give it to someone else? Why do we do it at all?

Asking this question is likely to evoke what may be described as a "hand waving" answer: It's all part of the general policy underlying the Statute of Limitations. This may be true; and it's also true that the trick of freezing things that have been around for a long time is, legally, almost universal—found, it is said, in all enlightened systems of law.[122] We have seen it operating, independently of the Statute of Limitations, in the early applications of the doctrine of prescription; and if we wished to collect all of the laws, statutory and otherwise, which operate in the same way as the more generalized statutes of limitations, we would have quite a green bag full.

The difficulty, of course, with this hand-waving answer is that it doesn't tell us what the policy of

the Statute of Limitations is nor which part of it is involved. The fact that something exists in quantity may be regarded, conceivably, as indicating that it's useful—law books, for example—but certainly the fact of quantity does not tell us the use. If one presses the point, and actually inquires what *is* the policy of the Statute of Limitations, one gets more hand-waving answers—not quite so grandiose perhaps, but still generalized and carrying the implication that the subject is closed. This generalization is inevitable. When one classes together personal injuries, contracts for the sale of farm produce, petty crimes, actions to recover land, and perhaps half a hundred other legal situations, and attempts to state some underlying principle, vagueness may be expected. Nothing very revealing is likely. Nevertheless, certain of these generalizations bear on adverse possession, and it may be profitable to examine them briefly.

Statutes of Limitations [123]

It is said, so frequently as to become monotonous, that statutes of limitations are designed to protect against stale claims after evidence has become lost, memories have faded and witnesses have disappeared. This statement represents not one idea but several.

The dictionary definition of "stale" is "old and strong." This scarcely can be what is meant when

used with reference to the Statute of Limitations. These claims do not literally have an odor. The word "stale" in this connection must mean either simply "unenforceable," which of course is the issue, or it is an attempt to include all of the specific purposes of the statute in one word, an attempt which fails.

The proposition that statutes of limitations are designed to protect against the assertion of claims after evidence to refute them has been lost, from one cause or another, is fairly obvious; but it should be noted that the applicability of the proposition is not as broad as the operation of the statutes themselves. This concern is with the preservation of a potential defendant's evidence, not a plaintiff's; and it is limited to claims which it is assumed he could have resisted successfully had the lost evidence been available. If one assumes that the plaintiff's claim was "good," in the sense that it could have been proved in the first place, the defendant can be no worse off no matter how much time has elapsed. Statutes of limitations operate to bar "good" as well as "bad" claims, and the purpose in barring the "good" ones must be something other than protection against the failure of evidence. If it were not we would be throwing out equal quantities of babies and bath water.

In the application of the Statute of Limitations to actions to recover land, it is apparent that "good"

as well as "bad" claims are barred. Indeed the designation of the doctrine as "adverse possession" indicates an assumption that the claim which a plaintiff is attempting to assert has an original basis in right. Further, the problem of avoiding the successful assertion of nonmeritorious claims appears to be less pressing in land cases than in some others. It may be that in earlier times the establishment of land titles depended on witnesses—we have stories of small boys being forced to attend liveries of seisin and being whipped so the memory of the occasion would endure—but record title, which is what we are talking about, commonly is proved, in these days, by the record. The "lost grant" theory of the later prescription cases is not the theory of adverse possession, and even in prescription it can hardly be taken seriously. As applied to land cases, the general purpose to protect against the assertion of "bad" claims may have some merit in relation to the resolution of ambiguous surveys. We *do* have in the original surveys of much of the country such dubious calls as "thence S. 73 degrees W. 10 poles to four sugar trees and a mulberry."[124] In times past persons may have needed to resort to witnesses to establish title to particular land under surveys of this sort and the doctrine of adverse possession may have resolved many of these old difficulties. To the extent that it has, it has done its work so far as the original surveys are concerned. I suspect

that there still may be some of this work to be done with respect to ambiguities created by more recently drawn descriptions in deeds.

A quite different and much broader purpose of the statutes of limitations is suggested by the frequently reiterated statement that these statutes are "statutes of repose." Repose for whom? For the courts, for potential defendants, or for the general public?

It *has* been intimated that these statutes are a practical device to spare the courts from litigation of old causes of action; but this has been denied vigorously, and I should think properly, on the ground that since courts are established to deal with litigation it would be strange to forbid litigation so as not to bother the courts.[125] I suggest that we can forget any such purpose as this.

The "repose" of individual defendants is a more complex purpose and perhaps more debatable. Here the policy of repose overlaps partially that of protecting defendants against the loss of combative evidence. If a claim is assumed to be bad, the policy of protecting a defendant from a failure of evidence and a policy which favors his "repose" are very much the same. The thing most likely to keep him awake nights is lack of evidence to support the facts. If, on the other hand, it is assumed that the claim against him is a meritorious one, we have an entirely different question: Is it a proper purpose

to enable a person who has committed a wrong, or who, as in the property cases we are concerned with, is in the continuing process of committing one, to be able to disregard it after a time? This question has been argued on moral grounds and has provoked some dispute even as to the proper application of Christian principles.[126] Whatever the validity of these arguments, it can be conceded that such a purpose is not *prima facie* outlandish. It certainly can be contended *reasonably* that a person is entitled to shape his affairs on the assumption that a claim against him, however just, will not be pressed after being allowed to lie dormant for a considerable time.

If this general purpose—the repose of individual potential defendants—should be taken as the dominant one, it would have an interesting application in our land case. There will be no interference with the repose of such a potential defendant if he does not know that a cause of action is outstanding against him. Accordingly, in the case of the mistaken boundary, the adverse possessor should acquire no title, no matter for how long his occupation up to the supposed line continues. Conceivably it could be contended that he is entitled not only to his repose with respect to what he takes to be the facts, but also to the additional smugness which comes from knowing generally that, even if he has slipped somewhere, things will work out

all right eventually; but this is giving him a little too much rest.

Assertions that the statutes of limitations are statutes of "repose" usually, however, do not suggest that it is the repose of the individual which is in question; rather the context indicates that the repose which is in mind is that of the "public" or of "society." [127]

Although society properly may be interested in the welfare of an individual, it is clear that the interest referred to here is that of those persons who have dealings with others and, accordingly, are concerned in the stability of the positions of those with whom they deal. Without this stability there would be little repose for anyone. The operation of this social purpose is especially evident in some instances such as the one with which we are concerned, the transfer of property; but it is difficult to imagine one to which it does not apply.

The social purpose is not limited, as the others may be, by concern as to whether a particular claim against a defendant is good or bad; the disruption of affairs is the same in either case. And, for the same reason, it makes no difference whether the person directly affected knew of the claim against him. This social purpose appears, then, to accord more nearly than the others with the way in which limitations, taken as a group, have been applied.

Counter Purposes

Some of the purposes just considered may be more persuasive than others, and some may have a wider application than others, but they all point in the same direction—limitation, and the shorter the better. If they stood alone they would dictate not only that actions be limited as to time but that they should be prohibited. Of course there is an obvious counter policy, that of fairness to persons who have claims, which prevents that result and which operates constantly on all limitations questions. For various reasons we may want to limit the time of bringing actions, but we don't want to do it at the expense of fairness to those whose rights are being invaded. This accounts, in our discussion, for the disabilities, and the immunity of the holders of future interests, and it also bears quite importantly on the length of the prescribed periods.

Purpose and Adverse Possession of Land

Generalized purposes of statutes of limitations are, of course, relevant to adverse possession, but they are, of necessity, so general that direct application, except perhaps in an instance or two, is not readily apparent. As has been suggested, the development of the law of adverse possession has not been noted for explicit reference to the purpose

which it was supposed to accomplish. However we have had occasional references to it; infrequently by courts, more often by commentators. These references, almost without exception, also have been of the hand-waving sort. But, cavalier or not, they are offered as reasons and entitled to a hearing.

There has been some suggestion that we take away an owner's land and give it to an adverse possessor, after the lapse of a prescribed time, in order to punish the owner for his neglect.[128] In part this suggestion derives from what is essentially a misinterpretation of other statements. When it is said that the English position, which as you recall emphasizes the running of the Statute of Limitations rather than the acquiring of title by the adverse possessor, focuses on the demerit of the owner rather than the merit of the one in possession,[129] this is simply an assertion of fact about the technical approach. Such statements are not, I believe, intended to be assertions that the purpose of the business is to punish the neglectful owner. The word "demerit" is unfortunate. In part, too, the conclusion that we are trying to punish neglect can be traced to statements made in the support of pet ideas. Dean Ames, who was interested in promulgating his gospel that successive periods of adverse possession could be added together to make out the limitation period even in the absence of privity, argued that, privity or not, the laches of

the owner was the same and should be attended with the same consequences.[130] If the punishment notion is removed from this setting and examined independently, there is little or nothing to commend it. If we feel impelled to punish a person, we have a criminal law whose business it is to do it. I am not, of course, suggesting that it should be a crime to fail to bring an action against an adverse possessor; but in any event the idea has no place in the law of adverse possession itself.

Somewhat related to the "punishment" purpose is the theory that the purpose of the doctrine of adverse possession is to encourage the development of land. This has a much better sound; it has an economic sound; and "development" is so important that we have endless commissions engaged in it.

If "the encouragement of the development of land," when offered as a purpose of the law of adverse possession, refers to encouragement through facilitating the transfer of land titles, then it is only a more generalized statement of a matter which we shall consider shortly. However, the context of some of the earlier statements of the "encouragement" purpose suggests that what was intended was the encouragement of the development of vacant lands by persons who had no very good reason to regard themselves as the rightful owners. It may be conceded, at least for the sake of discussion, that there is nothing inherently wrong in such a

suggestion. Yet two questions seem pertinent: First, do we *need* so to encourage the use of land? Are we running out of space, and if so, is it because large areas of land are unused or is it simply because there are getting to be too many of us? Others will have to answer these questions; I assert only that they are pertinent. Second, and more pertinent it seems to me, is the question whether, even if there is a great need to encourage the development of land, the doctrine of adverse possession, by any reasonable stretch of the imagination, can do it. Of course I don't *know,* and, I suggest, neither do you; but my hunch is that it will not do so. If we suppose a person with an urge to use someone else's land, and who is deterred from doing so by the possible consequences, will his reluctance be overcome by the knowledge that, if he gets away with it for a sufficiently long period, he will be in the clear? Everyone to his own hunches.

Neither punishment nor the encouragement of land development has been the purpose most frequently stated as that of the doctrine of adverse possession. From the time of the basic Statute of Limitations in 1623 [131] the purpose has been said to be the clearing of title to land. That statute began with the words, which writers frequently have repeated, "For quieting of men's estates." These words are meager enough, although they constitute a better legislative history than we have

for some recent state legislation. The fact that they appear in the original statute is of little importance nearly three and a half centuries later. Whatever may have been in the mind of the original draftsmen, I take it that the "quieting of men's estates" is now taken to refer, not to the repose of the individual person which may arise from the statute, but rather to the "social" purpose to which we referred as the principal purpose of the statute generally. As so viewed, the limitation of actions to recover land appears to fit not directly under a broad social or economic purpose, but indirectly, under the more specific policy of facilitating transfers of land.[132]

It is, I suppose, open to anyone who wants to do so to contend that facility in the transfer of interests in land is *not* a proper end; but I should think the accumulated evidence, both in words and in activity, leads to the conclusion that he would be outvoted by a large margin. At least by common supposition, the law has been engaged in a free alienability project for hundreds of years, and a multitude of statutory enactments, bar association activities, and the like, certainly point in that direction. Seeing no convincing argument to the contrary, I for one, am willing to accept the purpose of facilitating transfers as a proper one.

It seems equally clear that transfers will be facilitated by the removal, so far as practicable, of

doubts which may beset the transferee. Whether to buy a given thing, land or something else, must inevitably involve a balancing and a decision of greater or less significance. If the decision is of any substantial importance, it is likely to be a difficult one. If we can avoid adding to the purchaser's problem a further doubt as to whether he actually will get what he expects to get, even if he does buy it, we have done him a service. What we wish to do, then, is to enable him to know, so far as we can, what he is going to get for his money. If someone proposes to sell me an automobile, I should know whether he owns it, or, perhaps more accurately, whether he has the power to transfer it.

In the case of land the considerations are analytically the same—I want to know whether the person who proposes to transfer to me has the power to do so. But the nature of land and land transfers is such that the proposition may be more meaningful if put in another, and almost illogical, way: The purchaser needs to know, first, that the vendor owns the land, and second, that *this* is the land he owns. Ownership of land, in the conceptual sense, is manifested by a series of treaties, recorded surveys, deeds, plats, more deeds, wills, and various other writings; but none of these pieces of paper has the capacity to go out and locate itself, as it were, on the ground. Our purchaser wants to know that the title is good *and* that the boundaries are right.

This, then, is *an* accepted purpose, and, at least for discussion, it is the purpose against which we are trying to judge the doctrine of adverse possession. Where does the doctrine fit?

We have seen that possession is primitive ownership. In a society which provides no other means of delineating right, a purchaser can, and does, rely on possession by his prospective vendor. In the beginnings of our law, and in the beginnings of the doctrine now called adverse possession, this was true not only of personality but of land as well.

But this is not the beginning of the reign of Richard I, nor is it 1623, and things have changed. With respect to many chattels we still rely largely on possession in contemplating a deal. If I find a dozen baseball bats in a department store bin, I feel safe in buying one of them. Since we have a theory of ownership separate from possession, I'm taking a slight chance, but I'm prepared to take it in view of the amount involved and other protections which I have. When I move from baseball bats to automobiles things are different. With securities we have something else again. And it is clear that land is still another thing. It's conceivable that someone today might buy land on the strength of bare possession in the vendor, but the conventional pattern certainly is otherwise. It is here, it seems to me that the law of adverse possession as applied to land and the doctrine of the same name which

may be applied to personal property must separate. The function of neither doctrine can be considered apart from other devices which the law has provided for the same, or related, purposes. These other devices are markedly different in land transactions, on the one hand, and those involving personal property on the other. Accordingly, although the legal talk about adverse possession is much the same whether one or the other is involved, the analysis with respect to purpose *may* be different, and I elect to pursue the problem only as it relates to land.

Remembering, then, that the problem is the facilitation of the transfer of interests in land by enabling a purchaser to know with fair certainty what he is buying, and that the immediate problem is the role which the doctrine of adverse possession plays in forwarding this purpose, the next step is to look at the setting in which adverse possession finds itself with relation to land transactions.

The Torrens System

I mention first, and out of historical order, the statutory system of land title registration known as the Torrens Act. I do this for two reasons: first, because it may be in the minds of some of you, and second, because of a detail in connection with it which has some bearing on our subject.

This system, as many of you know, is one which

provides for the registration of title to land, as distinct from the device more familiar to us of recording the chain of instruments by which title to land is derived. Its details are set out in more than 120 sections of the Ohio Revised Code,[133] many of them quite long, and, even if time would permit, there would be little point in going into those details here. The essence of the act is that an owner who wishes to register his land may do so by instituting proceedings, provided for in detail, which are somewhat analogous to a suit to quiet title. If the applicant's title is found good, a decree of confirmation and registration is entered, which, after the expiration of the time for appeal, is conclusive against all claims, with certain supposedly minor exceptions. Pursuant to this decree, the title is registered by the county recorder and a certificate of title is given to the owner. Subsequent transfers of the land are made either by deed or by assignment on the certificate of title, but the transfer is not actually effected until it has been registered and a new certificate of title issued to the new owner; prior to that the deed, or other instrument, is merely a contract. A feature of the Torrens Act is the provision for an insurance fund, administered by the state treasurer, to be used to reimburse those who sustain loss, by reason of fraud or mistake, after the registration of the land. The fund arises from contributions, based on the assessed

value of the land, and made at the time of the original registration.

This system of transfer may be thought of as roughly similar to our system of automobile titles. A very significant difference is that land title registration is not compulsory, at least it is not so in any of the fifteen or so states in America which have statutes allowing it. The English have been working toward compulsory registration.[134]

Much ink and breath has been expended on the merits and demerits of the Torrens acts. Its vigorous proponents are sometimes described as "thoughtful persons," [135] and sometimes as "those strange people who seem convinced that change, whatever it may be, is certain to be progress." [136] We have the rather unusual spectacle of a law school professor writing a book in which he advocated that registration be abandoned in New York.[137] He was immediately and vigorously attacked, not only by some other professors but also by some members of the bar. One of the latter, in the course of a twenty-page article, referred to him as "the professor" forty-seven times.[138] I shouldn't want to get into that.

Whatever the merits of the system the fact is—and I'm almost afraid to say this—that, except perhaps in three states, it has not been widely accepted.[139] For whatever reasons, good or bad, land has not been registered in quantities sufficient to en-

able us to regard the Torrens Act as an existing solution to the problem. And it's had a fair chance. The present Ohio act became effective when I was three years old;[140] and, whatever my enthusiasm may have been then, it has cooled some.

A detail of the Torrens system which is of some interest in connection with the present discussion is the provision included in many of the acts, including that of Ohio, that land which has been registered under the system cannot be taken by prescription or by adverse possession.[141] Whether that exclusion is wise or not in the working of the system itself, it indicates a judgment that the purpose of the doctrine is the clearing of titles, and that, given the assurance of title and an accurate survey, which the act is supposed to provide, the doctrines of prescription and adverse possession would be not only unnecessary but undesirable.

The Record Title

What we do have generally in this country, including of course the states in which registration is optional, is a system of recording acts. The acts are an American, not an English, invention; but they are not at all recent. Their beginnings can be traced back to the early Seventeenth Century in the Plymouth Colony.[142] These acts vary considerably. They have in common the process of placing on record the instruments, of one sort or another, which have

to do with the ownership of land, plus a certain protection which they give to a prospective purchaser who relies on the record. They do not, in any way, provide for a record of the "title" to the land; they merely record, for the public view, some of the things, and only some, which bear on the title. The protection afforded is much more narrow than a layman would be inclined to believe. It consists principally of a reversal of the common law priority notion of first come, first served. A purchaser is protected from a prior conveyance which may have been made by one of the owners in his chain of title, if that prior conveyance has not been recorded, and, in some states, if he otherwise has no notice of it.

There are, however, a whole list of difficulties which may beset a prospective purchaser, which the record may not reveal, and against which the recording statute will not protect him. It would take too long, and be too boring, to go into them here; but it is interesting that one of these extra-record difficulties arises from the doctrine of adverse possession itself: If, somewhere back along the line, the land has been taken away from one of the record title holders by adverse possession, an entirely new chain of title will have been started. This does not appear on the record because the taking by adverse possession was not a conveyance which could have been recorded. Accordingly, un-

less the holders of the record title have taken the land back in a similar high-handed fashion, our purchaser may be stuck by the very doctrine which was supposed to facilitate transfers to him.

Remembering that there are fairly serious holes in the recording system, let's look at the situation of a prospective purchaser.

Let's suppose, first, that an accurate survey has been made and there is no question as to the identity and extent of the land he may buy. The concern is with the title to it. He, and of course we mean someone acting for him, examines the record, either through an abstract or otherwise. Suppose he finds that there has been a prior recorded conveyance of the land to someone other than his prospective vendor—that is, it appears that record title is in someone else. Would he buy from the vendor on the strength of the vendor's apparently having been in possession of the land for longer than the period of the statute? I should think not; he would be buying a lawsuit. Would he buy the land from the one who had the *record* title? I doubt it again, and for the same reason. The question of who owns this land is up in the air—whether the land actually *has* been taken by adverse possession will have to be settled before he knows who the proper vendor is. In this situation the doctrine of adverse possession hasn't facilitated the transfer; it has held it up by raising a doubt as to who owns the place.

Now let's take an entirely different "suppose." Suppose the search of the record reveals that the record title apparently *is* in the prospective vendor —there is no substantial doubt about it, so far as the purchaser can tell from the books and indexes available to him. In this situation, will the fact, if it be such, that the prospective vendor apparently has been in possession for longer than the period of the statute facilitate the transfer? Well—it may make our purchaser feel better about it. Unknown defects which are not suggested by the record, but which conceivably could rise to plague him, will be defeated if, but only if, there *has* been the required type of possession for the statutory period, and *if* the unknown defects have not involved disabilities, and *if* these unknown defects have not resulted in the creation of future interests which are not yet barred, and *if* the state isn't involved in it. This is a lot of "ifs" to put in the way of barring a defect which was itself "iffy" in the first place. I should think the facilitating value of the protection, while there, is not very persuasive.

A third "suppose" likely is the one which is the fact in most cases: The record itself is not perfect but it looks fairly good for the prospective vendor. It has its odd spots, which conceivably may be defects, but perhaps, on the other hand, are not. What then of the fact that the vendor appears to have been in possession for longer than the statutory pe-

riod? The answer seems to be the same as in "suppose" number 2. The defects actually are unknown, as in the second case, but here the possibility of their existence is suggested to a greater or less degree by the record. The fact of possession by the potential vendor is some solace; it has some persuasiveness toward acceptance of the deal. But again all the "ifs" of possible failure to show adverse possession, possible disabilities, and possible future interests are present; and these will have to be balanced against the unknown "ifs" of the possible defect.

It seems, then, that there is *some* facilitating going on here, but not very much. It is this sort of thing, I believe, which prompted a statement in Bayse's book on land titles, which is not the usual statement to find in print:

> The importance of [statutes of limitations] for providing a good record title is not so great as might be supposed.[148]

A consideration of all this suggests, and this has been noted by others, that the doctrine of adverse possession has its greatest application in cases where, in all likelihood, there has been no adverse possession at all. It is used merely as some slight assurance to a prospective purchaser of protection against claims which *may* exist, but which probably do not.

This leads to a further point which I think is significant. In the situation we have been examining the possession of the land, as such, has nothing to do with it. A purchaser relies on the record, not on the fact that his vendor has possession. What we really want to do is to bar claims inconsistent with *the record title* unless they are asserted within a reasonable period. Whether the holder of the record title has been in possession or not is really irrelevant. Why, then, don't we just *bar* the old claims?

Now I have not seen the proposition put in quite that way; but it is apparent, I suggest, that we are beginning to work in that direction. Suppose a deed in our prospective vendor's chain of title was delivered and recorded forty years ago; suppose further that the execution was defective in that it did not include a valid acknowledgment by the grantor. Under the law, the deed passed no title, but everyone has been acting all the time as though it did. This would be a typical case for the application of adverse possession to "clear the title." If one is convinced that the possession has been consistent with the record title for the required period, that is, has been sufficiently adverse, whatever that may mean, and that there are no disabilities or future interests hanging around to interfere, then the title will be regarded as good. But, under the present law in Ohio, and I suspect most states, he wouldn't have to worry about adverse possession with all its "ifs."

So-called "curative" statutes, of one sort or another exist in many states. The general effect of these statutes is simply to wipe out the capacity of certain defects to upset the title after a certain length of time. The Ohio act, for example, provides that an instrument which has been of record for more than twenty-one years shall be cured of a defective acknowledgment, along with other specified defects.[144] This, if you please, for the purpose of facilitating transfers, is adverse possession without the possession; and it is the obvious way to go at the problem.

A similar, and more far-reaching, device exists in a few states which have the so-called "marketable title" statutes.[145] These statutes are fairly complex and they differ from each other. Typically, and this description is over-simplified, they provide that all outstanding interests which may affect the record title, such as easements, future interests, and the like, are invalid unless they are re-asserted on the record once every thirty years, or once every forty years. If they are so re-asserted, and machinery is provided for doing it, they are preserved; otherwise these interests are cut off. This, again, is attacking the essential job without getting side-tracked by the idea of possession. These "marketable title" acts are going to spread, I believe. A model act has been prepared by Professor Simes, and it is currently receiving considerable attention.[146]

As marketable title acts are more widely adopted, and as curative acts are extended to cover more defects, the function of the doctrine of adverse possession as an affirmative device for clearing land titles will diminish still further. Its capacity to *upset* titles, because of the possibility that a stranger to the record may have acquired title by adverse possession, will remain. Acts of this type, unlike the Torrens acts, do not *eliminate* adverse possession. The time will come, and I'm not suggesting that it has come already, to raise the question whether, in relation to land titles, adverse possession isn't doing more harm than good.

Boundary Disputes

All of the above, you will recall, has been on the assumption that the prospective purchaser was concerned only with the question of the "title" to the land. We assumed that the actual physical boundaries of the tract in which he was interested were established. But, of course, there may be a problem here; and it differs somewhat from the title problem. Its nature is known, or should be, and the person who may raise the question is known.

The purchaser, for some reason, may elect to rely on the apparent physical boundaries of the land and have no survey made. If he does this, he will have, as in the case of title question, *some* protection by reason of the doctrine of adverse possession;

but, again as in the title question, the protection is subject to all the "ifs" which attach to the doctrine. If a survey *is* made, and in a transaction of importance I suppose it's likely, then the result of the survey, assuming its accuracy, will either substantially confirm the apparent boundaries, or show that they are substantially wrong. If the survey accords with the apparent boundaries, there is no occasion to consider adverse possession. If the survey does not, then the effect of the existence of the doctrine of adverse possession is to raise a problem, not settle one. Absent the doctrine, the purchaser would know that what he is being offered is the land as shown by the survey; he could take it or leave it. *With* the doctrine, and all of its "ifs," he doesn't know whether he is going to get the disputed strip or not; and this situation can hardly be said to be one which facilitates the transfer of the land.[147]

Application to Specific Questions

Given this setting of the doctrine of adverse possession in relation to other devices which the law has provided for facilitating the transfer of land, and conceding that the doctrine will be retained perhaps beyond the time when its usefulness will have been exhausted, what does it all mean with regard to the particular rules of which the doctrine is made up? What of the length of the period? What of the disabilities? What of color of title?

What of claim of right? What of "tacking"? What of the whole matter of the intent of the adverse possessor?

I think there is some danger of taking the wrong tack at the beginning. It seems apparent that the job of quieting things for prospective purchasers does not require that the benefit of the doctrine of adverse possession be extended to what people like to call "a mere squatter." The purchaser does not rely on possession, he relies on ownership. It is the record title that concerns him. Accordingly, the possession of a person who *does* have color of title, at least, and who *does* appear to be claiming the title is the possession with which we are primarily concerned. It is tempting, then, to shape the rules so as to make it possible to include the holder of a record title in the operation of the doctrine, and *exclude* the squatter. Accordingly, it may be suggested that the purpose analysis dictates the requirements of color of title and claim of right in the rules governing adverse possession. From the point of view of clearing the record title there is *something* to this. To the extent that squatters are excluded, the possibility that the record title will be upset through adverse possession taken earlier by someone extraneous to the record will be lessened, although not by any means eliminated. On the other hand, the addition of these requirements means that less reliance can be placed on the pos-

session of the record owner. The color of title requirement interferes with the application of adverse possession to the question of boundaries; a person who occupies a strip of land along his boundary by mistake *has* no color of title to the strip. Further, and more significant, the requirement of claim of right gets us into all the befuddlement, inconsistency, and litigation that is involved in going into the intention of the possessor. It adds some of the biggest "ifs" to the situation of the prospective purchaser. Is getting rid of the squatter worth it? There's judgment, or perhaps hunch, involved of course; but mine is that, from the point of view of facilitating transfers, it's *not* worth it.

Now it's possible to say, of course, that there is an *affirmative* policy *against* squatters, and that the furthering of that justifies interfering to some extent with the transfer policy. Of course, anyone is entitled to assert such a policy. I have some doubts about it, but, as I said earlier, I'm not a priest of policy—at least at the moment. In any event, if we were to grant such a policy we would simply begin the reasoning process all over again, starting very likely with the proposition that a good way to stop squatters from taking land by adverse possession is to *have* no doctrine of adverse possession. The suggestion of a counter policy here does point out, however, that inevitably there *will* be counter policies, inevitably policies will buck each other,

and inevitably compromise decisions will have to be made.

What has been said suggests that, so far as the operation of the doctrine of adverse possession as a device for facilitating land transfers is concerned, the detailed rules of the doctrine should be shaped so as to remove as many of the "ifs" as possible. The trend toward simplification should, I should think, be encouraged. We should *not* become embroiled over the state of mind of the adverse possessor, we should *not* require a "claim of right," or a "claim of wrong" for that matter. The "privity" presently required for "tacking" likely will exist in all cases in which the facilitation purpose calls for the application of the doctrine of adverse possession; but it's difficult to see any real point in the requirement. As to the length of the periods and the disabilities, we obviously are facing a counter policy. Solely from the point of view of transfer, the length of the period should be zero and there should be no disabilities. Clearly this won't do, and we must look to the question of fairness to see to what extent the transfer policy must give way. There is no time for that here. I merely say that, apart from the holders of future interests, I question whether there is any need for the disabilities; and, further, that twenty-one years, or even fifteen, seems a very long time.

It would be quite proper, I think, to say that

the case of the mistaken boundary involves matters quite distinct from any consideration of the transferability of the land. The settling of the issues between the adjoining owners has an importance all of its own, especially where there has been all manner of reliance on the mistake. It may be that the importance of a just resolution of the parties' difficulties exceeds the questionable effect which an application of the doctrine of adverse possession to the situation has on the facility of transfer. If that is so, and it very well may be, then the matter must be handled separately, and the doctrine of adverse possession, while perhaps relevant, will have to stand in line with other suggested approaches. Mistake cases are difficult ones. They are not satisfactorily decided by any such tomfoolery as, say, the notion of "relation back."

Conclusion

The question in this whole matter, it seems to me, is not whether I've been right in what I've said about the purpose of the doctrine of adverse possession, or whether I've made proper deductions, or whether I haven't missed this or that important aspect of the matter. I'll concede on that. The real question is whether it isn't better to talk in this way than to purport to solve a live problem by an incantation, such as the assertion that disseisin is an intentional act.

Notes

I

1. 304 N.Y. 95, 106 N.E. (2d) 28 (1952), reh den. 304 N.Y. 590, 107 N.E. (2d) 82 (1952). Facts not appearing in the report are taken from the record.

2. Lutz v. Van Valkenburgh, 274 App. Div. 813, 81 N.Y.S. (2d) 161 (1948).

3. Van Valkenburgh v. Lutz, 278 App. Div. 983, 105 N.Y.S. (2d) 1003 (1951).

4. Brief of Plaintiffs-Appellants, pp. 42–43.

5. Brief of Defendants-Appellees, pp. 37–38.

6. See Kessler, On the Value of Roman Law for Twentieth-Century American Law Students, 12 Jour. L. Edu. 377, 390 (1960).

7. N.Y. Civ. Prac. Act, § 39.

8. *Ibid.*, § 40.

9. Ohio Rev. Code § 5301.02, eff. June 13, 1925.

10. e.g. Warren v. Brenner, 89 O App. 188, 101 N.E. (2d) 157 (1950).

11. Ohio Rev. Code § 2107.49, eff. August 21, 1941. Cf. former Gen. Code § 10504–70.

12. 9 Ohio St. 77 (1859).

13. 1 Ohio St. 511 (1853).

14. In re Vine Street Congregational Church, 20 O.D.N.P. 573 (1910).

15. McDougal, Future Interests Restated: Tradition Versus Clarification and Reform, 55 Harv. L. Rev. 1077, 1115 (1942).

16. Exception: Casner and Leach, Cases and Text on Property (Supp., 1959) 1336.

17. Ohio Rev. Code § 2131.04 reads: "Remainders, whether vested or contingent, executory interests, and other expectant estates are descendible, devisable and alienable in the same manner as estates in possession." This was patterned on a New York statute (N.Y. Real Prop. L. § 59) which has been held not to establish the alienability of rights of entry because such interests are not "estates." Upington v. Corrigan, 151 N.Y. 143, 45 N.E. 359 (1896). Whether this holding will prevail in Ohio is still an open question. See White, Reversionary Restrictions, 14 Cin. L. Rev. 524 (1940); Note, 21 Ohio Ops. 270 (1941).

18. Quoted in Cheshire, Real Property (8th ed., 1958) p. 3.

19. Settled Land Act; Trustee Act; Law of Property Act; Land Registration Act; Land Charges Act; Administration of Estates Act; Universities and College Estates Act. These acts are, respectively, 15 & 16 Geo. 5, chapters 18–24 (1925).

20. Ohio Rev. Code § 2307.02.

21. 51 Ohio L. 57, § 3 (1853).

22. Boatman v. Lasley, 23 Ohio St. 614 (1873).

23. Stanton v. T. L. Herbert & Sons, 141 Tenn. 440, 211 S.W. 353 (1919).

24. See Caldwell v. Fulton, 31 Pa. 475 (1858). In the older English law non-exclusive rights were referred to as "commons." Exclusive rights were "several." Co. Litt. 122a.

25. Restatement, Property, § 487 et seq.

26. *Ibid.*, § 450, *Special Note.*

27. XX Proc. A.L.I. 216 (1943).

28. Restatement, Property, § 473, comment *a.*

29. Van Zile, Bailments and Carriers (2d ed., 1904).

30. See statement by Bigelow in VII Proc. A.L.I. 216 (1929).

31. Cook, Hohfeld's Contribution to the Science of Law, 28 Yale L. Jour. 721, 729 (1919).

32. Restatement, Property, §§ 1–5.

33. *Ibid.*, § 473, *comment a.*

34. 4 Williston, Contracts (rev. ed., 1936) § 1032.

35. Holdsworth, Historical Introduction to the Land Law (1927) p. 123.

36. Holmes, The Common Law (1881) p. 206.

37. Salmond, Jurisprudence (7th ed., 1924) p. 293.

38. Brown, Personal Property (2d ed., 1955) p. 19.

39. Bingham, The Nature and Importance of Legal Possession, 13 Mich. L. Rev. 535, 623 (1915); Bordwell, Disseisin and Adverse Possession, 33 Yale L. Jour. 1, 141, 285 (1923–24); Ballantine, Title by Adverse Possession, 32 Harv. L. Rev. 135 (1918).

40. Holmes, The Common Law (1881) p. 219.

41. *Ibid.*, p. 211.

42. *Ibid.*, p. 213.

43. Shartel, Meanings of Possession, 16 Minn. L. Rev. 611 (1932).

44. Holmes, The Common Law (1881) p. 227.

45. See Holland, Jurisprudence (13th ed., 1924) p. 193; Holdsworth, Historical Introduction to the Land Law (1927) p. 124.

46. Restatement, Torts, § 217.

47. See Walsh, A History of Anglo-American Law (2d ed., 1932) p. 103.

II

48. Ohio Rev. Code § 2305.11.

49. Jackson ex dem. Klock v. Hudson, 3 Johns. (N.Y.) 375 (1808). Possession of land by native Indians is not adverse and does not invalidate a patent from the State granting the land to other persons without the consent of the Indians; nor does possession by the Indians render sub-

sequent alienations by the patentees invalid on the ground of maintenance. *Ibid.*

50. p. 1, *supra.*

51. Kirk v. Smith, 9 Wheat. (22 U.S.) 241, 286 (1824).

52. 3 Amer. L. Prop. (Casner, ed., 1952) 755 *et seq.*

53. Restatement, Property, Chapter 15, Introductory Note.

54. 3 Amer. L. Prop. (Casner, ed., 1952) p. 759.

55. Most American statutes of limitations derive from 21 Jac. I, c. 16 (1623). Earlier statutes limiting the period within which a plaintiff could set up the seisin of his ancestor were 3 Edw. I, c. 39 (1275) and 32 Hen. VIII, c. 2 (1540).

56. Holdsworth, Historical Introduction to the Land Law (1927) p. 279.

57. 1 Maitland, Collected Legal Papers (1911) p. 330.

58. Holdsworth, Historical Introduction to the Land Law (1927) p. 121.

59. Salmond, Jurisprudence (7th ed., 1924) p. 295. On the question, generally, see 2 Holdsworth, History of English Law (3d ed., 1927) p. 581, n. 2.

60. On the early history of prescription see Holdsworth, Historical Introduction to the Land Law (1927) pp. 279 *et seq.*

61. Holdsworth, *supra* n. 60, p. 281.

62. 21 Jac. I, c. 16 (1623).

63. Cheshire, Real Property (8th ed., 1958) p. 798.

64. 3 & 4 Will. IV, c. 27, § 34 (1833).

65. 2 & 3 Geo. VI, c. 21, § 16 (1939).

66. Taylor v. Horde, 1 Bur. 60, 119 (1757), cited in Bordwell, Disseisin and Adverse Possession, 33 Yale L. Jour. 1 (1923).

67. 2 & 3 Geo. VI, c. 21, § 10 (1939).

68. Franks, Limitation of Actions (1959) p. 119.

69. The story of this legislation is recounted by Marshall in Patton's Lessee v. Easton, 1 Wheat. (14 U.S.) 474 (1816).

70. Marshall, n. 69, *supra.*

71. Hawk v. Senseman, 6 Serg. & Rawle 21, 23 (1820).

72. N.Y. Rev. Stat. (1828) Part III. c. 4, tit. 2, art. 1.

73. Bordwell, Disseisin and Adverse Possession, 33 Yale L. Jour. 141, 149 (1923); see Taylor, Titles to Land by Adverse Possession, 20 Iowa L. Rev. 551, 552 (1935).

74. Note 73, *supra.*

75. Bordwell, Disseisin and Adverse Possession, 33 Yale L. Jour. 141, 148 (1923).

76. 2 & 3 Geo. VI c. 21, § 4(3) (1939). The 12-year period appeared in the Real Property Limitation Act of 1874. 37 & 38 Vict. c. 57 (1874).

77. N.Y. Civ. Prac. Act, § 34.

78. 8 Ohio L. 62, § 2 (1810).

79. Tiffany, Real Property (Zollman ed., 1940) p. 777.

80. 3 Amer. L. Prop. (Casner, ed., 1952) p. 759 *et seq.*

81. 3 & 4 Will. IV, c. 27, § 34 (1833).

82. See Taylor, Titles to Land by Adverse Possession, 20 Iowa L. Rev. 551, 563 (1935).

83. For an account of the history of the common law rule that land in the adverse possession of another could not be conveyed, see 1941 Rep. N.Y. Law Revision Comm. pp. 170 *et seq.*

84. Co. Litt. 214a.

85. 8 & 9 Vict., c. 106, § 6 (1845).

86. Tiffany, Real Property (Zollman ed., 1940) p. 876.

87. Burby, Real Property (2d ed., 1954) p. 373.

88. Smith, Survey of the Law of Real Property (1956) p. 31.

89. Mass. Ann. Laws, c. 183, § 7 (Laws, 1891, c. 354); N.Y. Real Prop. L. § 260 (Laws, 1941, c. 317, § 1).

90. Conn. Gen. Stat. (1958) § 47–21; Fla. Rev. Stat. (1944) § 689.09; Ky. Rev. Stat. (1955) § 372.070; N. Dak. Rev. Code (1943) § 12–1713; Okla. Stat. Ann. (1958) tit. 21, §§ 547,548,549; Tenn. Code Ann. (1955) § 64–497.

91. 1941 Rep. N.Y. Law Revision Comm., p. 163.

92. See the state-by-state listing in the Report of the New York Law Revision Commission, note 91 *supra,* p. 182 *et seq.*

93. Counce v. Yount-Lee Oil Co., 87 F. (2d) 572 (1937); cert. den. 302 U.S. 693, 58 S. Ct., 12, 82 L. Ed. 536 (1937); noted in 51 Harv. L. Rev. 160 (1937).

94. 3 Amer. L. Prop. (Casner, ed., 1952) p. 819.

95. N.Y. Civ. Prac. Act § 40.

96. See Taylor, Titles to Land by Adverse Possession, 20 Iowa L. Rev. 551, 554 *et seq.* (1935).

97. See 3 Amer. L. Prop. (Casner, ed., 1952) p. 765.

98. Marengo Cave Co. v. Ross, 212 Ind. 624, 10 N.E. (2d) 917 (1937).

99. For a discussion of privity and tacking see Ballantine, Title by Adverse Possession, 32 Harv. L. Rev. 135, 147 *et seq.* (1918).

100. Ames, The Disseisin of Chattels, 3 Harv. L. Rev. 313, 323 (1890).

101. McNeely v. Langan, 22 Ohio St. 32 (1871).

102. To the effect that the theory of an inference of a claim of right requires privity in order to "tack" see Bayse, Clearing Land Titles (1953) p. 106.

103. 3 Amer. L. Prop. (Casner, ed., 1952) pp. 779–780.

104. Bordwell, Disseisin and Adverse Possession, 33 Yale L. Jour. 141, 152 (1923).

105. Yetzer v. Thoman, 17 Ohio St. 130 (1866).

106. Ewing v. Burnet 11 Pet. (36 U.S.) 41 (1837).

107. Bond, The Civilization of the Old Northwest, p. 85 (1934), quoted in Casner and Leach, Cases and Text on Property (1950) p. 51.

108. See Bordwell, note 104 *supra,* p. 152.

109. "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." *Ibid.*

110. Van Valkenburgh v. Lutz, 304 N.Y. 95, 99, 106 N.E. (2d) 28, 30 (1952).

111. Preble v. Maine Central Ry., 85 Me. 260, 27 Atl. 149 (1893).

112. See 3 Amer. L. Prop. (Casner, ed., 1952) p. 788.

113. See Note, Requisites of Adverse Possession in Ohio, 22 Cin. L. Rev. 480 (1953).

114. Note 103, *supra.*

115. 3 Amer. L. Prop. (Casner, ed., 1952) Part 15.

116. *Ibid.*, p. 826.

117. See Gill, Sovereign Immunity Under Statutes of Limitations, 16 Ohio St. L. Jour. 178 (1955).

118. 2 & 3 Geo. VI, c. 21, § 4(1). (1939).

119. For the disabilities provided for in the American Statutes see, Taylor, Titles by Adverse Possession, 20 Iowa L. Rev. 738, 743 *et seq.* (1935).

120. 3 Amer. L. Prop. (Casner, ed., 1952) p. 802.

121. Restatement, Property, § 226.

III

122. Swayne, J., in Wood v. Carpenter, 101 U.S. 135, 139, 25 L. Ed. 807, 808 (1879).

123. This section is taken largely from Callahan, Statutes of Limitation–Background, 16 Ohio St. L. Jour. 130 (1955).

124. From Survey No. 12566 located in the Virginia Military Lands in Ross County, Ohio; quoted in Peters, Ohio Lands (3d ed., 1930) p. 29.

125. Hand, J., in U.S. v. Curtiss Aeroplane Co., 147 F.(2d) 639, 642 (C.C.A. 2d, 1945).

126. See A'Court v. Cross, 3 Bing. 329, 333 (1825); The Limitation of Actions, 190 Law T. 303, 304 (1940).

127. See Lewis v. Marshall, 5 Pet. (30 U.S.) 470 (1831); Summers v. Connolly, 159 Ohio St. 396, 112 N.E.(2d) 391 (1953).

128. 3 Amer. L. Prop. (Casner, ed., 1952) p. 759 and note 1.

129. Bordwell, Disseisin and Adverse Possession, 33 Yale L. Jour. 1, 8 (1923).

130. Ames, The Disseisin of Chattels, 3 Harv. L. Rev. 313, 325 (1890).

131. 21 Jac. I, c. 16 (1623).

132. See Bayse, Clearing Land Titles (1953) p. 18.

133. Ohio Rev. Code, Chapters 5309, 5310.

134. Registration may be made compulsory in any county at the instance either of the government or of the county council. The localities in which it is now compulsory are listed in Cheshire, Real Property (8th ed., 1958) p. 100.

135. Bayse, Clearing Land Titles (1953) p. 2.

136. 1 Aigler, Bigelow and Powell (2d ed., 1951) p. 1149.

137. Powell, Registration of the Title to Land in New York (1938).

138. Fairchild and Springer, A Criticism of Professor Richard R. Powell's Book Entitled Registration of Title to Land in the State of New York, 24 Corn. L. Quart. 557 (1939). The count has not been checked for accuracy.

139. See 4 Amer. L. Prop. (Casner, ed., 1952) p. 640.

140. 103 Ohio L. 914 (1913).

141. Ohio Rev. Code § 5309.89.

142. 4 Amer. L. Prop. (Casner, ed., 1952) p. 527.

143. Bayse, Clearing Land Titles (1953) p. 108.

144. Ohio Rev. Code § 5301.07.

145. Statutes of nine states are examined in Bayse, note 143 *supra*, §§ 171–180.

146. Simes and Taylor, Improvement of Conveyancing by Legislation (1960) p. 6.

147. See, generally, Browder, The Practical Location of Boundaries, 56 Mich. L. Rev. 487 (1958).

(continued from front flap)

to variant theories of property, ownership, and possession, and to the Restatement of the Law of Property. He traces the history of the doctrine from the English Statute of Limitations of 1623 to recent American court decisions in several states; examines the possible interpretations and implications of the terms "actual, open, and notorious," "hostile," "claim of right," "stale claims," and "statutes of repose"; and discusses the relative merits of the Torrens acts and the "record titles."

Supplemented by commentarial notes and case citations, the book is a noteworthy illumination of an often ill-understood branch of property law.