> 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.

They contend that they and their predecessors in title have occupied the strip (twenty-four feet wide and ninety feet long) adversely to the defendant for more than twenty years and now own it under G.L. c. 260, § 21.

There was no finding and there was no evidence to warrant a finding of adverse use prior to 1936. The plaintiffs' case must stand or fall on events commencing with that year. We have considered all of the evidence in the case and have weighed and measured it with due regard to the findings of the judge. We conclude for purposes of this decision that it is unnecessary to recount the evidence in detail or to embark upon a dissertation on the propriety of the legal significance or nonsignificance given to the evidence by the judge. There is no doubt that the defendant erected and maintained a fence parallel to and more than twenty-four feet from its ninety foot west boundary until 1951. There is no doubt that the plaintiffs and some of their predecessors made use of the strip for various purposes without protest or objection by the defendant, nor is there any doubt that a chain link fence was erected in 1941 by one of the plaintiffs' predecessors in title on the Emma Street side of the strip. But there likewise is no doubt as the judge found, and his finding is firmly supported by the evidence, that "In 1951 the defendant rebuilt the gas station renovating the small building and adding thereto a large lubrication bay which extended the building both toward Emma Street and back in the direction of the disputed area. During this renovation work the contractor used the disputed area for the storage of building materials and equipment for a period of three or four weeks without protest from the then current owner of the plaintiffs' land. As part of the work, the contractor tore down both of the fences . . . [which the defendant had erected and] which were then in poor repair. A new wooden fence was erected across the lot parallel to and about twenty-four feet from the boundary line between the parcels."

The judge concluded his findings of fact with the statement, "On all the evidence I find as a matter of fact that plaintiffs and their predecessors in title had actual open, continuous possession of the disputed area under a claim of right or title for a period of over twenty years." We think this ultimate finding is plainly wrong. "Acquisition of title through adverse possession is a fact . . . to be proved by the one asserting the title. The burden of proof extends to all of the necessary elements of such possession and includes the obligation to show that it was actual, open, continuous, and under a claim of right or title." Holmes v. Johnson, 324 Mass. 450, 453, and cases cited. If any of these elements is left in doubt, the claimant cannot prevail. [Citations omitted.]

The plaintiffs cannot prevail here because the use of the strip by the defendant in 1951 broke the requisite element of continuity of possession. Any adverse use subsequent to 1936 was interrupted before twenty years had elapsed; and any adverse use since 1951 falls short of the required twenty years. The removal of the fences and the use of the strip during the [p*85] remodeling of the station were acts of dominion by the defendant consistent with its title of record.

The final decree must be reversed. A decree is to be entered (1) confirming the title of Cities Service Oil Company to the area described as the second parcel in the deed to it dated December 23, 1936, recorded with Bristol South District registry of deeds, book 788, page 81; (2) declaring the plaintiffs' affidavit recorded in the same registry on July 17, 1964, book 1452, page 345, to be null and void; (3) enjoining permanently the plaintiffs and the members of their family, tenants, agents or servants from trespassing on any part of the defendant's premises as described above in clause (1); and (4) dismissing the plaintiffs' bill.

So ordered.

Notes and Questions

1. MASS. ANN. LAWS ch. 260, § 21 (2012) provides:

> An action for the recovery of land shall be commenced, or an entry made thereon, only within twenty years after the right of action or of entry first accrued, or within twenty years after the demandant or the person making the entry, or those under whom they claim, have been seized or possessed of the premises . . . .

MASS. ANN. LAWS ch. 260, § 28 (2012) provides:

> No person shall be held to have been in possession of land within the meaning of this chapter merely by reason of having made an entry thereon, unless he has continued in open and peaceable possession thereof for one year next after such entry or unless an action has been commenced upon such entry and seisin within one year after he was ousted or dispossessed.

Section 21 is cited but not quoted in the principal case; § 28 is not mentioned at all. Do you think the case would have come out the same way if the court's attention had been focused on these provisions? Such provisions are not uncommon. What effect do they have on the judicially-created notion of continuity in adverse possession? See Taylor, *Continuity in Adverse Possession of Land*, 27 IOWA L. REV. 396, 400–05 (1942).

2. We are now ready to consider the problem of the continuity of adverse possession when one adverse possessor succeeds another and-or one "true owner" succeeds another. To do so we will make use of the analytical scheme devised by Wesley Necomb Hohfeld at the beginning of the last century.

W. HOHFELD, SOME FUNDAMENTAL LEGAL CONCEPTIONS AS APPLIED IN JUDICIAL REASONING

23 YALE L.J. 16, 28–59 (1913)

One of the greatest hindrances to the clear understanding, the incisive statement, and the true solution of legal problems, frequently arises from the express or tacit assumption that all legal relations may be reduced to "rights" and "duties," and that these latter categories are therefore adequate for the purpose of analyzing even the most complex legal interests, such as trusts, options, escrows, "future" interests, corporate interests, etc. Even if the difficulty related merely to inadequacy and ambiguity of terminology, its seriousness would nevertheless be worthy of definite recognition and persistent effort toward improvement; for in any closely reasoned problem, whether legal or non-legal, chameleon-hued words are a peril both to clear thought and to lucid expression. As a matter of fact, however, the above mentioned inadequacy and ambiguity of terms unfortunately reflect, all too often, corresponding paucity and confusion as regards actual legal conceptions. . . .

The strictly fundamental legal relations are, after all, *sui generis*; and thus it is that attempts at formal definition are always unsatisfactory, if not altogether useless. Accordingly, the most promising line of procedure seems to consist in exhibiting all of the various relations in a scheme of "opposites" and "correlatives," and then proceeding to exemplify their individual scope and application in concrete cases. An effort will be made to pursue this method:

Jural	rights	privilege	power	immunity
Opposites	no-rights	duty	disability	liability
Jural	right	privilege	power	immunity
Correlatives	duty	no-right	liability	disability

Rights and Duties. As already intimated, the term "rights" tends to be used indiscriminately to cover what in a given case may be a privilege, a power, or an immunity, rather than a right in the strictest sense; and this looseness of usage is occasionally recognized by the authorities. . . .

Recognizing, as we must, the very broad and indiscriminate use of the term, "right," what clue do we find, in ordinary legal discourse, toward limiting the word in question to a definite and appropriate meaning. That clue lies in the correlative "duty," for it is certain that even those who use the word and the conception "right" in the broadest possible way are accustomed to thinking of "duty" as the invariable correlative. . . .

In other words, if X has a right against Y that he shall stay off the former's land, the correlative (and equivalent) is that Y is under a duty toward X to stay off the place. If, as seems desirable, we should seek a synonym for the term "right" in this limited and proper meaning, perhaps the word "claim" would prove the best. . . .

Privileges and "No-Rights." As indicated in the above scheme of jural relations, a privilege is the opposite of a duty, and the correlative of a "no-right." In the example last put, whereas X has a right or claim that Y, the other man, should stay off the land, he himself has the privilege of entering on the land; or, in equivalent words, X does not have a duty to stay off. The privilege of entering is the negation of a duty to stay off. As indicated by this case, some caution is necessary at this point, for, always, when it is said that a given privilege is the mere negation of a duty, what is meant, of course, is a duty having a content or tenor precisely opposite to that of the privilege in question. Thus, if, for some special reason, X has contracted with Y to go on the former's own land, it is obvious that X has, as regards Y, both the privilege of entering and the duty of entering. The privilege is perfectly consistent with this sort of duty,—for the latter is of the same content or tenor as the privilege;—but it still holds good that, as regards Y, X's privilege of entering is the precise negation of a duty to stay off. Similarly, if A has not contracted with B to perform certain work for the latter, A's privilege of not doing so is the very negation of a duty of doing so. Here again the duty contrasted is of a content or tenor exactly opposite to that of the privilege.

Passing now to the question of "correlatives," it will be remembered, of course, that a duty is the invariable correlative of that legal relation which is most properly called a right or claim. That being so, if further evidence be needed as to the fundamental and important difference between a right (or claim) and a privilege, surely it is found in the fact that the correlative of the latter relation is a "no-right," there being no single term available to express the latter conception. Thus, the correlative of X's right that Y shall not enter on the land is Y's duty not to enter; but the correlative of X's privilege of entering himself is manifestly Y's "no-right" that X shall not enter.

In view of the considerations thus far emphasized, the importance of keeping the conception of a right (or claim) and the conception of a privilege quite distinct from each other seems evident; and more than that, it is equally clear that there should be a separate term to represent the latter relation. No doubt, as already indicated, it is very common to use the term "right" indiscriminately, even when the relation designated is really that of privilege; and only too often this identity of terms has involved for the particular speaker or writer a confusion or blurring of ideas. . . .

A "liberty" considered as a legal relation (or "right" in the loose and generic sense of that term) must mean, if it have any definite content at all, precisely the same thing as privilege . . . . It is equally clear, as already indicated, that . . . a privilege or liberty to deal with others at will might very conceivably exist without any peculiar concomitant rights against "third parties" as regards certain kinds of interference. Whether there should be such concomitant rights (or claims) is ultimately a question of justice and policy; and it should be considered, as such, on its merits. The only correlative logically implied by the privileges or liberties in question are the "no-rights"

of "third parties." It would therefore be a non sequitur to conclude from the mere existence of such liberties that "third parties," are under a duty not to interfere, etc. . . . [1]

Powers and Liabilities. As indicated in the preliminary scheme of jural relations, a legal power (as distinguished, of course, from a mental or physical power) is the opposite of legal disability, and the correlative of legal liability. But what is the intrinsic nature of a legal power as such? Is it possible to analyze the conception represented by this constantly employed and very important term of legal discourse? . . .

A change in a given legal relation may result (1) from some superadded fact or group of facts not under the volitional control of a human being (or human beings); or (2) from some superadded fact or group of facts which are under the volitional control of one or more human beings. As regards the second class of cases, the person (or persons) whose volitional control is paramount may be said to have the (legal) power co effect the particular change of legal relations that is involved in the problem.

The second class of cases—powers in the technical sense—must now be further considered. The nearest synonym for any ordinary case seems to be (legal) "ability,"—the latter being obviously the opposite of "inability," or "disability." The term "right," so frequently and loosely used in the present connection, is an unfortunate term for the purpose,—a not unusual result being confusion of thought as well as ambiguity of expression. . . .

Many examples of legal powers may readily be given. Thus, X, the owner of ordinary personal property "in a tangible object" has the power to extinguish his own legal interest (rights, powers, immunities, etc.) through that totality of operative facts known as abandonment; and—simultaneously and correlatively—to create in other persons privileges and powers relating to the abandoned object,—*e.g*., the power to acquire title to the lat[t]er by appropriating it. *Similarly*, X has the power to transfer his interest to Y,—that is, to extinguish his own interest and concomitantly create in Y a new and corresponding interest. So also X has the power to create contractual obligations of various kinds. Agency cases are likewise instructive. . . . The creation of an agency relation involves, inter alia, the grant of legal powers to the so-called agent, and the creation of correlative liabilities in the principal. That is to say, one party P has the power to create agency powers in another party A,—for example, the power to convey X's property, the power to impose (so-called) contractual obligations on P, the power to discharge a debt, owing to P, the power to "receive" title to property so that it shall vest in P, and so forth. . . .

As regards all the "legal powers" thus far considered, possibly some caution is necessary. If, for example, we consider the ordinary property owner's power of alienation, it is necessary to distinguish carefully between the *legal* power, the *physical* power to do the things necessary for the "exercise" of the legal power, and, finally, the privilege of doing these things—that is, if such privilege does really exist. It may or may not. Thus, if X, a landowner, has contracted with Y that the former will not alienate to Z, the acts of X necessary to exercise the power of alienating to Z are privileged as between X and every party other than Y; but, obviously, as between X and Y, the former has no privilege of doing the necessary acts; or conversely, he is under a duty to Y not to do what is necessary to exercise the power.

In view of what has already been said, very little may suffice concerning a *liability* as such. The latter, as we have seen, is the correlative of power, and the opposite of immunity (or exemption). While no doubt the term "liability" is often loosely used as a synonym for "duty," or "obligation," it is believed, from an extensive survey of judicial precedents, that the connotation already adopted as most appropriate to the word in question is fully justified. . . .

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[1] [Query: When you were told in the first grade that going out to recess was a "privilege" not a "right," was the teacher using these words in their Hohfeldian sense? Ed.]

[Consider, for example, an 1861] Virginia statute providing "that all free white male persons who are twenty-one years of age and not over sixty, shall be *liable* to serve as jurors, except as hereinafter provided." It is plain that this enactment imposed only a liability and not a duty. It is a liability to have a duty created. The latter would arise only when, in exercise of their powers, the parties litigant and the court officers, had done what was necessary to impose a specific duty to perform the functions of a juror. . . .

Immunities and Disabilities. As already brought out, immunity is the correlative of disability ("no-power"), and the opposite, or negation, of liability. Perhaps it will also be plain, from the preliminary outline and from the discussion down to this point, that a power bears the same general contrast to an immunity that a right does to a privilege. A right is one's affirmative claim against another, and a privilege is one's freedom from the right or claim of another. Similarly, a power is one's affirmative "control" over a given legal relation as against another; whereas an immunity is one's freedom from the legal power or "control" of another as regards some legal relation.

A few examples may serve to make this clear. X, a landowner, has, as we have seen, power to alienate to Y or to any other ordinary party. On the other hand, X has also various immunities as against Y, and all other ordinary parties. For Y is under a disability (*i.e.*, has no power) so far as shifting the legal interest either to himself or to a third party is concerned; and what is true of Y applies similarly to every one else who has not by virtue of special operative facts acquired a power to alienate X's property. If, indeed, a sheriff has been duly empowered by a writ of execution to sell X's interest, that is a very different matter: correlative to such sheriff's power would be the liability of X,—the very opposite of immunity (or exemption). It is elementary, too, that as against the sheriff, X might be immune or exempt in relation to certain parcels of property, and be liable as to others. Similarly, if an agent has been duly appointed by X to sell a given piece of property, then, as to the latter, X has, in relation to such agent, a liability rather than an immunity. . . .

In the latter part of the preceding discussion, eight conceptions of the law have been analyzed and compared in some detail, the purpose having been to exhibit not only their intrinsic meaning and scope, but also their relations to one another and the methods by which they are applied, in judicial reasoning, to the solution of concrete problems of litigation. Before concluding this branch of the discussion a general suggestion may be ventured as to the great practical importance of a clear appreciation of the distinctions and discriminations set forth. If a homely metaphor be permitted, these eight conceptions,—rights and duties, privileges and no-rights, powers and liabilities, immunities and disabilities,—seem to be what may be called "the lowest common denominators of the law." Ten fractions (1–3, 2–5, etc.) may, superficially, seem so different from one another as to defy comparison. If, however, they are expressed in terms of their lowest common denominators 5–15, 6–15, etc.), comparison becomes easy, and fundamental similarity may be discovered. The same thing is of course true as regards the lowest generic conceptions to which any and all "legal quantities" may be reduced.

. . . In short, the deeper the analysis, the great[er] become one's perception of fundamental unity and harmony in the law.

Notes and Questions on Tacking

1. Consider the situation of *O* (true owner) and *AP* (adverse possessor) before the statute of limitations has run. What are *O*'s rights and privileges vis-a-vis *AP*? Vis-a-vis third parties (*T*)? What are *AP*'s rights and privileges vis-a-vis *O*? Vis-a-vis *T*? Suppose that *AP* dies before the statute of limitations has expired. His child, his only heir at law, continues to live on the property. When does the statute run? It is almost universally held that the statute continues to run from the time *AP* entered. See 3 A.L.P. § 15.10. Why? Similarly, *AP* can devise his possessory interest or

convey it to anyone he chooses. What does this tell you about the nature of possession? When *AP*'s heir, devisee, or grantee enters he is said to have "tacked" his possession to that of *AP*.

2. Is tacking involved in *Belotti v. Bickhardt*? What policy was the trial court supporting when it held that the corrective deed of Reidel's heirs and [p*86] devisees was void? Why was it "champertous"? *But cf.* N.Y. REAL PROP. LAW § 260 (McKinney 2012): "No grant, conveyance or mortgage of real property or interest therein shall be void for the reason that at the time of the delivery thereof such real property is in the actual possession of a person claiming under a title adverse to that of the grantor." Derived from an amendment to the statute in 1941. The provision in effect at the time *Belotti* was decided read: "Effect of grant or mortgage of real property adversely possessed. — A grant of real property is absolutely void, if at the time of the delivery thereof, such property is in the actual possession of a person claiming under a title adverse to that of the grantor; but such possession does not prevent the mortgaging of such property, and such mortgage, if duly recorded, binds the property from the time the possession thereof is recovered by the mortgagor or his representatives, and has preference over any judgment or other instrument, subsequent to the recording thereof; and if there are two or more such mortgages, they severally have preference according to the time of recording thereof, respectively." N.Y. Laws, 1896, c. 547, § 225. Did the trial court properly apply the statute?

3. Suppose that *AP* is ousted by *T*. May *T* tack his adverse possession to *AP*'s? Why or why not? Which of the statutory policies supports your answer? For a heretical view of the last question, see Ames, *The Disseisin of Chattels*, 3 HARV. L. REV. 313, 323–26 (1890), in J. AMES, LECTURES ON LEGAL HISTORY 192, 204–07 (1913).

4. It is possible to divide the right of possession of land between present and future interests. We will deal with these divisions in detail when we cover the material on estates in land and future interests. For the time being let us consider one very common division, that between life estates and remainders. Suppose that *O* wishes his wife, *W*, to have the use of his land for the rest of her life after he dies and wishes his child *C* to have the land after *W* dies. He devises a life estate to *W* with the remainder (i.e., what remains after the life estate) to *C*.

(a) Now suppose that after *O* dies, *W* moves far away. *AP* enters and possesses for the statutory period. Now *W* dies and C brings an action of ejectment against *AP*. What result? Most courts hold in this situation that *C*'s action is not barred by the statute. See 3 A.L.P. § 15.8; *but cf.* Clement v. R.L. Burns Corp., 373 So.2d 790 (Miss.1979) (owner of several mineral interests barred by adverse possession of the surface estate because of failure to have mineral interest separately assessed for tax purposes). Why? Might your answer be any different if the jurisdiction had a statutory provision allowing *C* to bring a quia timet bill or action to try title during *W*'s lifetime?

(b) Would your answer in (a) be any different if *AP* entered on the land before *O* died? Why or why not? The few courts which have passed on this question say that it does make a difference. *See* Hubbard v. Swofford Bros. Dry Goods Co., 209 Mo. 495, 108 S.W. 15 (1908) (alternative holding); 3 A.L.P. § 15.8. Can you see why?

5. (a) Prior to the expiration of the statute *AP* devises the possessed land to *W* for life, remainder to *C*. *W* dies, and *C* enters into possession. *O* sues. Neither *AP*, *W* nor *C* has possessed for the statutory period, nor did the possession of any two of them exceed the statutory period, but the combined possession of *AP*, *W* and *C* exceeds the statutory period. What result in *O*'s suit? Most courts hold the suit barred. *See, e.g.*, Williams v. Woodruff, 374 So.2d 232 (Miss. 1979). Why?

(b) Same facts as in (a), except that the statute runs out during *W*'s lifetime. She then conveys the land to T who enters and holds for less than another statutory period. Upon *W*'s death, *C* sues

to eject T. What result? Is this case any different from (4)(a) *supra*? Would your answer be any different if T held for more than another statutory period?

(c) *O* in possession devises land to *W* for life, remainder to *C*. The devise is void because *O* himself has only a life estate. *W* enters and possesses for the statutory period, conveys to *T* and dies the next day. *C* sues *T* in ejectment. What result? The cases are divided on this topic but the "better rule" is said to be that *T* should prevail. See 3 A.L.P. § 15.4. Why? Would your answer be any different if *O* were not in possession? If *C* were the true owner?

See 3 A.L.P. secs. 15.2, 15.4, 15.8; Ballantine, *Title by Adverse Possession*, 32 HARV. L. REV. 135 (1918). (Don't make up your mind completely on these problems [p*87] until you consider the materials on estoppel in adverse possession, *infra*, p. S108).

Notes and Questions on Hostility, Permission, and Acquiescence

1. The notion that the adverse possessor must have a certain state of mind dies hard. So, too, does the disagreement over the precise contents of that state of mind. In Price v. Whisnant, 236 N.C. 381, 72 S.E.2d 851 (1952), plaintiff entered land under a deed which he thought described the land disputed in the case. He farmed the disputed land for a while; after he discovered in 1921 that the land was not described in the deed, his use was sporadic. The court held that the use of the land prior to 1921 could not be used to establish plaintiff's "actual" possession because he did not have the requisite hostile state of mind. In Jasperson v. Scharnikow, 150 F. 571, 572 (9th Cir. 1907), the court said: "'This idea of acquiring title by larceny does not go in this country. A man must have a bona fide claim, or believe in his own mind that he has got a right as owner, when he goes upon land that does not belong to him, in order to acquire title by occupation and possession.'"

Can you see the distinction between what is being required in *Jasperson* and what is being required in *Price*? Should either requirement exist as a matter of policy? Both requirements as to state of mind are discussed in the continental theories of possession and have their base in Roman law. The power of ideas, however, is great, and a most erudite discussion (albeit with the name of the great German jurist Jhering misspelled) of these notions and their relationship to the English concept of seisin may be found in a 1929 Wyoming case, City of Rock Springs v. Sturm, 39 Wyo. 494, 273 P. 908 (1929). See Bordwell, *Disseisin and Adverse Possession* (pts. 1–3), 33 YALE L.J. 1, 141, 285 (1923–24).

By and large, most American courts today appear to require neither that the adverse possessor have a subjective hostile intent nor that he be in good faith. However, a review of a large sample of reported decisions led one scholar to conclude that no matter what courts say they, in fact, decide against adverse possession claims of those who enter in bad faith. Helmholz, *Adverse Possession and Subjective Intent*, 61 WASH. U. L.Q. 331, 347 (1983).[1] A minority of jurisdictions explicitly require subjective hostile intent (but not good faith) in cases where adverse possession is claimed in a boundary dispute. Thus, in boundary-dispute cases in these jurisdictions the plaintiff must show that his possession did not result from a mistake as to the location of the true line. The exception for boundary disputes has been sharply criticized both on the ground that it is inconsistent with the policy of the statute of limitations-an imposition of foreign ideas on the basic common law notion that the true owner must bring an action within the limitation period or suffer for his laches-and on the ground that the exception for boundary disputes is unwarranted by the language of the statute and unworkable in practice. *See, e.g*, Predham v. Holfester, 32 N.J.

[1] The Helmholz article set off an exchange that went two rounds. *See* Cunningham, *Adverse Possession and Subjective Intent*: *A Reply to Professor Helmholz*, 64 WASH. U. L.Q. 1 (1986); Helmholz, *More on Subjective Intent: A Response to Professor Cunningham*, 64 WASH. U. L.Q. 65 (1986); Cunningham, *More on Adverse Possession: A Rejoinder to Professor Helmholz*, 64 WASH. U. L.Q. 1167 (1986).

Super. 419, 108 A.2d 458 (App. Div. 1954). *Predham* involved a concrete driveway which had encroached from four to six inches over the plaintiff's lot line for more than 25 years. Can you see any argument for making an exception in the case in boundary disputes? [p*88]

In Mannillo v. Gorski, 54 N.J. 378, 255 A.2d 258 (1969), the Supreme Court of New Jersey, citing *Predham*, abandoned the New Jersey intent requirement in boundary dispute cases and elected to follow the majority rule. The court added this caveat, however:

> [W]hen the encroachment of an adjoining owner is of a small area and the fact of an intrusion is not clearly and self-evidently apparent to the naked eye but requires an on-site survey for certain disclosure as in urban sections where the division line is only infrequently delineated by any monuments, natural or artificial, such a presumption [of the knowledge of adverse user] is fallacious and unjustified. . . . Therefore, to permit a presumption of notice to arise in the case of minor border encroachments not exceeding several feet would fly in the face of reality and require the true owner to be on constant alert for possible small encroachments. . . . Accordingly we hereby hold that no presumption of knowledge arises from a minor encroachment along a common boundary.

Id. at 388–89, 255 A.2d at 263–64. (How would *Predham* have been decided under New Jersey law today?)

In those jurisdictions which still have an intent requirement in boundary dispute cases, the requirement has given rise to numerous complexities. Among these are:

(1) A notion that the intent to claim to a mistaken boundary is sufficient while an intent to claim only to the true line is not (*compare*, *e.g.*, Rountree v. Jackson, 242 Ala. 190, 4 So.2d 743 (1941) *with* Hess v. Rudder, 117 Ala. 525, 23 So. 136 (1898)); (2) a presumption that the intent is hostile; and (3) a rule that intent is a question of fact to be inferred from the acts of the parties so that statements of intent are frequently given little weight (see Payne v. Priddy, 371 S.W.2d 783 (Tex. Civ. App. 1963)). *See generally* Annot., 80 A.L.R.2d 1171 (1961); 3 A.L.P. § 15.4.

2. One of the most interesting theories discussed in *Peters* is permissive occupancy. Indeed, the court suggests that the adverse possessor must overcome a presumption of permission. The line between permission and acquiescence is very hard to draw. To compound the problem, there are instances in which statements or behavior of either O or A are said by a court to estop them from denying or claiming adverse possession. Consider the following situations:

(a) The right to possession of land can be shared among two or more people simultaneously. Such people are called cotenants or concurrent owners. (We will have occasion to deal with concurrent ownership at some length, *infra*, p. S237.) When two people are cotenants of the same piece of land, neither one can point to 1/2 of it and say, "I own that"; each has an equal share of the whole, and are entitled to 1/2 the proceeds from it. Cotenancies are frequently held by members of the same family, such as husband and wife, or a number of siblings.

One of the most troublesome aspects of adverse possession, if the amount of litigation and literature on the subject is any indication, is its application to cotenancies. The typical situation is when a parent dies and his land as a whole is willed or passes by intestate succession to a number of children. Often, by agreement, only one of the children will live on the land. As the years go by and he farms it, or takes care of it, pays the taxes, etc., he may come to think of the land as his and his alone. [p*89]

Suppose he keeps all the profits from the land for the statute of limitations period, instead of making an accounting with his cotenants as he is supposed to do. Is this enough to establish title to the whole by adverse possession? Generally the answer is 'no'. Because of the nature of concurrent ownership-it is generally interfamilial, the claimant is usually on the land by an agreement with his cotenants, etc.-the law has created a "presumption of permissive user" to

protect the cotenants out of possession. This means that the cotenant claiming adverse possession is normally required to show actual ouster of his cotenants or other acts so open and hostile to the interests of his cotenants that they would have to be extremely lax not to be aware that he was claiming the land as his own. *See, e.g.,* Westheimer v. Neustadt, 362 P.2d 110 (Okl. 1961); but see Ruick v. Twarkins, 171 Conn. 149, 367 A.2d 1380 (1976) (holding that a mother began adverse possession against her daughters, who were living with her, when she fraudulently obtained a probate decree vesting title to her husband's estate in her while the husband was still alive). Some states apparently require actual notice of the adverse claim or something very close to it. *E.g.,* Quates v. Griffin, 239 So.2d 803 (Miss. 1970). *See generally* 3 A.L.P. § 15.7. Along the same lines it is generally held that a life tenant may not hold adversely to his remaindermen without giving notice (*e.g.*, Piel v. DeWitt, 170 Ind. App. 63, 351 N.E.2d 48 (1976)), but a remainderman may hold adversely to a life tenant without giving notice (*e.g.*, Lucas v. Brown, 396 So.2d 63 (Ala. 1981)). (Why the difference in the two situations?) Can you see how the doctrine of estoppel might operate in some of these cases against the adverse claim?

(b) Sometimes the doctrine of estoppel may cut in favor of the adverse possessor: *A* owned a parcel which he left by will to his child *B*. The will, however, was never probated and by state law *A*'s land passed to *B*, *C* and *D* as cotenants. *B* had lived on the land with his father and continued to live there exclusively for 36 years. He paid taxes, collected rents and improved the property. In 1961 the state condemned the land and C and D sought a portion of the eminent domain award. What result? Why? *See* Johnson v. James, 237 Ark. 900, 377 S.W.2d 44 (1964). *But cf.* Westheimer v. Neustadt, *supra,* which was a 5–4 decision. Suppose *B* had been on the land for less than the statutory period. What result? Why?

A was getting old. He persuaded his child *B* to come to live with him and make repairs on the property. He attempted in return to give the land to *B*, but the grant was void because it was not made in writing. *A* several times during his lifetime stated that *B* owned the property. *A* and *B* lived together on the land for more than the period of limitations. Upon *A*'s death, *B*'s brother *C* sued for his share of the property. What result? Why? See Newells v. Carter, 122 Me. 81, 119 A. 62 (1922). *See generally* Annot., 43 A.L.R.2d 6 (1955). Would it make any difference if *B* knew the grant was void? Consider again *Jasperson v. Scharnikow*, *supra*, p. S106.

(c) A typical fact situation runs like this: *A* and *B* are adjoining lot owners who are unsure of the location of their boundaries. They agree upon a line but do not reduce that agreement to writing, so it is void. Can you see how the doctrine of estoppel would apply here? Suppose that no formal agreement was made but both sides generally recognized some physical boundary? Suppose that no agreement was made but one party made a statement that the line was in a certain place and the other party relied on that statement? What does all this have to do with our policies concerning adverse possession? If the "true owner" is estopped to deny adverse possession, who owns the land? [p*90]

The doctrines of agreed boundaries, acquiescence and estoppel are among the most frequently controverted in boundary-dispute litigation, both in conjunction with and independent of the statute of limitations. *See, e.g,* Boyer v. Noirot, 97 Ill. App. 3d 636, 53 Ill. Dec. 82, 423 N.E.2d 274 (1981) (boundary need not be disputed in order to be subject to the doctrine of acquiescence); Monroe v. Harper, 619 P.2d 323 (Utah 1980) (boundary must be marked by a visible line to be subject to the doctrine); Sachs v. Board of Trustees, 89 N.M. 712, 557 P.2d 209 (1976) (parties need not have intended originally that line be the boundary if they subsequently treated it as such); Peters v. Straley, 306 So.2d 588 (Fla. Dist. Ct. App. 1975) (plaintiff not fulfilling statutory requirements of color of title and payment of taxes may still rely on doctrines of agreed boundaries and acquiescence); *see generally* 3 A.L.P. § 15.5.

3. A few states by statute require "color of title" for any adverse possession. See statutes collected in Taylor, *Titles by Adverse Possession,* 20 IOWA L. REV. 551, 553 (1935). Many more

states have references to it in decided cases, sometimes not always clear, as the reference in *Belotti, supra,* p. S80, illustrates. Color of title refers to a piece of paper which purports to pass title but which fails for some reason to have that effect. Is color of title what is being required in *Jasperson v. Scharnikow*? Which of the statutory policies does the requirement of color of title support? Many states have statutes similar to the following:

> No person may bring or maintain any action for the recovery or possession of any lands or make any entry upon any lands unless, after the claim or right to make the entry first accrued to himself or to someone through whom he claims, he commences the action or makes the entry within the periods of time prescribed by this section.
>
> (1) When the defendant claims title to the land in question by or through some deed made upon the sale of the premises by an executor, administrator, guardian, or testamentary trustee; or by a sheriff or other proper ministerial officer under the order, judgment, process, or decree of a court or legal tribunal of competent jurisdiction within this state, or by a sheriff upon a mortgage foreclosure sale the period of limitation is 5 years.
>
> (2) When the defendant claims title under some deed made by an officer of this state or of the United States who is authorized to make deeds upon the sale of lands for taxes assessed and levied within this state the period of limitation is 10 years.
>
> (3) When the defendant claims title through a devise in any will, the period of limitation is 15 years after the probate of the will in this state.
>
> (4) In all other cases under this section, the period of limitation is 15 years.

MICH. COMP. LAWS ANN. § 600.5801 (West 1987).

Why would a state have such provisions? What policies concerning adverse possession do they support?

Problem

This is the core of the essay question that I gave in this course a few years ago. There is much about this question that you still are not ready to deal with, but there is one issue that you should be ready to say something intelligent about right now. In fact, we discussed the core issue in class. You may assume that it is possible that under Andrew's will, Clarissa became the owner of Stark Farm when David ceased to farm it. If this is the case, then his letter to Clarissa and Ebenezer (which we will assume, without deciding, would constitute a valid conveyance of the farm) conveyed nothing, because he did not own the farm. Under the Married Women's Property Act, Clarissa may own land without her husband having an interest in it. The question under this set of assumptions is does Ebenezer have any claim to the farm, now that Clarissa is dead and David is her heir at law? You may also assume that the current year is 2003.

The first person (*or group of people*) *who think they have an answer to the question posed above send it to me* (*rspang@law.harvard.edu*)*. At this stage of the game we're looking for a paragraph or two, not for pages. I'll forward it anonymously by email to class. See if you agree with it or disagree with it. Why? Let us know. I'll intervene if and when I think it's necessary.*

I'll add other issues as the semester progresses. We will have covered everything that you need to know fully to answer the all the questions by Tue. Apr. 4. (*It turns out in this case that the things that we do after that are "red herrings."*) *Before Mon. Apr. 10, e-mail me your answer to the whole question (rspang@law.harvard.edu). After that, I'll post the answer that I wrote the question, and you can compare your answer to the that answer. (I will also post [anonymously] pieces of your answers that I thought were particularly good or which went astray in typical kinds of ways.) We can discuss the answers either by email or in the Q&A sessions before the*

exam. Obviously, I can't prevent you from waiting until the last minute before you write out your answer, but I can assure that it's easier if you do it as we go along.

Andrew Stark was the owner in fee simple of the Stark Farm, in the U.S. state of Ur, east of Eden, with an unimpaired chain of title going back to a grant from the Federal Government in the mid-nineteenth century. Andrew died in 1973, leaving a will which was duly admitted to probate and which provided, in pertinent part:

> "I devise the Stark Farm to my son Bartholomew and his heirs in fee simple for as long as they shall farm the property; and if they shall ever cease to farm it, then to my daughter, Clarissa and her heirs in fee simple, if she shall then be living; otherwise to the Eden Audubon Society.
>
> "All the rest and residue of my property, real personal and mixed, I devise and bequeath to my aforesaid son Bartholomew and my daughter Clarissa, and to the survivor of them."

Bartholomew took possession of the Stark Farm and farmed it until 1978 when he died intestate, a widower survived by his only child, David, who took over the farming operations on the Stark Farm. In 1985, Clarissa, and her husband, Ebenezer, received the following letter signed by David:

> "Dear Aunt Clarissa and Uncle Eb.,
>
> "Despite my respect for Grandpa Andrew's wishes, I've found that the farmer's life is not for me. Deeply as I love you both, I'm perfectly happy to have you take over the Stark Farm. The land is all yours. I'm sure that you'll take care of it."

Clarissa and Ebenezer wrote David that they would respect his wishes and "took over the farm." David joined the Foreign Legion.

From 1985 to the present (which is 2003) Ebenezer has managed the farm, hired the help, borrowed the necessary funds on his own signature, and paid the taxes by checks on his own bank account. Clarissa lived with Ebenezer on the farm and helped out until her death in 1998. None of her children survived her. She left no will, and under the common law of intestacy (which still prevails in Ur), her heir is her nephew, David.

In the meantime the development that Andrew had anticipated as early as 1970 has come to fruition. Ebenezer has concluded that farming the Stark Farm is no longer feasible because of the combined effect of a number of circumstances: (1) Residential development in the area has prompted the adoption of environmental regulations that severely restrict the use of pesticides that are necessary for the profitable operation of the farm. (2) Huge mechanized farms are being developed in adjoining states (and in more rural areas of Ur) that are able to sell their produce at prices with which the Stark Farm cannot profitably compete.

Fiona, a land subdivider, is willing to pay Ebenezer a sum of money for the Stark Farm about twenty times its current worth as a farm, if satisfactory answers can be produced to the following legal questions:

(1) Does Ebenezer own any interest in the Stark Farm? If so, what interest?

[*The other questions are omitted for the time being.*]

Your senior partner (Ebenezer's attorney) has asked you for a preliminary memorandum analyzing the problem and indicating factual or legal questions requiring further investigation. You should write the memorandum, taking into account, to the extent necessary, the following statutes, the only ones in the state of Ur of any possible relevance to the case.

(1) A common-law reception statute. (1785)

(2) A married women's property act. (1850)

(3) A twenty-year statute of limitations on actions to recover real property. (1805)

(4) "Whoever, under claim and color of title, shall have maintained uninterrupted possession of land and paid the taxes on the same for a period of seven consecutive years shall be deemed the owner thereof." (1920)