> [T]he general rule in condemnation proceedings is that proof of possession under claim of title will be treated as *prima facie* evidence of ownership in fee, and will be sufficient to entitle the person in such possession to receive the compensation awarded for the land, if no one showing a better title lays claim to it.

See, *e.g.*, United States v. Certain Land, 314 F.Supp. 1372 (D.Mass.1970).

6. On the basic question, American courts today generally follow the rule of *Tapscott* and not that of *Winchester*:

> There are cases which hold that a plaintiff in ejectment cannot recover on possessory rights alone, unless such possession has ripened into title by prescription or limitation, and that something more than a mere naked prior possession is necessary as a basis for ejectment; but generally prior possession of the plaintiff or those under whom he or she claims is sufficient to establish a prima facie title which will support the action, although the plaintiff shows no paper title, and although such possession has not ripened into title by adverse possession.
>
> Possession, however short, is sufficient. A plaintiff who relies on possession alone must show a possession anterior in date to the possession of the defendant, even though the defendant may be regarded as a mere naked trespasser. Where no legal title is shown in either party, the party showing prior possession in himself or herself or those through whom he or she claims will be held to have the better right, and such right is not defeated by the subsequent entry and occupation by the opposing claimant until the latter's claim has ripened into title by adverse possession.

C.J.S. *Ejectment* § 24 (2012) (citations omitted).

Among the recent cases applying the majority rule are: Stewart v. Sidio, 358 S.W.3d 524 (Mo. App. 2012); Department of Conservation *ex rel.* People v. Fairless, 273 Ill. App. 3d 705, 653 N.E.2d 446 (Ill.App. 1995).

Section 3. ADVERSE POSSESSION

A. INTRODUCTION

You probably have already heard the hoary old saw that "the law is a seamless web." A web it may be, but one full of rents and patches and numerous, inartistic seams. Nonetheless, there are some rather obvious crossovers between topics in property law, and this fact, as we noted in the Preface, creates certain pedagogical difficulties. Adverse possession is perhaps the most significant possessory concept in the law of the land. For this reason we feel it has to be considered at this point. To do so, however, involves peering into some topics which we won't officially come to until later in the book. On the other hand, adverse possession provides a good introduction to much of what is to follow. The Notes for Further Reference which follow some of the principal cases below deal with issues, frequently assumed in the principal cases, which will turn up again in different guises; the Notes and Questions which follow these focus directly on the adverse possession issues raised by the cases.

BELOTTI v. BICKHARDT

Court of Appeals of New York.
228 N.Y. 296, 127 N.E. 239 (1920).

ELKUS, J. The plaintiff's mother, Maria G. Belotti, in 1897, and the defendant Bickhardt's predecessor in interest, Gustave Riedel, in 1892, purchased adjoining parcels of land now in the borough of The Bronx, New York City, and then on Berrian avenue, and now by the opening of Webster avenue located on the latter avenue. The plaintiff's property was a lot [p*64] known as "K" on a map made by Josiah A. Briggs, dated May 5, 1889, and the defendant's property was known as lots "H," "I," and "J" on the same map. Lot "J" immediately adjoined lot "K." About 1892 the then owner of defendant Bickhardt's lots, one Van Schaick, erected a building on lot "J" and a portion of lot "K," the building extending from the rear of the lots to the easterly side of Berrian avenue. The building thus erected actually encroached upon plaintiff's lot, so that it covered a portion of it, twelve feet in width and fifty-one feet in depth, with a substantial structure.

In December, 1892, Van Schaick conveyed the three lots known as "H," "I," and "J" to Riedel, with the building thus erected, partly on lot "J" and partly on lot "K," as indicated, and Riedel entered into the occupation of the premises and used the building as a saloon and roadhouse continually thereafter until his death which occurred June 18, 1898.

In 1897, Webster avenue was legally opened and Berrian avenue closed, the grade of Webster avenue was raised and Riedel raised his building, placing a foundation under it, to conform to the grade of Webster avenue, and added an extension westerly over the discontinued Berrian avenue to the new easterly line of Webster avenue. This addition likewise encroached on the plaintiff's lot for a width of twelve feet and the depth of the widening of the avenue. Riedel left a last will and testament, and his devisees and heirs conveyed the four lots "G," "H," "I" and "J" to the defendant Bickhardt by deed dated August 16, 1906. Between Riedel's death in 1898, and the conveyance by the heirs at law and devisees in 1906, the premises including that portion of the building which was upon the plaintiff's lot were actually occupied by Riedel's heirs and devisees.

After Bickhardt received this deed, the possession of Riedel and his widow and devisees was continued in him uninterruptedly.

By an alleged corrective deed, dated April 24, 1916, and not recorded, the devisees and heirs of Riedel attempted to correct their deed of 1906 and convey to the defendant Bickhardt by correct description the premises of which he was actually possessed, including the portion of the plaintiff's property which is the subject-matter of this action. The trial court held that this instrument was champertous and of no effect.

Since August 16, 1906, Bickhardt has used and rented the entire building, including that portion of the property of plaintiff on which the portion of the building stands, for a hotel, and collected rent therefor.

The contest of the parties is as to the right of possession and title to the strip eleven and thirty-one one-hundredths feet wide and by about fifty-one and thirty-four one hundredths feet in depth on part of lot "K." Riedel and his devisees and heirs had undisputed possession from December, 1892, to 1906, a period of fourteen years, and Bickhardt has had possession ever since. Bickhardt's claim is that his possession tacked on to that of his grantors and their testator entitles him to defeat the plaintiff's claim and justifies his claim of title by adverse possession.

The action [commenced in 1914] was for recovery of the land thus seized and for possession thereof, for damages and for a mandatory injunction directing the removal of the encroaching building.

The trial court held that the defendant having no record or paper title to the disputed premises, must show not only adverse possession as provided by sections 371 and 372 of the Code of Civil Procedure, but that there was privity of estate or contract between the successive possessors. It also held [p*65] that there was no evidence of any intent on the part of Riedel or his predecessors in title to take possession of any portion of the plaintiff's lot, except as may be inferred from the fact of possession alone.

The Appellate Division affirmed this judgment by a divided court without opinion.

It appears that the encroachment by Van Schaick, who built the building, now partially upon the plaintiff's lot, in 1892, was because of a mistake made by reason of an error in an old sketch map erroneously locating lots "H," "I," and "J" and "K," and if this map was correct, the building did not encroach upon the plaintiff's lot. This faulty map appears to have been generally followed and was followed by both the plaintiff's and the defendant's predecessors in interest.

If Riedel or his heirs had retained title to the premises and occupied the same adversely until the twenty years required by law had expired, there would be little or no question as to their having acquired title by adverse possession. Bickhardt has continued to occupy the same building which has been occupied by him and his predecessors in interest for thirty-five years. The building is a substantial, two-story frame structure with stone foundation and is used as a hotel. The defendant's wife, who was the daughter of Riedel, testified that her father, with whom she then lived, moved on the premises in question in 1892 and lived there and carried on his business as a saloon-keeper until his death. Bickhardt purchased the property in 1906 for $14,000. The plaintiff admits that he actually saw the building erected by defendant Bickhardt's predecessors in interest; that it substantially was as it is now and that the plaintiff's father, one of his predecessors in title, had erected or moved a building on his own lot immediately adjoining.

Adverse possession, even when held by a mistake or through inadvertence, may ripen into a prescriptive right after twenty years of such possession . . ., the actual physical occupation and improvement being, in a proper case, sufficient evidence of the intention to hold adversely. [Citation omitted.]

There are five essential elements necessary to constitute an effective adverse possession; first, the possession must be hostile and under claim of right; second, it must be actual; third, it must be open and notorious; fourth, it must be exclusive; and fifth, it must be continuous. If any of these constituents is wanting, the possession will not effect a bar of the legal title. [Citations omitted.]

The trial court found that there was privity of estate between Riedel and his heirs and that thus adverse possession was proven from 1892 to 1906. In 1906 the conveyance from Riedel's heirs to the defendant was made and recorded. This deed, however, did not include in its description any portion of the plaintiff's property, lot "K," but described the northerly boundary of the property conveyed as running along lot "K," claimed by plaintiff, thereby excluding any portion of lot "K," plaintiff's property, from the terms of the conveyance. This, the trial court says, shows a clear intent upon the part of the grantors of the defendant Bickhardt not to convey any land not expressly included in the description and not to convey that portion of the plaintiff's premises claimed to be adversely possessed.

The lower court and the respondent rely upon three cases decided by courts in this state as authority for this proposition. [Citations omitted.]

These cases may be distinguished on the ground that there was no evidence of an intent on the part of the grantor to transfer possession to the [p*66] grantee of any land not expressly included in the descriptions of the conveyances there shown.

The findings of fact and the evidence, however, clearly show the intent, not only to transfer the title to the lot which is described in the deed to the defendant Bickhardt, but also to transfer

possession of the building as a whole and not merely that part of it which stood upon the lot to which Riedel and his heirs had unmistakable title. . . .

It is clear that where the defense is founded on adverse possession, color of title by deed or other documental semblance of right is required, but it is equally clear that neither a deed nor any equivalent instrument is necessary when the possession is indicated by actual possession and any other evidence of an adverse claim exists. The claim of such possession may continue unbroken by a succession of tenants and where this occurs the adverse possession may be just as effectual as though the premises were held during the whole period by one person. All that is necessary in order to make an adverse possession effectual for the statutory period by successive persons is that such possession be continued by an unbroken chain of privity between the adverse possessors. [Citations omitted.]

In courts of other states a number of cases may be found which decided that, if the intent to transfer the possession of a building and land as a whole and not merely a part of it exists, the transfer may be by parol as well as by deed. . . .

In *Illinois Steel Co. v. Budzisz* (106 Wis. 499) a claim arose in actual, hostile occupancy without any presumption or claim or right, and it was held that such occupancy might be transferred to successive occupants orally.

The statute there was similar to ours. The court there held that there is no estate in lands until adverse possession is complete. Privity may be established in many ways, as by lease, descent, conveyance, parol or otherwise. All that the law requires is continuity of possession.

In *Viking Refrigerator & Mfg. Co. v. Crawford* (84 Kans. 203) it was decided that where the possession of real estate is actual, it may commence in parol and without deed or writing may be transferred from one occupant to another by parol or bargain and sale accompanied by delivery. . . .

In the instant case there was evidence of an intent to hold more than the land which the deed specifically conveyed.

The evidence of the intent to convey and hold the whole building, erected partly on the lot conveyed and partly on the premises then belonging to the plaintiff's predecessors, is clear. There was evidence that the adverse possession of the defendant Bickhardt and his predecessors of the building so far as it was erected on plaintiff's lot was clear and continuous. . . .

Adverse possession, although not a favored method of procuring title, is a recognized one. It is a necessary means of clearing disputed titles and the courts adopt it and enforce it, because, when adverse possession is carefully and fully proven, it is a means of settling disputed titles and this is desirable.

There are many cases where adverse possession has occurred in conveying by instrument in writing the premises adversely held, but where the possession has been open and notorious, the law applies the doctrine of adverse possession.

It is claimed by the respondent that in no event can title by adverse possession arise to that part of the premises which was originally Berrian avenue. When the lots in question were originally laid out by the holder of [p*67] them, one Eden, he mapped and sold to purchasers so that each one should have lots fronting on an existing street, the fee of which was conveyed by his deeds, and when the easement in the existing street should be abandoned after Webster avenue was opened, their lots should still have frontage upon that street. That part of the property which was originally Berrian avenue is a part of the lot of the defendant Bickhardt. It was not left unimproved. It was subjected by Riedel and by his successors to every use permitted to the then owners of the land and when Webster avenue was opened and the easement abandoned, Riedel continued to use the land to afford access to his property, besides extending his building to cover

the land. That part of the premises stands in the same position as the lot which was not included in Berrian avenue. . . .

The judgments of the trial court and of the Appellate Division should be reversed and there should be a new trial, with costs to abide the event.

HISCOCK, C.J., CHASE, CARDOZO, MCLAUGHLIN AND CRANE, JJ., concur; HOGAN, J., dissents.

Judgments reversed, etc.

Notes and Questions for Further Reference

1. *Primus in tempore potior est in jure* (first in time is stronger in right) is a legal maxim which, like so many other maxims, states a tendency of the law, but does little to resolve specific cases. First in time to do what? Stronger in what rights? Is the *primus in tempore* principle involved in the *Belotti* case? Who was first in time? What would have happened in the principal case if the adverse possession defense had not succeeded? The unstated premise of the case is that somehow the plaintiff would have won. Why? Can you conceive of a property system in which plaintiffs in Belotti's situation would not win as a general matter?

2. What remedies would have been available to the plaintiff if he had won? See Peters v. Archambault, 361 Mass. 91, 278 N.E.2d 729 (1972), *infra*, p. S118. The trial court in the instant case allowed the plaintiff the rental value of the land as vacant land, not as improved-a total of $108.44. It also held that the ejectment remedy was "doubtful." (Why? *See infra*, p. S125 n.2.) It therefore was prepared to grant a mandatory injunction to remove the building but allowed defendants a "reasonable time" to remove it. Belotti v. Bickhardt, 101 Misc. 707, 711–12 (1916).

3. What was the source of the problem in the *Belotti* case? The difficulties of reducing to writing the physical facts concerning a piece of land have plagued lawyers and property owners since written records of land transactions began. Mistaken and inadequate surveys and maps are a fertile source of a pervasive problem in property law—that of "clouds on title." What policy support can you think of for a general rule that the written record should prevail (if it does not describe a physical impossibility) over what is actually going on on the land? What policy support can you think of for ignoring the written record in favor of what is actually going on? How does the *Belotti* court resolve this conflict?

4. Land is a well-nigh indestructible capital asset. Fixtures (things permanently attached to the land) generally have a long useful life. These facts coupled with the legal principle that the person who got there first has a better right means that many land cases involve transactions long past and people long dead. Until you can hold a complicated chain of title in your head, you ought to draw little diagrams of the chains of title involved in property cases. This will [p*68] help you to focus on the source of the problem and to see precisely what the relationship of the parties to the suit is to the original causes of the suit.

5. Real property cases also frequently involve problems of geography. Many courts try to describe these problems in words and frequently leave the readers of their opinions confused. After many years of reading property cases, the editors of this book still draw pictures, little maps, whenever a case turns on an understanding of what is actually going on on the ground. We recommend that you do this for the *Belotti* case and all similar cases.

6. In the principal case the abutting landowners are said to have owned "the fee" in Berrian Avenue, so that when the Avenue was abandoned as a public street they were once more entitled to use the land. The City, on the other hand, had an "easement" which allowed the public to use the street until the street was closed. This is probably the most common arrangement for public streets in the United States, but it is also possible for the government to own "the fee" in public streets. It all depends on the relevant statutes and on the way in which the public authority

acquired the right to build the street. See 39 AM. JUR. 2D *Highways* secs. 157–58 (1968). For more on the "easement/fee" distinction, see *infra*, p. S385.

Questions

Not only does the principal case raise a number of issues which we will be considering throughout the book, it also raises almost every issue which we will consider in this section. We raise these questions now to highlight the issues and to allow you to use *Belotti* for review purposes:

1. Why was the deed of April 24, 1916, "champertous and of no effect"? *See* p. S105, Note 2.

2. Of what relevance is it that the source of the problem in this case was an apparently honest mistake? *See* Note on Hostility, p. S106.

3. Of what relevance is it that Belotti saw the offending building being put up? That his father didn't object? *See id*.

4. What is the meaning of the paragraph beginning "It is clear" on p. S82? *See* pp. S98 note 4, S108 note 3.

5. Why does the court refer to the intent of the parties in the conveyance to Riedel? *See* Note on Tacking, p. S104.

6. How is the court's policy of clearing titles at stake in this case? Does the court mean "quieting men's titles" or "avoiding of suits"? *See* Note on Statutes of Limitation, *infra*.

7. How does the court handle the fact that the addition to the building had only been there for 14 years? *See* Note on "Actual," p. S96.

Notes and Questions on Statutes of Limitation in Real Actions and Their Policy

1. Consider the following statute:

> (a) General rule.—The following actions and proceedings must be commenced within 21 years:
>
> (1) An action for the possession of real property.
>
> (2) An action for the payment of any ground rent, annuity or other charge upon real property, or any part or portion thereof. If this paragraph [p*69] shall operate to bar any payment of such a rent, annuity or charge, the rent, annuity or charge to which the payment relates shall be extinguished and no further action may be commenced with respect to subsequent payments.
>
> (b) Entry upon land.—No entry upon real property shall toll the running of the period of limitation specified in subsection (a)(1), unless a possessory action shall be commenced therefor within one year after entry. Such an entry and commencement of a possessory action, without recovery therein, shall not toll the running of such period of limitation in respect of another possessory action, unless such other possessory action is commenced within one year after the termination of the first.

42 PA. CONS. STAT. ANN. § 5530 (Purdon 2012).

Statutes do not make pleasant reading. They are the butt of numerous bad jokes about lawyers. Nonetheless they are a vital part of the law, and you should learn to read them with the minimum of pain and the maximum of efficiency.

Subsection (a) of the Pennsylvania statute seems straightforward enough, though some of the phrases in (a)(2) may require a check in the law dictionary. What you might begin to ask yourself

is "so what"? What does it mean to say that someone can't bring an action for the possession of real property after 21 years? Twenty-one years after what? Normally a statute of limitation bars an action which is brought after the limitation period as measured from the time the cause of action accrued.[1] When does a cause of action for possession of real property accrue? Reconsider the Note on the History of Real Actions, *supra*, p. S68. Suppose that 21 years have passed since the cause of action accrued. Who owns the land now? What is the answer that the court suggests in *Belotti*?

Subsection (b) of the statute is much harder to read. Here it may help to look at the predecessor statute, the import of which the recent codifiers did not intend to change:

> No entry upon lands shall arrest the running of the statute of limitations, unless an action of ejectment be commenced therefor within one year thereafter; nor shall such entry and action, without a recovery therein, arrest the running of said statute in respect to another ejectment, unless it be brought within a year after the first shall have been nonsuited, arrested, or decided against the plaintiff therein.

PA. STAT. ANN. tit. 12, § 85 (Purdon 1953) (repealed 1976).

Recall that at common law in order to bring an action of ejectment the plaintiff first had to enter on the land, make a lease, and have his lessee ejected. *See* Note on the History of Real Actions, *supra*, p. S68. Normally today the plaintiff need not go through this process, but may bring the action directly and in his own name. But suppose he does make an entry. Will that toll the running of the statute of limitations? What answer does Pennsylvania statute give? Do you see how the current provisions of the Pennsylvania statute might be read to allow a plaintiff to harass a defendant with ejectment actions indefinitely even after the statutory period had passed? Multiple ejectment actions are one of the reasons for the development of the equitable action to quiet title, discussed *infra*, p. S123. [p*70]

It may surprise you to learn that statutes like subsection (a)(1) of the Pennsylvania statute are the authority for the decision in many cases like *Belotti v. Bickhardt.* The language of the New York statute is closer to the *Belotti* court's reasoning than is that of the Pennsylvania statute, but *Belotti* could equally well have been decided under the Pennsylvania statute. (For a somewhat out-of-date but still useful discussion of the various state provisions, see Taylor, *Titles to Land by Adverse Possession*, 20 IOWA L. REV. 551, 738 (1935).)

2. Every state has statutes which limit the time within which certain actions may be brought. Six years is a favorite period for actions upon ordinary contracts; one or two years for ordinary tort actions. Why should the period of limitations be so long for actions for the recovery of land? Recently there has been a tendency to reduce the period. Michigan now has a 15–year period with shorter periods if the possessor enters pursuant to certain types of instruments (*infra*, p. S108); New York has twice lowered its period to the present ten years. What reasons can you think of for this trend?

3. Consider the five "essential elements necessary to constitute an effective adverse possession" set forth in *Belotti*. The court requires that the possession be: (1) actual, (2) exclusive, (3) open and notorious, (4) continuous, and (5) hostile and under claim of right. Where does the statute say anything about these things? Can these requirements be inferred from the statute? Consider whether there would be a cause of action to be barred by the statute if each of these

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[1] Those familiar with accounting terminology frequently have trouble with this use of the word "accrue." A cause of action "accrues" at that fixed point in time when suit may be brought on it. The accounting use of the term, which normally implies that something is happening over a period of time, should not be thought of in this context.

requirements were not met. When you get all through, does it still strike you that some of the requirements have no basis in the language of the statute?

4. The prototype of the Pennsylvania statute is 21 Jac. 1, c. 16, § 1–2 (1623). The preamble to the English statute expressed the twin purposes of "avoiding of suits" and "the quieting of Men's Estates." These policies are not necessarily consistent. Which of the "five essential elements" in the principal case seem directed toward the policy of avoiding suits? Which toward the policy of quieting estates? On the question of the policy of the statute consider the following:

BALLANTINE, TITLE BY ADVERSE POSSESSION
32 HARV. L. REV. 135 (1918)

Title by adverse possession sounds, at first blush, like title by theft or robbery, a primitive method of acquiring land without paying for it. When the novice is told that by the weight of authority not even good faith is a requisite, the doctrine apparently affords an anomalous instance of maturing a wrong into a right contrary to one of the most fundamental axioms of the law.

"For true it is, that neither fraud nor might Can make a title where there wanteth right."

The policy of statutes of limitation is something not always clearly appreciated. Dean Ames, in contrasting prescription in the civil law with adverse possession in our law, remarks: "English lawyers regard not the merit of the possessor, but the demerit of the one out of possession." It has been suggested, on the other hand, that the policy is to reward those using the land in a way beneficial to the community. This takes too much account of the individual case. The statute has not for its object to reward the diligent trespasser for his wrong nor yet to penalize the negligent and dormant owner for sleeping upon his rights; the great purpose is automatically to [p*71] quiet all titles which are openly and consistently asserted, to provide proof of meritorious titles, and correct errors in conveyancing.

PATTON, TITLE BY ADVERSE POSSESSION
in AMERICAN LAW OF PROPERTY § 15.2, at 760–63
(A.J. Casner ed. 1952)

The various statutes limiting the bringing of actions to recover land from a wrongdoer in possession under English law have resulted in barring the real owner's right to recover the property and the necessary result has been to extinguish his title. The law does not recognize a title which it will not protect. The result is that the title which the wrongful possessor has against all but the real owner is no longer subject to the former owner's right to recover it, by real action prior to ejectment or by ejectment after that action took the place of the ancient obsolete actions. His title originating in his wrongful possession becomes absolute by the extinguishment of the former owner's title. There is, of course, no transfer by operation of law or otherwise of the former owner's title. A new title has arisen simply and solely because of the wrongful possession followed by the statutory extinguishment of the former title.

Difficulties have arisen from statements made in the cases that the adverse possessor must have occupied under claim of right; that his possession will not be adverse and will not ripen into ownership under the statute unless he asserts a title adverse to the title of the record owner; that he will acquire no title by adverse possession under the statute if he admits, no matter how casually to third parties, that he knows he has no title to the property, or admits that the real ownership is in the record owner. Assuming that a real possession exists in the wrongdoer, has there ever been any doubt that he is actually owner of the property as against all but the true owner, so that he can recover against any subsequent disseisor or trespasser? If a real possession exists without the owner's consent is there any doubt of the right of the true owner to maintain ejectment against him at any time after he acquired his actual possession? Would he have any defense against such an action by introducing evidence that he so occupied without intent to

claim a title superior to that of the plaintiff, or that he had in conversations with third persons admitted the superiority of the plaintiff's title? There is, of course, no doubt at all that such evidence would be excluded. A claim of title on his part is not essential to the maintenance of ejectment against him. Even positive affirmative evidence that he at all times admitted that he occupied the premises without right or title, in the absence of proof that he occupied as licensee or tenant of the true owner or of notice of such statements to the owner, would not make him any the less a trespasser and disseisor, liable to a suit in ejectment and the usual action for mesne profits either following that action or in connection with it. It necessarily follows that the statute runs against the owner's right of action in ejectment from the time the wrongdoer took possession irrespective of his mental attitude. Every wrongdoer entering without right knows that fact. That is the typical case of the usual disseisor whose possessory title has been protected by possessory assizes, writs of entry and ejectment from 1166 down to the present day. If he has possession in fact, irrespective of his mental attitude toward the title of the true owner, he has a possessory title subject to the owner's right of action in ejectment, and the statute of limitations runs against that action. When the period of the statute has run, the former owner's title is necessarily extinguished. Though there may have been in [p*72] theory a cause of action under the ancient writ of right when the limitation on that action was longer than the limitation on the possessory assizes, that remedy became an empty thing like trial by battle after it had become obsolete as it surely had by the time the statute of James I was enacted and ejectment was displacing the old possessory actions. Nothing is better settled than that the barring of the action in ejectment ends the former owner's title so that he can pursue no other remedy such as trespass, action in equity to quiet title, or an action at law or in equity for partition, based on his former title to the property. Adverse possession must necessarily mean any wrongful possession which subjects the wrongdoer to the action of ejectment, since the running of the statute barring the real owner's right to maintain that action and nothing else whatever, brings his title to an end, making the possessory title of the wrongdoer, which was established against everyone else when the wrongful possession started, good also against the former rightful owner. These fundamental principles cannot be ignored or put to one side in any examination of the cases.

HOLMES, THE PATH OF THE LAW

10 Harv. L. Rev. 457, 476–77 (1897)
in O. HOLMES, COLLECTED LEGAL PAPERS 167, 198–99 (1920)

. . . Let me now give an example to show the practical importance, for the decision of actual cases, of understanding the reasons of the law, by taking an example from rules which, so far as I know, never have been explained or theorized about in any adequate way. I refer to statutes of limitation and the law of prescription. The end of such rules is obvious, but what is the justification for depriving a man of his rights, a pure evil as far as it goes, in consequence of the lapse of time? Sometimes the loss of evidence is referred to, but that is a secondary matter. Sometimes the desirability of peace, but why is peace more desirable after twenty years than before? It is increasingly likely to come without the aid of legislation. Sometimes it is said that, if a man neglects to enforce his rights, he cannot complain if, after a while, the law follows his example. Now if this is all that can be said about it, you probably will decide a case I am going to put, for the plaintiff; if you take the view which I shall suggest, you possibly will decide it for the defendant. A man is sued for trespass upon land, and justifies under a right of way. He proves that he has used the way openly and adversely for twenty years, but it turns out that the plaintiff had granted a license to a person whom he reasonably supposed to be the defendant's agent, although not so in fact, and therefore had assumed that the use of the way was permissive, in which case no right would be gained. Has the defendant gained a right or not? If his gaining it stands on the fault and neglect of the landowner in the ordinary sense, as seems commonly to be supposed there has been no such neglect, and the right of way has not been acquired. But if I were the defendant's counsel, I should suggest that the foundation of the acquisition of rights by lapse of time is to be

looked for in the position of the person who gains them, not in that of the loser. Sir Henry Maine has made it fashionable to connect the archaic notion of property with prescription. But the connection is further back than the first recorded history. It is in the nature of man's mind. A thing which you have enjoyed and used as your own for a long time, whether property or an opinion, takes root in your being and cannot be torn away without your resenting the act and trying to defend yourself, however you came by it. The law can ask no better justification than the deepest instincts of man. It is only by way of reply to the suggestion that you are disappointing the [p*73] former owner, that you refer to his neglect having allowed the gradual dissociation between himself and what he claims, and the gradual association of it with another. If he knows that another is doing acts which on their face show that he is on the way toward establishing such an association, I should argue that in justice to that other he was bound at his peril to find out whether the other was acting under his permission, to see that he was warned, and, if necessary, stopped.

Questions

How do Ballantine, Holmes, and the American Law of Property differ on the question of the policy of the statute? Which of the "five essential elements" would you keep if you took the Ballantine view? The Holmes view? The A.L.P. view? For a contemporary review of the policies of adverse possession, see Merrill, *Property Rules*, *Liability Rules*, *and Adverse Possession*, 79 NW. U. L. REV. 1122 (1985).

Notes and Questions on Disability Provisions

Consider the following provisions either of which could be found attached to the statute quoted *supra*, p. S84:

> (a) "That if any person or persons that is or shall be entitled to such writ or writs, or that has or shall have such right or title of entry, be or shall be, at the time of the said right or title first descended, accrued, come, or fallen, within the age of one and twenty years, feme covert, non compos mentis, imprisoned or beyond the seas, that then such person and persons, and his and their heir and heirs, shall or may, notwithstanding the said twenty[-one] years be expired, bring his action or make his entry as he might have done before this act, so [long] as such person and persons, or his or their heir and heirs, shall within ten years next after his and their full age, discoverture, coming of sound mind, enlargement out of prison, or coming into this realm, or death, take benefit of and sue forth the same, and at no time after the said ten years." 21 Jac. 1, c. 16, § 2 (1623) (spelling modernized).

> (b) "[B]ut if a person entitled to bring the action is, at the time the cause of action accrues, within the age of minority or of unsound mind, the person, after the expiration of twenty-one years from the time the cause of action accrues, may bring the action within ten years after the disability is removed." OHIO REV. CODE ANN. § 2305.04 (Baldwin 2012)[1]

Disability provisions of this sort occur in most states' statutes of limitation on real actions. Toward which policy are they directed: that of avoiding suits or that of quieting estates? The limitation periods given after the disability is removed are an obvious compromise between two logical extremes.

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[1] Derived from Ohio Rev Stat 4978, codified in 1879 [http://books.google.com/books?id=vYM0AQAAMAAJ&printsec=frontcover&source=gbs_ge_summary_r&cad=0#v=onepage&q&f=false]; the Rev Stat also included "a married woman" and "imprisoned" among the 'disabled'. The Rev Stat wording seems to be same as that in the Code of Civil Procedure § 10, 51 Acts of the State of Ohio 57 (1853) (http://books.google.com/books?id=4kYZAAAAYAAJ&printsec=frontcover&source=gbs_ge_summary_r&cad=0#v=onepage&q&f=false). I have been unable to find any earlier version. Ed.

What did the Ohio legislature do to the English statute? (Notice the assumption about legislative history here.) (1) Removed the disabilities of coventure, imprisonment, and being "beyond the seas." (2) Fussed around with the wording. The first changes are clear enough, though one might want to make use of them in determining the policy of statute. We want to focus on the second. (TO = "true owner" and AP = "adverse possessor".) Hence, the only disabilities that we will consider are those of age and insanity.

AP enters in 1990. The limitations period is 21 years. AP has possessed in all the ways that AP is supposed to possess. The age of majority in both England and Ohio is 21 (contrary to fact, but it makes the arithmetic easier). When does the statute run out under the following assumptions (suggested answers are given in square brackets):

1. TO was of sound mind in 1990. TO became insane the day after AP entered. TO is alive and not well today. [2011] The limiting case and the plain meaning rule.

2. TO was 18 in 1990. [2011] It is highly probable that under either wording, if the disability ends within the basic statutory period and if the ten year extension is not as beneficial to the holder of the cause of action as is the basic statutory period, the holder gets the basic period. The language of the English statute may be clearer in this regard, but that of the Ohio statute probably does the job just as well.

3. TO was 5 in 1990. TO died in 2000. H, TO's heir, was of full age and of sound mind at the time. [2011] It is less clear, but probable, that a court would hold that once the disability had ceased because of the death of the holder of the cause of action, the heir, if himself not disabled, cannot claim a hypothetical disability. This is particularly apparent if one considers the disability of insanity.

4. TO was insane in 1990. He died insane in 2005. H is his heir and has no disability. [2015, probable] Both statutes speak in terms of a person who is both disabled and entitled to bring the cause of action. Since H is not disabled, it might be argued that s/he should not get the benefit that O would have gotten had his disability ceased during his lifetime. Such a result is possible under the words of the statute and might be reached if the statute were viewed with disfavor for policy reasons. But since it is clear that the legislature was simply not thinking about the possibility of inheritance of the cause of action, the court should be free to give H the disability extension on the argument that H inherits the disability extension along with the cause of action.

5. TO was 5 in 1990. He became insane in 1995. He is alive and not well today. [2016, or still tolled under the English statute; 2016 under the Ohio statute] There is a possible argument under the English statute that all disabilities must be removed before the statute runs. The Ohio statute is clearer on this point. Its reference to "such disability" pretty clearly refers only to the disability that existed at the time the cause of action accrued.

6. TO had no disability in 1990. He died in 1995. H is his heir and was 6 in 1995. [2015 under the English statute; 2011 or 2015 under the Ohio]. As I read the Ohio statute, in order to claim disability, the holder of the cause of action must be the holder of the cause of action at the time the cause of action accrued and disabled. The words to focus on are "if *any* person . . . bring *his* action in the English statute, and "if a person *entitled* . . . *such* person . . . *such* disability" in the Ohio. It is possible, however, to read the Ohio statute to refer to the person *now* entitled to bring the cause of action. Another road to the same result is discussed in Question 7, below.

7. TO was 5 in 1990. He is alive and competent today. [2016 under the English statute; 2011 or 2016 under the Ohio statute]. The earlier result under the Ohio statute is predicated on the proposition that the statute refers only to those disabilities that are removed after the expiration of the 21 year period. This leads to harsh results in the limiting case, but such is the nature of statutes of limitation. The mention of the age of minority as a possible disability may indicate legislative intent not to achieve this result, but it may have been a drafting error. The fundamental

problem is why did the legislature change the perfectly clear "notwithstanding" in the English statute to the at least ambiguous "after" if it did not intend to change the result? Supporting this reading of the intent is the fact that Ohio eliminated the disabilities of coverture, imprisonment, and being beyond the seas and is probably stricter than the English is situations (5) and (6).

If one is convinced that the result under the Ohio statute is simply irrational, it is possible to arrive at the same result under the English statute by reading the first "after" as if it were a second "if" and by reading the second "after" as referring only to the immediately preceding phrase. This reading ignores the fact that legislature made a change and the fact that the Ohio statute is generally stricter.

8. TO was insane in 1990. TO died insane in 1995. H was 6 at the time of TO's death. [2011 or 2015 under the English statute; 2011 under the Ohio.] This basically combines arguments previously made.

9. Would your answers to any of the above questions be different if you were told that all the disabled parties had a judicially-appointed guardian or conservator who could sue on their behalf?

10. TO disappeared in 1985. You are representing P who wishes to buy the property from AP. When would you advise P that such a purchase is safe? Consider not only the possible effect of disability provisions but also the possible effect of TO's having divided the land between life estate and remainder before the entry of AP.

B. "ACTUAL," "EXCLUSIVE," "HOSTILE AND UNDER CLAIM OF RIGHT"

PETERS v. JUNEAU-DOUGLAS GIRL SCOUT COUNCIL

Supreme Court of Alaska.
519 P.2d 826 (1974).

CONNOR, J. The property in dispute is a small section of beachfront in a protected cove of Tee Harbor, a semi-wilderness area near Juneau, Alaska.[1] [p*74] Record title to the property is held by the Juneau-Douglas Girl Scout Council. Claiming the property by adverse possession is Willis M. Peters, a 71 year-old Tlingit Indian.

At trial, Mr. Peters stated that he first came to Tee Harbor when he was about eight years old. However, his family's particular interest in the property involved in this dispute dates from 1916. In the spring of that year according to Mr. Peters' testimony, his uncle Elijah Sharclane "bought the place" from one Henry Phillips for twenty-five dollars in gold.[2] Before Elijah died, he asked his oldest brother, Jerry, to take care of the property after he "took off." Similarly, when Jerry Sharclane felt he was getting too old to manage the property, he gave it to his nephew Willis Peters. This transfer occurred in about 1932. Mr. Peters described it as follows:

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[1] The Girl Scout Council holds title to a long, narrow 9.24 acre tract of beachfront property abutting Tee Harbor. Mr. Peters claims only a fraction of this tract, a section 575 feet long in the middle of the tract.

[2] Apparently what Elijah bought was not the land, but a house on the land, a building which he intended to and did use as a store. Willis Peters, age 16 at the time, witnessed the purchase. When asked whether when Elijah bought the building he got the land the building sat on too, Mr. Peters answered:

> "Well, I don't think it can go without it. The house can't be up in the air. I don't know about that one. I can't answer it. He bought the building for store, that is all I know."

The trial testimony seems to indicate, however, that what was informally transferred from Elijah to Jerry to Willis was not just the store building itself, but the whole area used by the family. It is this wider area, on which the family over the years built several houses and other structures, that Mr. Peters now claims to have adversely possessed.

"Well, he's (Jerry Sharclane is) getting pretty old and that is howcome he tell me I have to take care of it now, You're (sic) old enough to take care of it. That is howcome I got it, yes."

At the time Elijah purchased the building for his store, a community of Tlingit Indians occupied the area. A nearby cannery apparently ceased operation sometime in the 1920's, and the Tlingits gradually began to move away. By the time Jerry Sharclane gave the property to Willis, only Peters and his family remained on the land.

Over the 40 years since then, Peters has used the land in various ways. Although he has had a house in Juneau for "close to twenty" of those years and has only lived solely on the claimed property for the last five years,[3] Peters made regular and extensive use of the property throughout the 40–year period. While he lived in Juneau, according to his testimony, he drove out there every weekend. He lived on the Tee Harbor property off and on every year during seal hunting season.[4] A bench for scraping seal hides was built there. During the summers, he repaired boats there, his own and those of certain of his relatives. Throughout the period, Peters has worked to keep the beach area free of rocks so that it will be a good place to land his boats. He has used his boats for sealing and for fishing, returning to his land at Tee Harbor to process the seal and smoke the fish. In addition, Peters has used the property as a station from which he hunts deer. He has also dug clams and planted a somewhat unsuccessful garden on it. Apart from these rather numerous activities, there are several structures on the land which should have indicated Peters' occupancy to the record owners. [p*75] The property is dotted with the remains of several cabins, some of them caved-in and abandoned now like Jerry Sharclane's, Tom Sharclane's, and Flora Rudy's.[5] Other structures appear to be still in use. These include the house Peters built on the site of Elijah's old store, a platform with a tent on it which Peters testified he put up six years ago to store his boat motors and trolling outfit, a smokehouse put up "close to twenty years ago" for smoking fish and seal and deermeat, a seal skinning bench, and a well dug by Peters' sons.

The boundaries of Peters' claim are marked on the southwest by the remains of Jerry Sharclane's cabin, on the north or northwest by a bronze or brass post and on the east by the shoreline. The bronze post marking the north boundary is a piece of air pipe given to Peters to mark the end of his claim and to replace other markers that had been knocked down. The marker post has been knocked down four times. Peters testified that the first post was put there before 1930. He further testified that the piece of pipe was given to him in "maybe 1935," and that he had a sign on it indicating his ownership of the property until someone threw the sign away. He testified:

"After Donohue gave me this pipe I attach a notice to it. I say this property owned by Willis M. Peters. Please don't pull this post away. We see it on the beach."

It is not clear when Mr. Peters first decided he should "get papers" for his property like other people had. But at some point, apparently through talking to people, he became aware that in order to protect his holding and preserve it for his children, he must acquire a written paper title.[6]

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[3] In approximately 1966 Peters' house in Juneau was apparently taken over by the State Housing Authority, so Peters moved out to the property in question and began living permanently in his boat. The boat is on land above the high tide mark, not in the water. It rests in a cradle which Mr. Peters built for it.

[4] According to Peters, he and his family "never stop seal hunting." They hunt "as long as the seal float." According to the testimony of one of Peters' sons-in-law who hunted with Peters every year from 1952 until approximately 1968, the seals float "(a)nytime before May and also after October." They hunted "off and on for about three months," spending nights in a cabin at Tee Harbor.

[5] Flora Rudy is Willis Peters' mother. He lived in this cabin with his mother during part of his youth.

[6] Apparently Mr. Peters has desired for sometime to build a "good" house on the property, but wished to clear his title before doing so. Mr. Peters' understanding of the reason he needed papers on the property he claimed is indicated by the following excerpts from his trial testimony:

He sought the help of many people in his search for these papers. He went first to Territorial Governor Ernest Gruening, and after that to Gruening's successors. He went to the Land Management Office and to Alaska Native Services. He talked to several people. At some point he was told that the land belonged to Nick Bez and that he should see Nick Bez about it. Nick Bez is apparently an official in the company that owned the cannery. Peters testified that in 1950 he and his wife went down to Seattle to see Nick Bez and were told to stay "right there" on the land because that was their home and the cannery no longer had any use for it. Peters stated that Nick Bez told them he, Bez, no longer owned it.[7] It was not until about 1969 that [p*76] Peters learned that the Girl Scouts had title to the property.[8] Shortly thereafter, in January, 1970, Peters brought the present action seeking to establish his title to the property.

The case was tried by the superior court, without a jury. After hearing the evidence, the court found that Peters had satisfactorily shown that his use of the land was continuous, open and notorious for the ten-year statutory period.[9] However, the court further concluded that Peters had

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"Well, this is the point. This is the point. I could have built a house a long time ago but I ask Nick's man when the Nick's man tell me you have to have a title, you have to have something to show on it then I begin to think myself too about I better get title to it, I better get papers for it like a birth certificate. Something like that. . . .

"I want to clear everything before I build a house there, like what we are talking about now. Now what we gonna do if the Court hand it to me, we are going to get papers for it, surveyor papers or something to show, something my kids can show. Well, that is what I want. That is howcome I don't want to touch it. That is howcome I live in the boat.

". . . Well, this is the way. You have to have-you have to show papers. I realize that, you have to show papers, your title, that you own the place, you own the house or you own the boat like Coast Guard. You show it to the people, this is my boat, this is the number of it. That's what it mean. That's what it mean to me in my head in my mind."

[7] The following interchange took place at trial between the attorney for the Girl Scouts and Mr. Peters:

"Q. [By attorney] Now, after he (Bez) told you that he didn't own it, then who did you believe owned it? Who did you think owned it?

A. [By Peters] The Thlingets. The Thlingets. He tell me himself, that place belong to your people. He asked me, how many of you live there now? All by myself and my kids."

[8] Peters' discovery of this fact is described in the following excerpt of trial testimony:

"Q. [By attorney for Girl Scouts] When did you find out the Girl Scouts had an interest in this property.

A. [By Peters] I'm going to tell you. After all I knock everybody's door and this man start laughing at me, that Ed Neilson. You know that place is bought by Girl Scout. I said no, well howcome you never tell me? Well, the Girl Scout bought it 1940, '48 or something like that. Here you guy tell me to go down and see Nick Bez. That is a trick. That is quite a trick. Now suppose I do anything, I build a house over there why they burn my house up. Well, I didn't know anything about that. I tell him I don't know anything about it, honest to God I didn't know nothing. When the Girl Scout bought that place tax or something. I don't know. I can't tell you that."

[9] AS § 09.10.030 states:

"No person may bring an action for the recovery of real property, or for the recovery of the possession of it unless commenced within 10 years. No action may be maintained for the recovery unless it appears that the plaintiff, his ancestor, predecessor, or grantor was seized or possessed of the premises in question within 10 years before the commencement of the action."

This statute not only establishes a time limit within which an action to recover real property must be brought, but also constitutes the method by which a claimant may establish a new title through adverse possession. Ayers v. Day and Night Fuel Co., 451 P.2d 579, 581 (Alaska 1969).

failed to prove that his use of the property was exclusive or that his possession was hostile. Hence, judgment was rendered against Peters and for the Girl Scout Council.

I. EXCLUSIVITY

Contrary to the conclusion of the trial court, we find that Peters' use of the property was sufficiently exclusive to satisfy the requirements of adverse possession.

The exclusive use requirement is often defined quite similarly to certain of the other requirements of adverse possession. This seems natural since the main purpose of nearly all the requirements is essentially the same, that is, to put the record owner on notice of the existence of an adverse claimant. That purpose should, therefore, be kept in mind when deciding whether any given set of circumstances satisfies the exclusive use requirement.

An owner would have no reason to believe that a person was making a claim of ownership inconsistent with his own if that person's possession was not exclusive, but in participation with the owner or with the general public. To deprive the record owner of his title, the adverse claimant's acts must "evince a purpose to exercise exclusive dominion over the property."[10] The "exclusive use" requirement is further described in 5 Thompson on Real Property § 2547 (1957 Replacement) as follows:

"It is necessary that the adverse claimant hold possession of the land for himself, as his own, and not for another. In determining the exclusive character of the possession, the character and locality of the property and the uses and purposes for which it is naturally adopted are considered, and mere casual and occasional trespasses upon the land by a stranger are not [p*77] generally considered as interrupting the continuity of adverse possession of land." (Footnotes omitted.)

In the present case there is no real indication that Peters and his family shared possession with anyone else. All the improvements to the property were made by Peters or his relatives. Peters testified that to his knowledge, no one in the last twenty years had actually stayed on the property other than his family and the people to whom he gave permission. During extreme low tides, the beach fronting on Peters' land as well as his neighbors' lands was often populated with numerous clamdiggers. Peters admitted that he never made any effort to keep those people off his beach because, as he put it, "I haven't got that kind of heart." The only reason given by the trial court for finding that Peters had not proven exclusive use of the property was:

"Clamdiggers, picnickers, and others have certainly occasionally made use of the beach area off and on through the years, and not necessarily with permission of plaintiff or anyone."

There is no indication in the record of picnics on the property by anyone other than Peters and his family, nor is it clear who the "others" referred to by the trial court are.[11] In any case, occasional use of the beach by clamdiggers or other trespassers does not destroy the exclusivity of Peters' use. Total exclusivity is not required. In the words of the Oregon Supreme Court, a claimant's "possession need not be absolutely exclusive; it need only be a type of possession which would characterize an owner's use." Norgard v. Busher, 220 Or. 297, 349 P.2d 490, 496 (1960).

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[10] 5 Thompson on Real Property § 2547 (1957 Replacement).

[11] The only contact of the Girl Scout Council with the property is noted in the following response to one of plaintiff's interrogatories:

"The property was inspected from time to time by adult members of the Girl Scouts Council with a view to developing the property. It is also believed that some girl scouts used the area for overnight camping trips."

No work has been done or improvements of any kind placed on the property by the Girl Scout Council.

In Anderson v. Cold Spring Tungsten, Inc., 170 Colo. 7, 458 P.2d 756 (1969) the defendant adverse-possessors had used a cabin located on the disputed land on weekends and vacations during the summer. The trial judge found that, because the public used part of the property in question for picnicking, there was no exclusive possession of the property for the statutory period. The Colorado Supreme Court held that this was error, stating that

"(i)n order for possession to be exclusive, it is not necessary that all use of that property by the public be prevented. . . . In light of the nature of the property claimed by the defendants and in light of the nature of their use of the property as a vacation cabin, the record reveals that the defendants acted as the average landowner would act under such circumstances to assert the exclusive nature of their possession." 458 P.2d at 759.[12]

Perhaps even more to the point is the case of Pulcifer v. Bishop, 246 Mich. 579, 225 N.W. 3 (1929). The court there held that the defendant had established a claim by adverse possession to a portion of a beach even though [p*78] the beach was commonly used by others for recreation without protest by defendant. The Michigan court stated:

". . . In view of the well-known tendency of people to make rather free use of shores and beaches, we think defendant exercised all control of these premises that reasonably could be expected in view of their character. . . ." 225 N.W. at 4.

In the present case Willis Peters' use of the property in question was exclusive and not in common with the public generally. Occasional clamdiggers could not destroy the exclusive character of Peters' use since such casual intrusions were clearly not considered by Peters to interfere or conflict with his own use. In allowing strangers to come on the land to dig clams and in allowing friends, relatives and other members of the Tlingit tribe occasional use of the land, Peters was merely acting as any other hospitable landowner might. Appellee's implication that Peters held the land as steward or custodian for all the Tlingits of Alaska is not supported by the record. Rather, it appears that Peters held his land as any other landowner might, for himself and for his descendants.

II. HOSTILITY

The trial court based its finding that Peters failed to satisfy the hostility requirement on its belief that Peters' possession was permissive and therefore subservient to the true owner's legal title. In so concluding, the trial court erred. We find that Peters satisfied the hostility requirement.

"The great majority of the cases establish convincingly that the alleged requirements of claim of title and of hostility of possession mean only that the possessor must use and enjoy the property continuously for the required period as the average owner would use it, without the consent of the true owner and therefore in actual hostility to him irrespective of the possessor's actual state of mind or intent."[13]

The test for determining the existence of the requisite degree of hostility is a fairly objective one. The question is whether or not the claimant acted toward the land as if he owned it. His beliefs as to the true legal ownership of the land, his good faith or bad faith in entering into possession (i.e., whether he claimed a legal right to enter, or avowed himself a wrongdoer), all are

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[12] *See also* McKelvy v. Cooper, 165 Colo. 102, 437 P.2d 346, 347 (Colo. 1968) where it was held that casual intrusion by fishermen did not prevent the adverse claimants' possession from being exclusive or defeat their claim to the ranch land involved; and Bloodsworth v. Murray, 138 Md. 631, 114 A. 575, 579, 22 A.L.R. 1450 (1921), which held that use of marsh land pasture by trespassing trappers did not prevent a claimant from acquiring title to it by adverse possession.

[13] American Law of Property § 15.4, at 776–77, quoted in Ottavia v. Savarese, 338 Mass. 330, 155 N.E.2d 432, 435 (1959).

irrelevant. An early Minnesota case, Carpenter v. Coles, 75 Minn. 9, 77 N.W. 424 (1898), put it quite succinctly when it said:

"The misapprehension on the subject arises from the somewhat misleading, if not inaccurate, terms frequently used in the books to express this adverse intent, such as "claim of right,' "claim of title,' and "claim of ownership.' These terms, when used in this connection, mean nothing more than the intention of the disseisor to appropriate and use the land as his own to the exclusion of all others. To make a disseisin it is not necessary that the disseisor should enter under color of title, or should either believe or assert that he had a right to enter. It is only necessary that he enter and take possession of the lands as if they were his own, and with the intention of holding for himself to the exclusion of all others."[14]

From the standpoint of the true owner, the purpose of the various requirements of adverse possession-that the nonpermissive use be actual, open, notorious, continuous, exclusive and hostile-is to put him on notice of the hostile nature of the possession so that he, the owner, may take steps to [p*79] vindicate his rights by legal action. Where the user has acted, without permission of the true owner, in a manner inconsistent with the true owner's rights, the acts alone (without any explicit claim of right or intent to dispossess) may be sufficient to put the true owner on notice of the nonpermissive use. Ottavia v. Savarese, 338 Mass. 330, 155 N.E.2d 432, 435 (1959). See American Law of Property § 15.4, at 771–785; Restatement of Property 458, comments "a" and "d". "[T]he physical facts of entry and continued possession may themselves evidence an intent to occupy and to hold as of right sufficient in law to support the acquisition of rights by prescription." Ottavia v. Savarese, *supra*, at 435, citing Holmes v. Johnson, 324 Mass. 450, 86 N.E.2d 924 (1949).

"The intent with which the occupant holds possession is normally determined by what he does upon the land. (Citation omitted.) Where the land is used in the manner that an owner would use it there is a presumption that the possession is adverse. (Citation omitted.)" Springer v. Durette, 217 Or. 196, 342 P.2d 132, 135 (1959).

The nature of Peters' possession in the present case has already been discussed. The court is satisfied that Peters acted toward the land in question as would an owner, taking into account the geophysical nature of this land and the reasonable uses for which it is suitable. Springer v. Durette, *supra*, at 134; 6 Powell on Real Property § 1018, at 740.

In spite of the trial court's conclusions, this court does not find that Peters' use either originated or continued under consent of the title holder. Peters believed his right to possession derived from his uncles, not from any acquiescence, consent or permission of the cannery or Nick Bez. The fact, referred to in the trial court's memorandum opinion, that the owners of the cannery may have acquiesced in Indian occupation of the land during the cannery's operation is irrelevant. Whether the Indians predated the cannery or whether they moved onto the land after the cannery began operations, the cannery's mere acquiescence in their use of the land cannot constitute the kind of permission which would prevent the acquisition of title by adverse possession. The whole doctrine of title by adverse possession rests upon the acquiescence of the owner in the hostile acts and claims of the person in possession. Arkansas Commemorative Commission v. Little Rock, 227 Ark. 1085, 303 S.W.2d 569, 571 (1957).

The trial court also pointed to a conversation between Peters and Nick Bez, a representative of the record owner, which apparently took place in 1950. In that conversation, according to the trial court's interpretation, Peters "sought and obtained verbal permission to continue his use of the land." Our reading of the record does not agree with the trial court's on this point. Peters visited

[14] See also 6 Powell on Real Property § 1015, at 725–6 and the mistaken boundary line cases cited therein, French v. Pearce, 8 Conn. 439 (1831), in particular.

Mr. Bez not seeking permission for anything, but rather seeking a piece of paper. Having become convinced that he must get paper title to the property, he went in search of that magical piece of paper. In his efforts he visited the Governor, the Bureau of Land Management and others. He was told he had to see Nick Bez before anything could be done. Nick Bez apparently told him "you stay right there, we can't use it no more . . . ." Peters testified that "Nick Bez tell me you stay right there, that is your home because he knows it himself." The word "permission" came up only on cross-examination. It was not Willis Peters' word. After being asked several times if he had asked Nick Bez if he could stay on there, (to which Peters answered in the affirmative each time) Peters was asked: "Did he (Bez) give you permission to stay there?" Peters answered "yes". Taken out of context this might support the analysis of the trial court. However, Peters' testimony as a whole reveals that he considered himself as owner [p*80] and not as a permissive user. Peters visited Nick Bez seeking a piece of paper, a deed, a title so that he could build a house on the land without fear of losing it. He wanted papers to show, papers his "kids" could show.

But, whether Peters thought the land was legally his or Nick Bez's or the cannery's or the Girl Scouts' is not controlling. What is more important is that he at all times acted as if the land were his and treated it as his.

In earlier cases we have noted that "(W)hen one enters into possession or use of another's property, there is a presumption that he does so with the owner's permission and in subordination to his title."[15] This presumption is, of course, rebutted by the adverse claimant's showing that he was not on the property by permission and establishing that the record title holder could have ejected him from possession throughout the statutory period. This, Mr. Peters has done.

We may set aside a finding of fact of the trial judge only if it is clearly erroneous. [Citations omitted.] In the present case, however, our decision depends primarily upon the validity or invalidity of the trial court's legal analysis, not its factual findings. The content of a particular legal doctrine, and what the facts of this case establish under such doctrine is the central issue in the case. Appellant Peters does not for the most part seek a reweighing of the evidence, but rather a reversal for failure to apply the proper standard of law. On questions of law, this court is not bound by the lower court's view and, consequently, we do not apply the "clearly erroneous" standard of review.

. . . .

The judgment of the superior court is reversed, and the case is remanded for entry of judgment in favor of appellant.

Reversed and remanded.

ERWIN and BOOCHEVER, JJ., not participating.

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[15] Hamerly v. Denton, 359 P.2d 121, 126 (Alaska 1961); Ayers v. Day and Night Fuel Co., 451 P.2d 579, 581 (Alaska 1969).

Notes and Questions on "Actual" and "Exclusive"

1. The following is the statement of facts of the court in Monroe v. Rawlings, 331 Mich. 49, 50, 49 N.W.2d 55, 56 (1951):

> The land is wild, undeveloped, covered with scrub oak and some pine, not suitable for farming or the production of crops, but there are some deer there, and it is suitable for hunting and fishing and recreational purposes, not "worth leaving outdoors . . . unless it has some value for oil leasing purposes," but at one time pulpwood on parts of it was of some value.
>
> In 1926, some of defendants built a hunting cabin on the land and used the premises for hunting and fishing. In 1928 they bought the tax title to the entire section for the 1924 taxes,

recorded the tax deed, and in 1929 attempted service of notice to redeem upon the person whom defendants claim to have been the one then appearing to be the owner of record (and recorded a copy with sheriff's return of service), as provided in CL 1948, § 211.140 (Stat. Ann. 1950 Rev 7.198), which procedure plaintiff claims to have been a nullity for failure to make service upon the proper persons. Defendants have paid the taxes on the premises for every year from 1924 until date of trial in 1949, except for the year 1945, when it was paid by an undisclosed person. After the hunting season in 1932 the cabin was destroyed [p*81] and in 1933 defendants built a new one upon the premises, at a cost for materials of $300, placed it on a cement foundation, painted it, cleared the brush and planted grass around it and erected a sign at the crossroads bearing the name of the camp. This cabin remained to the time of trial and it, together with the land, has been used by defendants every year for hunting, fishing and vacations. Defendants kept a register of camp guests which showed the visits of defendants and their guests from 1934 to 1949, indicating occupancy of the cabin by them for such purposes on an average of 6 times each year, including each of the hunting seasons. In 1939 defendants sold the pulpwood on the entire section for $2,150, the purchaser having thereafter engaged in cutting and removing it over a period of 5 years, during which time his loggers occupied temporary cabins and camps on the land visible from the road. From 1907 until 1948, when plaintiff acquired a deed to the premises, only one conveyance was recorded by plaintiff's predecessors in chain of title, which was a deed recorded shortly after the above mentioned service of notice to redeem. During the entire period from 1926 to 1949 defendants used the property as above indicated with no one challenging or questioning their use or possession thereof, nor, insofar as shown by the record, did plaintiff or her predecessors in title ever enter upon or pay any attention to the premises or assert title or right to possession, offer to pay taxes, or in any way indicate anything other than abandonment of their rights. During that time defendants sold a portion of the land to the county road commission for road purposes and executed and had recorded a number of oil leases and mortgages and also certain conveyances between themselves, all covering the land in question.

Plaintiff stresses that defendants have never improved the land, fenced it, posted it, attempted to keep off others, or lived on it. She relies on cases holding that mere payment of taxes for years, removal of timber and gravel, cutting of hay, and occasional squatting on the premises, do not suffice to establish title by adverse possession.

Same result as *Peters*?

2. Suppose in *Monroe v. Rawlings* that the defendants only visited the land during the deer hunting season. Third parties unknown either to plaintiff or defendants entered during the fishing season every spring and fished a stream running through the land. Same result? Why or why not? Consider the following case:

Plaintiff used 33 lots or parts of lots on the beach. He placed chairs, umbrellas, and floats on the property, renting them to the public, and he sold refreshments. The area he occupied was roughly delineated by posts he and the county had erected to keep cars off the beach. He hired a life-guard, erected sheds, and made certain other improvements; he also refused to allow competitors on the land. Plaintiff occupied the land only during the bathing season, coming there in the winter occasionally to clean up or to make repairs.

Plaintiff contended that the land was not fit for farming or raising cattle, and that he was putting it to its best use. The court, however, affirmed a summary judgment in favor of the defendant, the owners of the 33 beach-front lots; it held that the acts performed by the appellant were insufficient to raise a fact issue as to whether the owners had been reasonably notified of his adverse claim. The court concluded:

A break of six months each year does not constitute continuous and unbroken occupancy.

> An owner who viewed the land during at least six months of each year would not have fair notice that appellant was asserting a hostile claim. [p*82]

Winchester v. Porretto, 432 S.W.2d 170, 175 (Tex. Civ. App. 1968), noted in 21 BAYLOR L. REV. 217 (1969).

Can you reconcile this decision with *Monroe v. Rawlings*? With *Peters*?

The courts continue to disagree about the content of the actuality requirement. In McShan v. Pitts, 554 S.W.2d 759 (Tex. Civ. App. 1977), the court held that grazing animals and maintaining fences on a disputed strip of land was not sufficient for adverse possession because the fences had not been built by the adverse claimant and the grazing was not so intense as it might have been. But in Cheek v. Wainwright, 246 Ga. 171, 269 S.E.2d 443 (1980), the court, overruling Georgia precedent to the contrary, held that establishing a tree farm on land was sufficient because it would put the owner on notice of the adverse claim, and because tree-farming is an important part of the Georgia economy. While the cases may be reconcilable on their facts, neither the McCarty nor the McShan court considered whether the true owner should have perceived from the use being made of their land that another was making an adverse claim to it. The issue is not limited to rural areas. As it applies in urban and suburban settings it often bears on the extent of the adverse possessor's claim. In McCarty v. Sheets, 423 N.E.2d 297 (Ind. 1981), the court held that a man who had mowed the grass around a garage which had been built encroaching on his neighbor's lot had established adverse possession to the land on which the garage was located but not to the land around it. See also Carter v. Malone, 545 N.E.2d 5 (Ind. App. 1989).

3. Recall the suggestion in *Peters* that the requirements for adverse possession are interrelated concepts. Consider again the nature of the adverse possessions in *Peters*, *Monroe*, and *Winchester*, *supra*. To what extent are these possessions "actual," "exclusive," "open and notorious," "hostile and under claim of right," or "continuous"? Do the courts try to separate these concepts? For a case in which the continuity concept is relatively distinct, see Mendonca v. Cities Service Oil Co., 354 Mass. 323, 237 N.E.2d 16 (1968), *infra*, p. S99.

4. Some states furnish more specific statutory guidance on the necessary acts of adverse possession. *See*, *e.g*, CAL. CIV. PRO. CODE § 325 (West 2012), *infra*, p. S98, note 5. In some cases they set different standards for persons "claiming a title founded upon a written instrument, or a judgment or decree" and others. *See*, *e.g.*, CAL. CIV. PRO. CODE § 323 (West 2012). Some jurisdictions go so far as to make the existence of a written instrument ("color of title") a prerequisite for title by adverse possession. *See* p. S108 *infra*. Others adjust the period of limitations according to the existence or nonexistence of "color of title." *Ibid*. *See generally*, Taylor, *Actual Possession in Adverse Possession of Land*, 25 IOWA L. REV. 78 (1939). As an extreme consider ILL. COMP. STAT. ch. 735, § 5/13–110 (2012):

> Whenever a person having color of title, made in good faith, to vacant and unoccupied land, pays all taxes legally assessed thereon for 7 successive years, he or she shall be deemed and adjudged to be the legal owner of such vacant and unoccupied land, to the extent and according to the purport of his or her paper title.

Not surprisingly, the Illinois courts appear to have construed the act as requiring "possession" as well. See Chicago Title & Trust Co. v. Drobnick, 20 Ill. 2d 374, 169 N.E.2d 792 (1960). How does one possess "vacant and unoccupied land"? See *id.*

5. A few states, while not purporting to make payment of taxes a sufficient act of "actual possession," make it a necessary one: [p*83]

> In no case shall adverse possession be considered established under the provisions of any section of this code, unless it shall be shown that the land has been occupied and claimed for the period of five years continuously, and the party or persons, their predecessors and grantors,

> have paid all the taxes, state, county, or municipal, which have been levied and assessed upon the land for the period of five years during which the land has been occupied and claimed.

CAL. CIV. PRO. CODE § 325(b) (West 2012) (different provisions apply where the adverse possession is based on a written instrument).

Would such a statute have been a problem in *Peters*? *Belotti*? (*See* MINN. STAT. ANN. § 541.02 (2012): "The provisions [requiring payment of taxes by the adverse possessor] shall not apply to actions relating to the boundary line of lands, which boundary lines are established by adverse possession . . . .") Because of the practical difficulties involved in boundary dispute cases the California courts and courts in other states with a similar unqualified requirement that taxes be paid on the land in question for adverse possession to run, have developed judicial tools for getting around the requirement. One such tool is the doctrine of "agreed boundaries." If two neighbors agree on where their line is, that agreement, coupled with the payment of taxes, will be sufficient payment for the purposes of the statute even though the deed description differs. This is accomplished by the fiction that "a division line thus established "attaches itself to the deeds of the respective parties,' and defines the land described in each deed . . . ." Price v. De Reyes, 161 Cal. 484, 489–490, 119 P. 893, 895 (1911). The doctrine of agreed boundaries and the closely related doctrines of estoppel and acquiescence are discussed more fully, *infra*, p. S108. For a detailed account of the California doctrine, see 2 CAL. JUR. 3D *Adverse Possession* §§ 75–76 (1973); *id.*, *Adjoining Landowners* §§ 86–96 (1973 & Supp. 1982).

C. "CONTINUOUS," "HOSTILE AND UNDER CLAIM OF RIGHT"

MENDONCA v. CITIES SERVICE OIL CO.

Supreme Judicial Court of Massachusetts.
354 Mass. 323, 237 N.E.2d 16 (1968).

KIRK, J. This bill in equity was brought to enjoin the defendant from entering upon a strip of land (the strip) which the plaintiffs claim to have acquired by adverse possession and to recover damages for trespass. Annexed to the plaintiffs' bill is a copy of an affidavit, signed by them and recorded in the registry of deeds on July 17, 1964, claiming title to the strip by adverse possession. In its answer the defendant asked for affirmative relief against the claim and the acts of the plaintiffs.

The defendant appeals from a decree that the plaintiffs acquired the strip by adverse possession. The plaintiffs appeal because no damages were awarded. . . .

The parties own adjacent lots in New Bedford. It is undisputed that record title to a parcel of land including the disputed strip has been in the defendant since 1936 and that taxes on the whole parcel have been assessed to it and paid by it to the city since 1936. The defendant's predecessor, Cities Service Refining Company, had purchased the property in 1927. The defendant's parcel is at the southwest corner of the intersection of Emma Street and Brock Avenue. Emma Street runs east to west; Brock Avenue runs generally north to south. Since 1936 the defendant has operated a gasoline station on the property. It is also undisputed that the plaintiffs hold title as tenants by the entirety to the lot adjoining the defendant's on Emma Street by virtue of a deed dated February 14, 1957; that the deed to [p*84] the plaintiffs and the deeds to their predecessors in title, dating back to 1923, were all warranty deeds, and that none of them purported to convey the disputed strip to the grantee. All of the deeds in the plaintiffs' chain of title define or describe the north (Emma Street) and south boundaries of the plaintiffs' lot as forty-one feet long.

It is the plaintiffs' position that by adverse possession the north (Emma Street) and south boundaries of their property have been extended approximately twenty-four feet easterly into the property of the defendant, encompassing a strip ninety feet long, for a total of 2,187 square feet.