ADVERSE POSSESSION OF LAND IN THE LAW OF LIMITATION OF ACTIONS.

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Doctor of Philosophy

by

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I am also indebted to Mrs. A. E. Oldham who typed this thesis and on whose skill and expertise I have greatly relied.

Michael J. Goodman.

I obtained the degree, Bachelor of Arts (Law) in the University of Oxford in 1953 (in 1961, I converted this degree to that of M.A. (Oxon.)). I qualified as a Solicitor in 1956 and, thereafter for a year, was a Lecturer at Messrs. Gibson and Weldon's law-teaching establishment in London. Then for three years I practised as a Solicitor in the City of Lincoln. I then returned to teaching law at the Law Society's School of Law (latterly the College of Law) where I taught and researched for three years. I embodied the results of my research by publication of articles throughout those three years in the Solicitors' Journal and the Law Society's Gazette. In January, 1964, I took up a Lectureship in law at the University of Manchester and in October, 1966, became a Senior Lecturer in Law at that University.

No portion of this thesis has been submitted in support of an application for another degree or qualification of this or any other university or other institution of learning.

ABSTRACT OF THESIS.

The subject of this thesis is a study of that quality which English law requires of long-continued possession of land in order to recognize it as adverse to the owner of the land so that, at the expiry of the requisite statutory period, the title of that owner is extinguished, and the adverse possessor is said to have gained a title by adverse possession. The thesis first examines the public benefit or detriment involved in this concept and then postulates that, because of the public benefit, long-continued possession should be presumed to be adverse until the contrary is proved by showing that, whatever the belief or intention of the possessor, possession has in fact been referable to an existing lease, licence, trust, agency, or easement. The thesis then, in successive chapters, examines the existing law relating to possession referable to such concepts and analogous ones of the infant's and insane person's bailiff and analyses how far it is in conformity with a presumption of adversity. Finally, as a further deduction from the principle that the belief or intention of the possessor should be irrelevant in determining adversity of possession, the thesis examines in the last chapter how far possession taken under a mistaken belief as to the effectiveness of an instrument or transaction should be and, under the existing law, is adverse.

I have endeavoured to state the law as that in force in April, 1967.

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CHAPTER 1.

ADVERSE POSSESSION OF LAND IN THE LAW OF LIMITATION OF ACTIONS.

INTRODUCTION.

The legal concept by which a man's title to land will be extinguished if another possesses that land adversely for a requisite number of years finds a place in many systems of law. This thesis is concerned to attempt to make a logical and rational analysis of the concept in English law, in the belief that it has a beneficial role to play even in a highly civilized society like ours, since long-continued adverse possession should in the public interest prevail over a documentary or even a registered title. As Curtis and Ruoff[1] put it,

> "Misunderstandings have sometimes arisen from an unwarrantable belief that title deeds are sacrosanct documents, whereas the truth is that neither a conveyance nor a land certificate retains its value if the landowner is so lax or indifferent as to lose physical control of his land. It is clear, therefore, that in order that the title to registered land may be spoken of as 'State-guaranteed' in the true sense, it is essential that the owner should assume and maintain possession, which includes receipt of rents and profits (Land Registration Act, 1925, s.3(xviii), in addition to his being registered

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1. Curtis and Ruoff: Registered Conveyancing, 2nd ed. (1965), p.121.

with absolute title."[2]

The twentieth-century raison d'être of adverse possession is further emphasized in the recent report of the Law Reform Committee on the Acquisition of Easements and Profits by Prescription[3] which, while recommending the abolition of prescriptive acquisition of easements and profits[4], says of acquisition of title to land by adverse possession[5],

> "Certainty of title to land is a social need and occupation of land which has long been unchallenged should not be disturbed."

The moral merits and demerits of the concept of adverse possession are also debated in the recent Report of the Criminal Law Revision Committee on Theft and Related Offences[6] in relation to the problem whether land should be

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2. Curtis and Ruoff: Registered Conveyancing, 2nd ed. (1965), p.121. In connection with registered land, it is noteworthy that the original prohibition of acquisition of title to registered land by adverse possession (Land Transfer Act, 1875, s.21 cf. Land Transfer Act, 1897, s.12) has given way to allowing such acquisition and giving the rights (inchoate or perfected) of a squatter on registered land the status of an 'overriding interest,' so that they prevail against a purchase with no notice of them, as is the case with unregistered land - see now Land Registration Act, 1925, Ss.70(1)(f) and 75.
3. 14th Report (1966), Cmd. 3100.
4. Recommendation by a small majority so far as easements are concerned.
5. Report, p.12, para.36 - see also the advocacy of the principle of adverse possession by the minority who also wished to retain presumptive acquisition of easements; Ibid., p.13, para.38(d).
6. Eighth Report (1966), Cmd. 2977. I am indebted to my colleague, Mr. A. J. C. Hoggett, for drawing this point to my attention.

made the subject of the criminal offence of theft. The Committee say,

> "42. The arguments in favour of making land the subject of theft in general appear to be these:
>
> (i) Stealing by moving a boundary, for example, is a real problem, especially in crowded housing estates. It is as dishonest as stealing ordinary property, and it can cause considerable loss. Rectification may be difficult and expensive after boundaries and buildings have been erected. To make the misappropriation stealing would be salutary.
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> . . . . . .
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> 43. The contrary arguments seem to be these:
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> (i) Stealing land by encroachment is not so widespread or socially evil that the civil remedies are insufficient.
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> . . . . . .
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> (iv) A squatter may get a good title in civil law after occupation for twelve years (Limitation Act, 1939 (c.21) ss. 4(3), 16). It would be anomalous that he should in theory remain guilty of theft forever afterwards, however unlikely he would be to be prosecuted or, if convicted, given more than a nominal sentence. The anomaly is so great that it would seem necessary to provide that a squatter should not be liable to prosecution once he had acquired a good title. (This question hardly arises with a tenant holding over, because he would be unlikely to have the requisite intention of depriving the owner permanently.)
>
> 44. The arguments seem to us evenly balanced. On the whole we favour a compromise by which land (including things forming part of it or attached to it) should be the subject of stealing only in certain cases, not including moving

boundaries or squatting. We propose that the exceptional cases should be -

(i) dishonest appropriation by trustees or other persons in a position to sell or dispose of the land of another or anything forming part of it;[7]

(ii) dishonest appropriation by persons not in possession, for example by removing soil;

(iii) dishonest appropriation by tenants of fixtures let to be used with the land."

This Committee, also, therefore in effect endorses the principle that adverse possession should be capable of conferring title. With regard to their example of "land-stealing," namely moving boundaries, the writer's experience as a practising Solicitor was that on the "crowded housing estates" to which the Committee refer genuine mistakes as to boundaries, due for example to discrepancies between the physical lay-out of the land and the estate plan or the plans on individual conveyances, would be just as likely to occur as cases of deliberate "land-stealing." Such mistakes are best rectified by allowing the title to the land ultimately to correspond with the physical boundaries, this being one of the many ways in which adverse possession can be used as an excellent panacea for the ills to which both unregistered and

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7. Trustees who convert to their own use trust land can never acquire a title by adverse possession - Limitation Act, 1939, s. 19.

registered conveyancing will inevitably be subject from time to time.[8]

This thesis is concerned with the English law of adverse possession, but references are made from time to time to the position in the United States of America and Canada. Moreover, I visited in 1966 both Northern Ireland and Eire and discussed with the Parliamentary draftsmen there the content of their legislation on limitation of actions, which is more recent than ours, comprehensive Statutes of Limitation having been enacted in 1957 in Eire and in 1958 in Northern Ireland. I was also able to discuss problems of limitation generally with them. I am greatly indebted to Mr. W. A. Leitch and Mr. R. Erskine of the Parliamentary Draftsmen's Office in Northern Ireland and Mr. R. Hayes of the Department of Justice in Eire for the considerable help and encouragement they gave me. I have incorporated the results of these discussions in their appropriate places throughout this thesis.

The scheme of the Limitation Act, 1939, is, first, to provide maximum periods for the bringing of actions to recover land. The normal period is twelve years after the right of action first accrued[9] but thirty years are given

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8. See further, Chap. 6, infra, "Possession by Mistake," pp. 142-3.
9. 1939 Act, s. 4(3).

where the plaintiff is the Crown or a spiritual or eleemosynary corporation sole[10]. There are extensions of time for landlords or the owners of future interests[11], in cases where the plaintiff was under a disability when the right of action accrued to him[12], and where a right of action was concealed by fraud or the action is for relief from the consequences of mistake[13]. Moreover, a written signed acknowledgment of title during the limitation period will start time running anew[14].

When, however, the limitation period has expired, the title of the person who has failed to sue is extinguished[15] and though there is no "parliamentary conveyance" of that title to the person who could have been sued for recovery of the land but has not been sued[16] he acquires what is popularly known as a "squatter's title", that is, title by adverse possession. If no-one can sue him for recovery of the land, he has in effect an estate in fee simple absolute in possession.

However, the right of action will not accrue to the

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10. 1939 Act, s. 4(3). The period is 60 years for an action by the Crown to recover foreshore.
11. See S.6 of the 1939 Act for details.
12. See S.22 of the 1939 Act for details.
13. See S.26 of the 1939 Act for details.
14. See Ss.23 and 24 of the 1939 Act for details.
15. See S.16 of the 1939 Act for details.
16. Tichborne v. Weir (1892), 67 L.T. 735 (CA); Re Nisbet and Potts [1906] 1 Ch. 386; Taylor v. Twinberrow [1930] 2 K.B. 16.

owner of the land until he or some person through whom he claims has been dispossessed or discontinued his possession[17] and, in addition,

> "(1) No right of action to recover land shall be deemed to accrue unless the land is in the possession of some person in whose favour the period of limitation can run (hereafter in this section referred to as "adverse possession") and where under the foregoing provisions of this Act any such right of action is deemed to accrue on a certain date and no person is in adverse possession on that date, the right of action shall not be deemed to accrue unless and until adverse possession is taken of the land.
>
> (2) Where a right of action to recover land has accrued and thereafter, before the right is barred, the land ceases to be in adverse possession, the right of action shall no longer be deemed to have accrued and no fresh right of action shall be deemed to accrue unless and until the land is again taken into adverse possession." [18]

Continuous "adverse possession" for the statutory period is therefore required for the acquisition of a squatter's title. When one asks what is "adverse possession," the 1939 Act merely gives the circular answer, "the possession of some person in whose favour the period of limitation can run."[18] The purpose of this thesis is to identify that mysterious "some person" by asking in whose favour <u>can</u> the period of limitation run and attempting to give a logical and rational answer.

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17. 1939 Act, s. 5(1); for special rules as to those claiming under a will, intestacy, or assurance <u>inter vivos</u> without having taken possession, see s. 6(2) and (3).
18. 1939 Act, s. 10(1) and (2).

Of course, the first requisite is that the squatter must have possession in the factual sense. This is a concept not confined to the law of limitation of actions. He may establish this by showing, for example, that he has fenced off or otherwise enclosed the land or that he has cultivated it.[19] This is essentially a question of fact, though the legal point arises that the same quantum of acts done on the land may or may not be regarded as a dispossession of the true owner according to the intentions of that owner in regard to present and future use of the land. If he does not make any present use of the land, but yet just falls short of discontinuing possession, considerable acts of user of the land by another may fail to constitute a dispossession of the true owner.[20] The true question of law, however, is to ask, on the assumption that the claimant, the "squatter", has possession de facto, is it adverse possession?

Seven years after the Real Property Limitation Act of 1833, the then Lord Chief Justice, Lord Denman, said that the Act's effect was,

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19. Preston and Newsom: Limitation of Actions (3rd Ed., 1953), pp. 102 et seq; Franks: Limitation of Actions (1st Ed., 1959), pp. 122-4. For illustrations of the factual situations, see cases cited.
20. Leigh v. Jack (1879), 5 Ex.D. 264; Williams Bros. Stores Ltd. v. Raftery [1958] 1 Q.B. 159 (C.A.) - see discussion and criticism of the latter case - infra, Chapter 6, pp. 166-172.

> "to put an end to all questions and discussions, whether the possession of lands, etc., be adverse or not; and if one party has been in the actual possession for twenty years, whether adversely or not, the claimant, whose original right of entry accrued above twenty[21] years before bringing the ejectment, is barred..."[22]

The problem with which this thesis is concerned is whether the 1833 Act, substantially re-enacted in this context by the Limitation Act, 1939, abolished merely the technicalities of the pre-1833 doctrine of non-adverse possession[23], involved as it was with the long-since obsolete rules of disseisin at election, or, if not, to what extent it removed the requirement of "hostility" or "adversity" from the concept of a squatter's possession. No-one doubts that the 1833 Act abolished such arbitrary technicalities as the old rules that the possession of a younger son was deemed to be the possession of the elder son or that the possession of a tenant at sufferance or at will was deemed to be the possession of the landlord, but did the Act of 1833 go further and really "put an end to all questions and discussions" about the adversity of possession?

In the nineteenth century, there was no dearth of

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21. Now twelve years - Limitation Act, 1939, s. 4 re-enacting Real Property Limitation Act, 1874, s. 1.
22. Culley v. Doe d. Taylerson (1840), 11 Ad. & E. 1008, at 1015, cf. the same judge in Nepean v. Doe (1837), 2 M. & W. 894, at 911.
23. For an account of these, see Pollock and Wright: Possession in the Common Law (1888), pp.88-89.

statements, judicial and otherwise, to support the wider view. In 1873, for example, Lord Justice James, was moved to say,

> "It must always be borne in mind that in all such questions under the Statute of Limitations this Court has nothing todo with the nature, origin, or duration of the Defendant's possession, but simply whether or not the Plaintiff has or has not proceeded in due time after the accruer, or that which is taken to be the accruer of his right of suit."[24]

Pollock, writing in 1888, clearly took a broad view of the effects of the 1833 Act, for he wrote,

> "The result, and doubtless the intended result, is greatly to diminish the importance of the character in which and the intention with which acts of apparent ownership are done."[25]

The 1939 Act, unlike the 1833 Act, uses, as we have seen, the expression "adverse possession" but defines it simply as "the possession of some person in whose favour the period of limitation can run,"[26] leaving the problem unsolved. It is therefore proposed to examine the decisions of the Courts since the 1833 Act, on the footing that the statute law has remained unchanged since that date.[26]

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24. Vane v. Vane (1873), L.R. 8, Ch. 383, at 397.
25. Pollock and Wright: Possession in the Common Law (1888) at p.90; Cf. Darby and Bosanquet: Statutes of Limitation, 2nd Ed. (1893), pp.353-4.
26. See Limitation Act, 1939, s. 10, and Evershed, M. R. in Moses v. Lovegrove [1952] 2 Q.B. 533 (C.A.) at 539, "The notion of adverse possession, which is enshrined now in section 10, is not new; the section is a statutory enactment of the law in regard to the matter as it has been laid down by the Courts in interpreting the earlier Limitation Statutes."

It is hoped to discover whether the adjective "adverse" is merely an "abusive epithet," like "gross" negligence, or whether it really adds a requirement over and above that of a given number of years' continuous possession to enable the acquisition of a squatter's title.

If the animus possendi of possession were defined as an intention by the possessor to exercise physical control for himself and not on behalf of someone else, then "adverse" would add nothing to the requirement of twelve years continuous possession. Originally "possession" of land had this meaning.[27] It was only later that lessees, for example, were said to have possession in order to give them effective remedies, e.g. in trespass, to support their temporary interest in land. The same tendency is now seen in the emphasis placed on occupation for a licence to be effective in rem and the abandonment of the former test of exclusive possession as the hallmark of a lease, as distinct from a licence.[28] Admirable though these extensions may be in giving effective remedies, they have led the Courts into insisting that possession, in order to give a squatter's title, must not only be for twelve years continuously but must be in addition "adverse" or "hostile" or "under a claim of right." The problem is

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27. See Pollock and Wright op. cit. pp.47-49.
28. Errington v. Errington [1952] 1 K.B. 290; Cobb v. Lane [1952] 1 All E.R. 1199; National Provincial Bank Ltd. v. Ainsworth [1965] A.C. 1175.

that once the original purity of possession is sullied, the additional requirement of hostility becomes difficult to define and capricious in its operation. If I indulge in, to quote Pollock again, "acts of apparent ownership" for twelve years over your land, is it material to ask what my subjective intentions were? Ought there to be any difference between a case where I thought that the land was mine because of e.g. a mistake as to the boundaries and a case where I knew perfectly well that the land belonged to you but intended to 'steal' it if I could? The requirement of hostility can lead the Courts to the absurd conclusion that in the first case I do not acquire a squatter's title whereas in the second case I do. This is indeed the case in some jurisdictions in the U.S.A. In Preble v. Me. Cent. R. Co.[29] possession was held not to have conferred a title when the claimant testified, "Occupied it on account I thought it was my own land." In England, one mistaken boundary case has been decided in favour of the claimant on the ground of estoppel, twelve years not having elapsed - Hopgood v. Brown[30] and the Privy Council in Chisholm v. Hall[31], on an appeal from Jamaica, appear to have assumed without question that sufficient hostility existed in a mistaken boundary case.

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29. (1893), 85 Me. 260.
30. [1955] 1 All E.R. 550.
31. [1959] A.C. 719.

The mistaken boundary problem is but one arising from the difficult concept of hostility. In other adverse possession contexts one sees the invidious spectacle of a Court considering evidence of the character of a long possessor as being that of a "plunderer," "convicted forger" and "thief" to decide whether or not he was, in an ambiguous situation, likely to have taken possession adversely or not.[32] Again, if A enters B's land under a lease that is void in its inception, A's possession is adverse and time starts to run in his favour immediately[33] and yet if X constructs an artificial watercourse on Y's land because he mistakenly thinks an existing lease by Y to him gives him the right to do so when in fact it does not, X acquires no prescriptive right to do so[34]. The precario element of prescription is analogous - see Thomas W. Ward Ltd. v. Alexander Bruce Ltd.;[35] where a claim to strand vessels on a bed of silt in a dock was made, but rejected, both on the ground of prescription and adverse possession.

If, in fact, hostility does require the possessor to

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32. Corea v. Appuhamy [1912] A.C. 230, at 236 (P.C.)
33. Magdalen Hospital v. Knotts (1879), 4 App. Cas. 324 (H.L.) - where it was assumed that the possession was adverse - the controversy was whether the lease was void or voidable; it seems that payment of rent under a void lease will prevent time from running - Bunting v. Sargent (1879), 13 Ch.D. 330; Webster v. Southey (1887), 36 Ch.D. 9.
34. Chamber Colliery Co. v. Hopwood (1886), 32 Ch.D. 549.
35. [1959] 2 Ll.L.R. 472.

intend to claim adversely, why should the widower claimant in Doe d. Miller v. Brightwen[36] have failed when he undoubtedly intended to possess the land as fee simple owner, but unfortunately chanced to be a tenant by the curtesy, unrealized until the Court adjudicated it to be so on a minute point relating to admittance to copyholds? Small wonder that in 1957, Harman, J. felt impelled to interject incredulously during argument,

"You are worse off when you enter lawfully"[37]

and Counsel felt constrained to reply,

"Yes, often; the case is by no means as startling as it sounds, because one has a comparable situation in detinue."[37]

It is extremely difficult to reconcile the various cases, many of them decided in isolation, but as the concept of adverse possession seems in danger of becoming as technical as it was before the Real Property Limitation Act, 1833, it is now proposed to try to state workable tests for ascertaining whether possession for the statutory period should confer a squatter's title and to see how far existing law will obey those tests. It is therefore submitted that,

(a) Possession for the requisite period should be

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36. (1809), 10 East 583.
37. [1957] 1 Ch. 475, at 481. Bridges v. Mees.

presumed to be adverse until the contrary is proved;

(b) This presumption of hostility should be rebuttable by proof that the possession has throughout the relevant limitation period been clearly referable to an existing lease, licence, trust, agency, or easement.[38] The actual belief or intention of the possessor should be irrelevant;

(c) Possession should be adverse when taken under the mistaken belief that the right to possession was conferred by an instrument or transaction which in fact conferred no such right (as distinct from a voidable right), for the reason again that the actual belief or intention of the possessor is irrelevant.

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38. Possession taken by a mortgagee is the subject of a special rule under s. 12 of the 1939 Act, whereby "when a mortgagee of land has been in possession of any of the mortgaged land for a period of twelve years, no action to redeem the land of which the mortgagee has been so in possession shall thereafter be brought by the mortgagor or any person claiming through him." The mortgagee's possession is not technically adverse under s. 10 of the 1939 Act and therefore, is not examined further in this thesis. If the mortgagor retains possession, this will be adverse to the mortgagee and will bar the mortgagee's right to take possession and to foreclose when the appropriate period has expired after the right to take possession or foreclose accrued (normally on the execution of the mortgage in the case of taking possession, or on the passing of the legal date for redemption in the case of foreclosure). As no special problem of adversity or hostility arises here, the possession of the mortgagor is not examined further in this thesis.

These submissions will be elaborated in this thesis by considering, first, in this introductory chapter what support there is in the authorities for a presumption of hostility and, then, in subsequent chapters considering the rebuttal of that presumption by discussing some of the special problems relating to the possibility of a lessee or a licensee becoming an adverse possessor; the effect of the relationship of trustee and beneficiary on adverse possession by either; the question of when bailiffship for an infant or insane person prevents "adversity" of possession, and the relationship of prescriptive acquisition of easements and profits to adverse possession of land. The possession of an agent is not treated in a separate chapter but the concept occurs in several of the above-mentioned chapters. Finally, in the last chapter of the thesis, will be considered the question whether possession taken under a mistaken belief as to the validity of a void or voidable instrument or transaction is adverse.

First, then, is there existing authority for a presumption of hostility? In Lyell v. Kennedy[39] Counsel argued,

> "The essential difference between a title by prescription and a defence under the Statute of Limitations is that in prescription a defendant relies on something he or his predecessors have done; under the Statute of Limitations the defendant relies on what the plaintiff has not done." 39.

39. (1889), 14 App. Cas. 437, at 443.

It is respectfully submitted that this is (or ought to be) a correct statement of the law - once the claimant proves he has had continuous possession for the relevant period owing to the owner's dispossession or discontinuance of possession, the onus should be on the owner to explain why he has apparently slept on his rights. This would be consonant with the judicially-declared policy of the limitation legislation as for the quieting of titles gained by long undisturbed possession.[40] It must be confessed that such little authority as there is in English law seems to be more in favour of a presumption against hostility rather than in favour of it. In Littledale v. Liverpool College,[41] for example, the evidence as to the claimants putting locked gates at the end of a strip of land seems to have been equally compatible with the protection of the claimants' undoubted right of way over the land and with a claim to adverse possession of the land itself. In that situation, the Court of Appeal appears to have held there to be a presumption against hostility, but this may be explained in terms of whether or not the claimants had had exclusive possession at all (see, for instance, Lindley, M. R's statement that "when possession or dispossession has to be inferred from equivocal acts,

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40. See, e.g., Streatfeild, J. in R. B. Policies at Lloyds v. Butler [1950] 1 K.B. 76, at 81, 82.
41. [1900] 1 Ch. 19.

the intention with which they are done is all-important."[42] Moreover, Counsel for the claimant was stopped after formally saying, "The evidence shows that the [original owners] have been dispossessed by the [claimants] and the [claimants] have acquired a title in fee under the Statute of Limitations" and Counsel for the original owners was then called upon to show that the prima facie adverse possession was explicable by reference to a right of way.[43] The Privy Council, in Corea v. Appuhamy[44], after considering evidence that a claimant who had taken possession of land might have taken either as a "plunderer" or might have taken because he was a co-owner of the land, said of the alleged "plunder," "But would such conduct, were it conceivable, have profited him? Entering into possession, and having a lawful title to enter, he could not divest himself of that title by pretending that he had no title at all. His title must have enured for the benefit of his co-proprietors. The principle recognized by Wood, V. C. in Thomas v. Thomas[45] holds good:

> "Possession is never considered adverse if it can be referred to a lawful title. "[46]

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42. [1900] 1 Ch. 19, at p.23.
43. See Chapter 5, pp.126-31 infra: cf. Rains v. Buxton (1880), 14 Ch.D. 537, at 540 (per Fry, J:- onus of proof on original owners to show possession not adverse).
44. [1912] A.C. 230.
45. (1855), 2 K. and J. 79.
46. [1912] A.C. 230, at 236.

On the other hand in Pelly v. Bascombe,[47] Stuart, V. C. was clearly of the opinion that there is a presumption of hostility. He said,[48]

> "One effect of the [Real Property Limitation Act, 1833] is materially to alter the law as to what is called adverse possession. The present state of the law is as follows:- The fact of a person receiving the rents of a property raises a presumption that he receives them in the character of owner; but this presumption may be rebutted in many ways. It may be rebutted by express evidence to the contrary; by evidence affecting the person who has entered into possession, or by evidence of the mode in which he has dealt with the rents."

In Gaved v. Martyn[49] the Court held that whether or not a long-enjoyed flow of water in an artificial watercourse was enjoyed precario or as of right was entirely a matter for the jury; there was no presumption either way[50] but in Gardner v. Hodgson's Kingston Brewery, Lord Davey, speaking of a claim to a prescriptive right of way, said,

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47. (1863), 4 Giff. 390; 66 E.R. 758. This was an "infant's bailiff" case, like Thomas v. Thomas (note 45 above) which was cited to the Vice-Chancellor and which he referred to in his judgment.
48. (1863), 4 Giff. 390, at 394; 66 E.R. 758, at 760.
49. (1865), 19 C.B. (N.S.) 732; 144 E.R. 974.
50. They refused to disturb a finding of the jury that the enjoyment was precario as referable to an agreement with the claimant's predecessor that the water might be used subject to the payment of a "furze-prickle," despite Counsel's strenuous argument based on the fact that no furze-prickle had ever been paid!

> "But one explanation is inconsistent with an enjoyment as of right, while the other is not so, and it is for the appellant to make out that she and her predecessors in title have enjoyed as of right."
> [51]

This is not necessarily inconsistent with the contention advanced in this thesis, that there should be a presumption of hostility so far as adverse possession is concerned, because of "the essential difference" between prescription and adverse possession referred to at the beginning of this particular discussion. Prescription requires positive acts; adverse possession[52] requires negative acquiescence.

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51. [1903] A.C. 229, at 238.
52. See note 39 supra.

CHAPTER 2.

LEASES, LICENCES AND LIMITATION.

If the claimant's possession is shown to have been taken initially under a lease or licence etc., i.e. was derivative, difficulties may arise as to whether thereafter it has become adverse. Here, it is clear that the presumption of hostility (if it exists) having been rebutted, the onus should then be on the claimant to show that possession which began by being derivative has become adverse and independent.

So far as leases and tenancies are concerned, arbitrary rules were enacted in the Act of 1833 for tenancies at will and non-written periodic tenancies and re-enacted in Section 9 of the Limitation Act, 1939. By those rules a tenancy at will is deemed to have determined and the lessor's right of action to have accrued at the end of its first year (unless sooner ended) and a yearly or other periodic tenancy, without a lease in writing, is deemed to have determined and the lessor's right of action to have accrued at the end of the first year or other period, unless further rent is paid, when the lessor's right of action is deemed to accrue on the last payment of rent. This is of course a clear indication that after the deemed

determination dates the Court should automatically regard any further possession by the lessee as adverse.[1] This is so, even though the lessor's right of action is fettered by the operation of the Rent Acts[2] since the test of adverse possession is not necessarily that the owner should have an unqualified right to sue for possession,

> "In my opinion, if one looks to the position of the occupier and finds that his occupation, his right to occupation, is derived from the owner in the form of permission or agreement or grant, it is not adverse, but if it is not so derived, then it is adverse, even if the owner is, by legislation, prevented from bringing ejectment proceedings."[3]

These statutory rules were first introduced by the Act of 1833 to reverse the former rule that the possession of a tenant at sufferance or a tenant at will was deemed to be that of his landlord and therefore could not be adverse to the landlord. Although arbitrary, they have the merit of certainty, an essential when proprietorial rights depend on the rules. Unfortunately, the same cannot be said of the rules relating to licences of land. If it is true that a licensee can obtain possession of land, that

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1. See Moses v. Lovegrove [1952] 2 Q.B. 533 (C.A.) where Counsel conceded the point and the Court agreed that it could not be argued otherwise.
2. Moses v. Lovegrove [1952] 2 Q.B. 533 (C.A.). Presumably the ratio decidendi of the case applies to any other security of tenure legislation e.g. the Agricultural Holdings Act, 1948, and the Landlord and Tenant Act, 1954, and whether or not the legislation comes into effect only after the tenant's adverse possession began (as in Moses v. Lovegrove) - see dicta of Evershed M.R. at [1952] 2 Q.B. at 541-2.
3. Ibid. [1952] 2 Q.B. at 544 (per Romer, L. J.).

possession must originally, under the licence, be derivative, so that the possession is not adverse.[3a] The difficulty is to ascertain when the licence is determined for the purposes of the law of limitation, so that further possession by the licensee thereafter is adverse. The Act of 1939 contains no provision on this point corresponding to the precise provisions of Section 9 of the 1939 Act. It is nevertheless submitted[4] that a licensee in possession may acquire title to the land if he proves that he has remained in possession for the requisite number of years after his possession ceased to be referable to the licence. This submission involves two assertions:

(i) That a licensee is capable of having possession of the licensed land;

(ii) That that possession, though originally derivative, can become independent and therefore adverse.

It is with the second of these assertions that this article is principally concerned since the first assertion has already been much controverted elsewhere.[5] Indeed,

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3a. Moses v. Lovegrove [1952] 2 Q.B. 533, at 544 (per Romer, L. J.).

4. The remainder of this chapter appeared as an article in (1966) Conveyancer, p.106 et seq., though I have made some additions since, in the light of my visit to Ireland.

5. See Marcroft Wagons v. Smith [1951] 2 K.B. 496 (C.A.); Errington v. Errington and Woods [1952] 1 K.B. 290 (C.A.); Cobb v. Lane [1952] 1 All E.R. 1199 (discussed at p. 35, infra); Murray Bull & Co. Ltd. v. Murray [1953] 1 Q.B. 211; and a valuable article by Mr. M. A. Peel (1964) 28 Conv. (N.S.) 253, especially at pp.255-7.

the House of Lords in their decision in National Provincial Bank Ltd. v. Ainsworth[6] were careful to leave open the question whether or not a deserted wife could be said to occupy the matrimonial home. Lord Upjohn spoke the following significant words, however,

> "Nevertheless, I cannot seriously doubt that in this case in truth and in fact the wife at all material times was and is in exclusive occupation of the home. Until her husband returns she has the dominion over the house and she could clearly bring proceedings against trespassers."[7]

This is a strong dictum in favour of a licensee having possession, since the House of Lords regarded the wife as having a weaker and less well-defined position than a licensee proper. Suffice it to say that criticism of the decisions of the courts to the effect that a licensee can have exclusive possession[8] does not involve criticism of the contention now being advanced, since such criticism has assumed, and indeed the Court of Appeal in Cobb v. Lane[9] is said to have decided, that a licensee can never acquire title by adverse possession.[10] This assumption must

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6. [1965] A.C. 1175; [1965] 2 All E.R. 472 Cf. Halden v. Halden [1966] 3 All E.R. 412 and Re a Debtor, Ex. p. The Trustee v. Solomon [1966] 3 All E.R. 255.
7. [1965] A.C. 1175 at 1232.
8. Supra, p. 23, note 5.
9. [1952] 1 All E.R. 1199.
10. See, e.g., A. D. Hargreaves: "Licensed Possessors" (1953), 69 L.Q.R. 466, especially at pp. 481-482.

therefore be that even if the licensee has possession, it can never be adverse. It is submitted that there is no need for such an assumption and that, although the licensee's possession will not become adverse automatically at the end of the first year of the licence, as it would if it were a tenancy at will,[11] it can nevertheless become adverse in certain circumstances that it is hoped in this ~~article~~ chapter to specify.

Let us therefore assume for the moment that there is no legal obstacle to a licensee's possession changing from derivative to adverse[12] and ask ourselves in the light of that assumption when a licensee's possession can become adverse. The deceptively simple answer given, it seems, by the Limitation Act, 1939, is, at the first point of time that a right of action against the licensee for recovery of the land accrues to the licensor.[13] It is clear that this does not involve saying that success must be predictable of the licensor's action - it merely means that time should run from the first moment that the licensor could commence proceedings to invoke the jurisdiction of the court, whatever the nature of the proceedings.[14]

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11. Limitation Act, 1939, s. 9.
12. See discussion of the argument that Cobb v. Lane [1952] 1 All E.R. 1199 (C.A.) decided otherwise, p. 35, infra.
13. Limitation Act, 1939, ss. 5 and 10.
14. Cf., definition of "action" as including "any proceeding in a court of law": Limitation Act, 1939, s. 31(1).

Clear analogous authority for this is the Court of Appeal's decision in Moses v. Lovegrove.[15] In May 1938 the defendant's weekly tenancy of the plaintiff's dwelling-house was deemed to have ceased for the purposes of the Limitation Act.[16] Nevertheless he remained in possession and it was not until 1952 that the plaintiff commenced proceedings for possession. From May 1938 until September 1, 1939, the dwelling-house was not controlled under the Rent Acts, but on that latter date it became controlled by the Rent Restriction Act, 1939, which of course placed ~~severe~~ restrictions on the plaintiff's right to recover possession. The house remained controlled by the 1939 Act up to the date of the action but the defendant ~~ex-tenant~~ did not simply rely on the protection of that statute: he boldly asserted that he had extinguished the plaintiff's title to the premises by more than twelve years' adverse possession. Undoubtedly, the defendant's possession was adverse between May 1938 and September 1939, but it was argued on behalf of the plaintiff that thereafter the defendant's possession ceased to be adverse, because of the fetters on the landlord's right to recover possession imposed by the Rent Act, 1939. The Court of Appeal unanimously rejected this argument, holding that the defendant's possession had

15. [1952] 2 Q.B. 533 (C.A.).
16. No rent having been paid since that date: Limitation Act, 1939, s. 9.

continued to be adverse, even after the Rent Act, 1939, Romer, L. J. in particular using language whose breadth makes it equally applicable to the case of licensor and licensee:

> "It seems to me that one can, in addition to looking at the position and rights of the owner, legitimately look also at the position of the occupier for the purpose of seeing whether his occupation is adverse. In my opinion, if one looks to the position of the occupier and finds that his occupation, his right to occupation, is derived from the owner in the form of permission or agreement or grant, it is not adverse, but if it is not so derived, then it is adverse, even if the owner is, by legislation, prevented from bringing ejectment proceedings."[17]

It may be argued that this dictum is of limited help in considering when a licensor's right of action accrues against his licensee, since in Moses v. Lovegrove, the Rent Acts only intervened after the period of possession had already begun in adversity, so that a right of action had undoubtedly accrued to the landlord at the beginning, whereas in the case of the licence, there will certainly be no right of action in the licensor at the commencement of the licence. Such an objection might be based on the earlier decision of the Court of Appeal in Warren v. Murray[18] that long possession under a contract for a lease was not adverse to the intended lessor so as to vest the legal estate in the intended lessee without the execution

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17. [1952] 2 Q.B. 533, at p. 544. Writer's italics.
18. [1894] 2 Q.B. 648.

of a lease. That decision was partly grounded on the finding that no right of action for possession ever accrued to the lessor, since equity would restrain him from enforcing his legal right to possession, the contract for the lease being specifically enforceable. It was also, however, based on the ground that the intended lessee being a tenant at will, there applied to him the proviso to section 7 of the Real Property Limitation Act, 1833 (tenancy at will deemed determined at end of first year at latest), that "no... cestui que trust shall be deemed to be a tenant at will within the meaning of this clause to his...trustee." The intending lessor being because of the contract an implied trustee for the intending lessee (as in the case of vendor and purchaser), time did not run in the intending lessee's favour for this reason.[19] But this proviso is not repeated in the corresponding section of the Limitation Act, 1939 (s. 9),[20] and for this reason Harman, J. in Bridges v. Mees,[21] having had Warren v. Murray cited to him, held

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19. See the judgment of Kay, L. J. in Warren v. Murray [1894] 2 Q.B. 648, at p. 656.
20. It is interesting to note that the proviso has been repeated in the Statute of Limitations, 1957 (Eire) (S. 17(1)(c)) and in the Statute of Limitations (Northern Ireland), 1958 S. 21(2), so that in those countries it would appear that even a bare trustee cannot lose his title through long-continued possession by a beneficiary absolutely entitled. Cf., Eire Statute, S. 25(4); N.I. Statute, S. 29(4), both in terms virtually identical to S. 7(5) of the Limitation Act, 1939 which, while providing that a beneficiary's possession of settled land or land held on trust for sale is not adverse to the trustee, excepts "a person solely and absolutely entitled thereto."
21. [1957] Ch. 475; see infra, p. 39.

nevertheless that the possession of a purchaser under a specifically enforceable contract was adverse to the vendor, and the purchaser therefore extinguished the vendor's legal estate by the requisite period of adverse possession. He considered the argument that the vendor had had no right of action against the purchaser, since the purchaser was equitable owner of the land from the contract onwards, but dismissed it summarily in these words:

> "It was argued that...the trustee himself could never have brought an effective action to recover the land, because he would have been met by the plea that the whole beneficial interest was vested in the purchaser; but, in my judgment, the question cannot turn on whether the action would have succeeded or no."[22]

If one wished for further support in reply to an objection of Warren v. Murray, one finds that in Moses v. Lovegrove[23] itself, Evershed, M. R. doubts whether the decision would have been any different if the Rent Acts had applied to the house throughout the period of the former tenant's possession.[24]

Bearing in mind the guidance given by Moses v. Lovegrove[25] and Bridges v. Mees[26] on the modern judicial view of what is meant by the accrual of a right of action

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22. [1957] Ch. 475, at p. 485. Harman, J. cited Re Cussons (1904), 73 L.J. Ch. 296, at p. 298, to like effect.
23. [1952] 2 Q.B. 533, supra, p. 26.
24. [1952] 2 Q.B. 533, at p.541.
25. [1952] 2 Q.B. 533.
26. [1957] Ch. 475.

for the recovery of possession of land, let us look a little more closely at the licensor to ascertain when his right of action accrues. It is submitted that the possession of a licensee should be regarded as adverse as soon as the licensor revokes or purports to revoke the licence, even if in breach of contract.[27] The possibility that equity might specifically enforce the licence by injunction, so much canvassed when the licence is alleged to operate in rem, need not affect this submission, since Moses v. Lovegrove and Bridges v. Mees[28] have already been demonstrated as showing that it suffices that the plaintiff can at law at least invoke the court's jurisdiction. It ought not to lie in the licensor's mouth to say at once that he has withdrawn his permission and that he has not withdrawn it.

A fortiori, the deserted wife's possession of the matrimonial home should become adverse as soon as her husband denies by word or by conduct the lawfulness of that possession. He can then invoke the courts' jurisdiction under section 17 of the Married Women's Property Act, 1882.[28a] and it is immaterial that the court has a discretion whether or not it will order the wife to go, just as in Moses v. Lovegrove[29] it was immaterial that the court had

27. Possibly if the licence is coupled with an interest, possession could not be regarded as adverse until the interest has terminated.
28. Supra, p. 28.
28a. But see Spoor v. Spoor [1966] 3 All E.R. 120: Furthermore, the provisions of the Matrimonial Homes Bill, if and when enacted, may be interpreted as referring a spouse's occupation of the matrimonial home as referable to the statutory right and therefore not adverse.
29. [1952] 2 Q.B. 533, supra.

a discretion as to the grant of a possession order against a Rent Act protected tenant. In the Irish case of Keelan v. Garvey,[30] the Supreme Court held that a wife who resided on a farm for twenty-six years after her husband (the owner) left the farm had not acquired title by adverse possession against her husband, since her residence at the farm was attributable to the fulfilment of the marital obligation of a husband to provide a home for his wife. This must not, however, be taken as authority for the view that a deserted wife could not acquire title by adverse possession against her husband, since in this case the husband was found not to have been in desertion,[31] so that the wife never acquired independent possession of the land. O'Connor, J. said:[32]

> "It would not be quite accurate to describe a wife living with her husband as his guest or as a licensee, but she is certainly not his tenant, and she has no independent possession. In the present case the wife had during the consortium no estate or interest of any kind in the land. There was not the least necessity for the purpose of carrying out the arrangement or understanding that she was to have means of support during the separation."

In another part of O'Connor, J's judgment, the following significant passage occurs:

> "...if the husband announced to his wife that he did not intend to return, that he abandoned her and his family and farm, or if the circumstances showed that such was his intention,

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30. [1924] 1 Ir.R. 107; reversed on appeal [1925] 1 Ir.R. 1.
31. [1925] 1 Ir.R. 1 at pp. 8 and 11.
32. Ibid. at p. 11.

> then the conclusion might fairly be drawn that the previous unity which made the wife the mere bailiff or agent of the husband was severed, and that her subsequent possession was not his possession but her own. But in such a case the question would be one of fact to be arrived at from all the circumstances of the case. Such a question might arise, not merely between husband and wife, but between father and child, sister and brother, and even between strangers in blood."[33]

Here is a powerful support for the contention advanced in this article that the deserted wife can acquire title to the matrimonial home by adverse possession against her husband. Indeed, the passage cited seems to go further and to say that the deserted wife is an adverse possessor from the moment of the desertion itself and not merely from the time that the husband denies the lawfulness of her possession. This is in accord with the realities of the situation, since the deserting husband's "licence" to his wife to live in the matrimonial home is not a true voluntary permission but a legal fiction to enable the wife to assert her possession against her husband.

Indeed, in Re Michael Daily[34] the Court of Appeal in Northern Ireland has actually held that a wife left by her husband with infant children of the marriage in the matrimonial home was ab initio an adverse possessor and therefore extinguished her husband's title twelve years after her

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33. [1925] 1 Ir.R. 1 at p. 9.
34. [1944] 1 N.Ir. 1.

husband first "abandoned" her. The Northern Irish Court of Appeal was much pressed by the husband's counsel with the Irish Supreme Court's decision in Keelan v. Garvey,[35] but they distinguished it on various grounds, the one relevant to our purpose being that in Keelan v. Garvey[35] the husband had "an arrangement or understanding" with the wife that she could stay in the matrimonial home, which element was not present in the case before them. It is unhappily difficult to discover from the report of Re Michael Daily[35a] whether the husband in that case had deserted his wife, in the divorce law sense of that word. The Court of Appeal adopted the finding of the county court judge that the husband "ceased to reside" in the matrimonial home "and had no intention of returning," yet they interpreted the wife's evidence before the county court judge as meaning that the husband left with the wife's approval, indeed at her suggestion, which would negate desertion by the husband.[36]

To return from the special case of the deserted wife to licensees generally, it is also submitted that the licensee's possession should be regarded as adverse if he repudiates the licence unilaterally and claims thereafter

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35. [1925] 1 Ir.R. 1, supra.
35a. [1944] 1 N.Ir. 1.
36. See Lee: "Acquisition of Title to Registered Land by Adverse Possession", (1965), 31 Irish Jurist, p. 33 for an account from a different standpoint of these cases.

to hold possession in his own right. There is ample precedent in other fields of adverse possession - the infant's bailiff by refusing to deliver possession when demanded by the former infant, now adult, renders his continued possession thereafter adverse;[37] the agent in possession on behalf of his principal may declare his agency determined and that he holds thenceforth on his own account.[38] Even if the licence is contractual and for a fixed time, such conduct would prematurely determine the licence, but possibly only if the licensor elected to treat it as a repudiation.[39] The rules that a licence that is apparently perpetual may in fact be determinable by reasonable notice[40] and that determination of the licence may be inferred from the conduct of the parties as well as their statements[41] should also be available to change the licensee's possession from derivative to adverse.

A possible hurdle for an advocate of the principles

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37. McMahon v. Hastings [1913] 1 Ir.R. 395.
38. This seems to have been assumed by the House of Lords in Lyell v. Kennedy (1889), 14 App. Cas. 437. Cf., Ward v. Carttar (1865), L.R. 1 Eq. 29.
39. Cf., the much criticised decision of the House of Lords on anticipatory breach of contract in White and Carter (Councils) Ltd. v. McGregor [1962] A.C. 413 and s. 8 of the Limitation Act, 1939, as to premature forfeiture of a lease by, e.g., denial by tenant of landlord's title.
40. Martin-Baker Aircraft Ltd. v. Canadian Flight Equipment Ltd. [1955] 2 Q.B. 556.
41. Cf., the one-year rule in the case of a tenancy at will: Limitation Act, 1939, s. 9(1).

contended for in this article is the decision of the Court of Appeal in 1952 in Cobb v. Lane.[42] In that case, an action "for possession" of a house was brought against a brother by executors of his deceased sister. The sister had some fifteen years before allowed the brother to take possession of the house and live there with his family. He never paid any sum for use and occupation of the house, and paid the rates only for the first year, the sister thereafter paying them. The plaintiffs claimed possession on the footing that the brother (the defendant) was a licensee. He defended on the ground that he was a tenant at will and therefore after thirteen years had extinguished his sister's title to the house by twelve years' adverse possession after the notional determination of the tenancy at will one year after its commencement.[43] The Court of Appeal unanimously held that the defendant was a licensee, and not a tenant at will, the test of exclusive possession no longer serving to distinguish a tenant from a licensee since the real issue was the intention of the parties when they made the arrangement.[44] The controversy in the case seems to have turned entirely on whether there was a tenancy or a licence, and it seems to have been assumed without

42. [1952] 1 All E.R. 1119; [1952] W.N. 196 (C.A.).
43. Under s. 9(1) of the Limitation Act, 1939.
44. Cf., cases where similar family arrangements were held to create tenancies at will and not licences - Nicholson v. England [1926] 2 K.B. 93, infra p.38 and Bell v. Bell (1957), 9 D.L.R. 767 (2d)(Ont.).

argument that if there were a licence, no question of adverse possession could arise. Lord Justice Denning said:

> "The defendant had only a personal privilege with no interest in the land, which he could assign or sublet, and he could not part with the possession to another. He was only a licensee and he cannot pray in aid the provisions of the Limitation Act, 1939."[45]

This dictum is capable of two interpretations:

(i) That the licensee in Cobb v. Lane had not acquired title by adverse possession because there was no evidence that his possession had ever been otherwise than derived from the licence, i.e., the licence had not been expressly or impliedly determined; or

(ii) That no licensee can ever acquire a title by adverse possession.

If (i) is the correct interpretation, this causes no difficulty since it is merely an inference from the facts of the particular case and is no bar to future decisions that a licence has been determined and the licensee holding over is in adverse possession.[46] If (ii) is the true

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45. [1952] 1 All E.R. 1199 at p. 1202.
46. Cf., E. R. Ives Investments Ltd. v. High [1967] 1 All E.R. 504, at 508, 510 and 513, where the Court of Appeal held that the existence of a licence (not revoked) to protrude footings of a building into a neighbour's subsoil precluded a claim to adverse possession of the subsoil.

interpretation, then it is respectfully submitted that it would be unjust and out of accord with the general principle which as we have seen runs throughout the law of adverse possession that a possession at first derivative can become adverse. In Hunter v. Crawford,[47] for example, it was held that a mere caretaker could become an adverse possessor when he inquired whether he might purchase the land of which he was caretaking, since this showed an intention to hold possession thereafter in his own right.[48] In Peakin v. Peakin,[49] Andrews, J., while holding that two sisters' occupation of their brother's house was not referable to a tenancy at will, was careful to say of his finding that they were merely his guests: "It was in this capacity that they were allowed to enter...and there never was any change in the nature of their occupation."[50]

It may be that in Cobb v. Lane the Court of Appeal were in some way influenced by the fact that the defendant brother in that case occupied the house as a result of arrangements made during a Christmas family gathering. Somervell, L. J. cited with approval a passage from the judgment of Lord Greene, M. R. in Booker v. Palmer[51] during

47. (1842), 5 Ir.L.R. 402.
48. Cf., however the decision of the Court of Appeal in Nightingale v. Courtney [1954] 1 Q.B. 399 that a lessee's contract to buy the lessor's reversion is not normally an implied surrender of the lease.
49. [1895] 2 Ir.R. 359.
50. Ibid. at p. 360.
51. [1942] 2 All E.R. 674, at p. 676 (C.A.).

which the Master of the Rolls said:

> "Where the parties enter into a formal document the intention to enter into formal legal relationship is obvious; but when all that happens is a quite casual conversation on the telephone, it is very much more difficult to infer that the parties are really contemplating entering into any legal relationship at all and in particular, such a special relationship as that of landlord and tenant... There is one golden rule which is of very general application, namely that the law does not impute intention to enter into legal relationships where the circumstances and conduct of the parties negative any intention of the kind."

This language seems more appropriate to the denial of an intent to create legal relations - the Balfour v. Balfour[52] type of case - than the test of the distinction between licensee and tenant.

In Nicholson v. England,[53] Sankey, J. heard a case similar to Cobb v. Lane,[54] which involved a daughter's long possession of her father's house, but the learned judge came to the conclusion that there was a tenancy at will. He was fortified in this conclusion by the fact that the daughter had paid a lump sum to her father which he held was rent, the main point of the case being whether the payment revived the father's right of action. It is interesting to observe that Counsel for the plaintiff father

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52. [1919] 2 K.B. 571 (C.A.).
53. [1926] 2 K.B. 93.
54. [1952] 1 All E.R. 1199.

admitted, "If there was here no tenancy between the parties, the plaintiff might have difficulty in showing that the action was not barred by limitation,"[55] it being apparently assumed by him and by Sankey, J.,[56] that, if the defendant daughter had been a licensee, she would have acquired a title by adverse possession, presumably on the ground that the licence had determined by the daughter for many years not paying the yearly nominal sum that she had agreed to pay her father.

A most illuminating case in the no-man's land of tenancies, licences and trusts is the decision of Harman, J. in Bridges v. Mees.[57] The plaintiff in the action asked for a declaration (inter alia) that he had acquired title by adverse possession to registered land and for rectification of the register accordingly. Some nineteen years before, the plaintiff had orally contracted to purchase the land for £7, this sum having been paid by him to the vendor within about a year after the contract was made. By that time the plaintiff had gone into possession of the land (an act of part performance to render the contract, though oral, specifically enforceable) and had retained possession continuously up to the date of the action, but

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55. [1926] 2 K.B. 93, at p. 99.
56. Ibid. at p. 104.
57. [1957] Ch. 475; see also p. 28, supra.

the defendant who had allegedly purchased the legal fee simple from the plaintiff's vendor and who had been registered as proprietor denied that the plaintiff's possession had been adverse, since it was derived from the original contract.

Much of the controversy in the case concerned the difficulty that the vendor had become a constructive trustee of the legal estate for the plaintiff purchaser and it became therefore necessary to decide whether a beneficiary in possession can acquire a title against his trustee. On a construction of section 7 (3) and (5) of the Limitation Act, 1939, Harman, J. held that in the case of a beneficiary absolutely entitled in equity to the trust land, the beneficiary could acquire the legal estate from his trustee by adverse possession,[58] but it is also instructive to look at the case from the point of view of the tenancy at will/licensee dichotomy.

It is not altogether clear from the case whether Harman, J. differentiated between the possibility that the purchaser was a tenant at will of the vendor and the possbility that he was a licensee of the vendor. No doubt he was influenced in his decision by the normal rule of law that a purchaser let into possession before completion is

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58. Cf., the position in Eire and Northern Ireland - see note 20, supra.

a tenant at will.[59] Further, his decision on the trustee/beneficiary aspect of the case was based on the abolition of the proviso to section 7 of the Real Property Limitation Act, 1833, which proviso proceeded on the assumption that a beneficiary in possession was tenant at will to the trustee. Nevertheless, common form standard conditions of sale[60] provide that a purchaser taking possession before completion shall take possession as licensee and not as tenant and indeed in Bridges v. Mees itself, though not a case where the contract embodied any standard conditions of sale, Harman, J. said: "No doubt possession, when originally taken, may be referred to the vendor's leave and licence, but the position altered when the vendor's lien disappeared."[61] In other words, when the purchaser pays the full purchase price to the vendor and discharges the latter's lien, the licence is impliedly determined since the purchaser thereafter holds possession in his own right as absolute equitable owner.

In conclusion let us, so far as licences are concerned, take a well-known piece of practical advice and say, "If you cannot beat them, join them." Let us accept that the

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59. Howard v. Shaw (1841), 8 M. & W. 118; Wheeler v. Mercer [1957] A.C. 416, at p. 425.
60. e.g., the Law Society's Conditions of Sale and the National Conditions.
61. [1957] Ch. 475 at p. 484; cf., Toft v. Stephenson (1848), 7 Hare 1 at pp. 18-19.

licensee in possession is here to stay and accord him a respectable status in the law of limitation. It is unrealistic to decide the adversity of possession solely by attaching to the possessor an arbitrary label, "tenant at will" or "licensee." If it is desired to reject a particular period of long occupation as constituting adverse possession, there will be found quite adequate for the purpose the existing rules relating to intention to exclude all legal relations and those rules as to the nature of the acts necessary to constitute dispossession or taking possession after discontinuance.[62]

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62. See Limitation Act, 1939, s. 10, and Leigh v. Jack (1879), 5 Ex.D. 264; Williams Brothers Direct Supply Ltd. v. Raftery [1959] 1 Q.B. 159.

C H A P T E R 3.

LIMITATION, TRUSTEES, AND BENEFICIARIES.

No difficulty arises over the possession of a trustee *qua* his beneficiary because of the categorical provision of Section 19(1) of the Limitation Act, 1939, that,

> "No period of limitation prescribed by this Act shall apply to an action by a beneficiary under a trust, being an action...(b) to recover from the trustee trust property or the proceeds thereof in the possession of the trustee, or previously received by the trustee and converted to his use."

The only problem is to what kinds of trustee this provision applies in view of the reference by Section 31 (2) of the 1939 Act for the definition of "trustee" to the Trustee Act, 1925, which in turn defines trustee as including an implied and constructive trustee and a personal representative.[1] Discussion of the ambit of this definition will be found in the Chapter below on Infants' and Insane Persons' bailiffs and on possession taken by mistake.[2]

However, problems do arise in connection with the possession of beneficiaries *qua* one another and *qua* their trustee.

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1. Trustee Act, 1925, s. 68(17).
2. *Infra*, Chapter 4, pp.75-9; Chapter 6, pp. 211-13.

Fifty years ago[3] in an article in the Law Quarterly Review under the title "Adverse possession by a Cestui Que Trust,"[4] Charles Sweet made a plea on behalf of the beneficiary under a bare trust that he should, by long possession of the land held upon trust, in certain circumstances acquire a fee simple and extinguish his trustee's estate, on the ground that that possession was legally capable of being adverse. That plea was to a degree at least answered by the decision of Harman, J., as he then was, in Bridges v. Mees[5] in 1957. The learned judge then held that the possession for the statutory period of a contractual purchaser of land was capable of being adverse to the vendor, despite the fact that the vendor held the legal estate on a bare trust for the purchaser.

The purpose of this Chapter is, Oliver Twist like, to ask for more. A plea will be made for three more kinds of beneficiary to be regarded as able to acquire an absolute interest in trust land, though the trust is more than a bare trust. These three kinds are:

(1) the beneficiary who has had his beneficial status thrust upon him only after he has taken possession of the land adversely;

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3. The remainder of this chapter originally appeared in (1965) Conveyancer 356, though I have made one additional footnote in the light of my visit to Ireland.
4. (1914), 30 L.Q.R. 158.
5. [1957] Ch. 475.

(2) the beneficial co-owner who succeeds for the statutory period in ousting his fellow co-owners from possession of the land;

(3) the infant entitled to an absolute interest in land or in the proceeds of sale of land held upon trust for sale.

These three have not necessarily anything in common, except that they appear to be able to elude the prohibition contained in section 7(5) of the Limitation Act, 1939, reading,

> "Where any settled land or any land held on trust for sale is in the possession of a person entitled to a beneficial interest in the land or in the proceeds of sale, not being a person solely and absolutely entitled thereto, no right of action to recover the land shall be deemed for the purposes of this Act to accrue during such possession to any person in whom the land is vested as tenant for life, statutory owner or trustee, or to any other person entitled to a beneficial interest in the land or the proceeds of sale."

Section 7 is new - it had no counterpart in the Real Property Limitation Act, 1833 (repealed in its entirety by the Limitation Act, 1939) - but we have it on the authority of the then Solicitor-General, introducing the Bill to become the 1939 Act, that "clauses 4 to 7 deal with a limitation of actions in respect of land and they consist mainly of tidying-up provisions. Within those clauses will be found not so much new law as a codification of the existing laws, so that, at any rate, it is possible to

find out what the law is within the limits of one Bill."[6] The 1939 Act was the intended implementation of the 1936 Report of the Law Revision Committee[7] which did not recommend any change in the law relating to adverse possession by a cestui que trust. It is clear that before the 1939 Act a beneficiary's possession could be adverse ab initio if he had entered as absolute owner without assistance from or reference to the trustee.[8] Moreover, apart from the proviso to section 7 of the Real Property Limitation Act, 1833, excluding from the tenancy at will of the cestui que trust the statutory presumption of determination at the end of the first year,[9] the beneficiary's possession qua beneficiary could presumably thereafter determine and become adverse. In 1914, Charles Sweet certainly felt able to write of the beneficiary — "He can no longer disseise his trustee by executing a feoffment as he could before 1845, but under the present law as under the old law, there seems no doubt that he can put an end to the tenancy at will by holding the trustee at defiance; in other words by making it clear that he intends to retain possession independently of the trustee."[10]

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6. (1938), 338 H.C.Deb. 2149.
7. Fifth Interim Report - 1936 Cmd. 5334.
8. Burroughs v. M'Creight (1844), 7 Ir.Eq.R. 49; Doe d. Jacobs v. Phillips (1847), 10 Q.B. 130.
9. The "one year" rule is re-enacted in s. 9(1) of the 1939 Act but the exclusion of the beneficiary is omitted.
10. (1914), 30 L.Q.R. 158, at pp. 163-4.

In approaching the three problems mentioned above,[11] it is therefore permissible to lean in favour of adverse possession by a beneficiary, unless there is some clear change in the law to alter the earlier rules. If the Limitation Act, 1939, is to deserve the appellation, "Act of Peace," given by the judges to its predecessor,[12] it should not be invoked to disturb the long continued possession of a squatter merely because at some stage he had a limited beneficial interest in the land. Let us examine in turn each of the three classes of beneficiary that we have singled out as possible adverse possessors:

(1) The beneficiary who has his beneficial status thrust upon him only after he has taken possession of the land adversely;

(2) The beneficial co-owner who succeeds for twelve years in ousting his fellow co-owners from possession of or receipt of rents of the land.

These two classes are grouped together since, as we shall see, similar problems arise in relation to both classes.

The first category presents the converse of Charles Sweet's illustration of the beneficiary who afterwards

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11. Supra, p. 44.
12. See Best, C. J's citation of "great judges" in A'Court v. Cross (1825), 3 Bing. 329 at p. 332.

claims to hold in his own right. Here we consider the possessor who originally claimed in his own right but afterwards, before the twelve years are up, becomes a beneficiary. Literally read, section 7(5) of the 1939 Act[13] appears to cover this case. It will be recalled that the subsection says simply, "Where any settled land or any land held on trust for sale is in the possession of a person entitled to a beneficial interest in the land or in the proceeds of sale" and does not add words requiring that that possession should have been taken and maintained by reference to the strict settlement or trust for sale. Then the sub-section continues, "no right of action to recover the land shall be deemed for the purposes of this Act to accrue during such possession." If, however, the right of action had already accrued before the beneficial interest arose, ought not time to continue to run despite the subsection? There would be a respectable parallel with the undoubted rule that a disability in the plaintiff will not suspend the running of time against him if on the day when the cause of action accrued to him, he was under no disability.[14] Suppose that Doe has dispossessed Roe of Blackacre. Will Doe's possession cease to be adverse if, say, two years later Roe dies, by his will giving Doe a

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13. Cited in full at pp. 44-5, supra.
14. See the Limitation Act, 1939, s. 22.

life interest in the land? Despite the wide wording of the subsection, it should be justifiable to exclude a case of this kind from its operation, for otherwise one could defeat an adverse possessor without ever going near a court by the simple expedient of settling the land on him for a limited interest, whether he liked it or not!

A similar problem occurs in relation to the rule enacted by section 19(1) of the 1939 Act that, "No period of limitation prescribed by this Act shall apply to an action by a beneficiary under a trust, being an action...to recover from the trustee trust property or the proceeds thereof in the possession of the trustee, or previously received by the trustee and converted to his use." What if a man first takes adverse possession of land and then subsequently finds himself made a trustee of it by express declaration, by statute, or by judgment of the court? It seems clear that merely because he "stole" the land in the first place and thereby became in a sense a constructive trustee, nevertheless at that stage section 19(1) of the 1939 Act would not be brought into operation, despite its definition of "trustee," culled from the Trustee Act, 1925, as including implied and constructive trustees.[15] Why

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15. Taylor v. Davies [1920] A.C. 636, at pp. 652-3; Tintin Exploration Syndicate Ltd. v. Sandys (1947), 177 L.T. 412.

then should time be suspended from running merely because after a cause of action has once accrued the adverse possessor acquires the status of a trustee? The problem is particularly critical where, as in Re Landi,[16] the erstwhile adverse possessor subsequently becomes simultaneously both trustee and beneficiary, in that case, as we shall see, under the transitional provisions of the 1925 property legislation.

At first sight Re Landi,[16] decided by the Court of Appeal one month after the passing of the Limitation Act, 1939, but on the law prior to its coming into force, seems to be directly against the view advanced in this ~~article~~ chapter that the subsequent status of an adverse possessor does not matter. In that case Landi and Fantoni purchased in 1915 a house which they held as tenants in common in undivided shares. Until July 1923 they occupied the house themselves but then their occupation ceased and the house was let at a rent, Landi from the beginning keeping and collecting the entire rent. This he did until his death in May 1935, just under twelve years from the date when he first started to collect and keep the rent. Landi never rendered any accounts to Fantoni and made no payment to him. Landi's executors continued to collect the entire

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16. [1939] Ch. 828 (C.A.); see a valuable note on the case by R. E. Megarry in (1941), 57 L.Q.R. 26.

rent for long enough to complete the full twelve years from July 1923. Then a claim was made against Landi's executors by the personal representative of Fantoni (he died after Landi) for a half share of the rents from July 1923, when Landi first started to collect the rents, to the date of Landi's death. The trial judge, Simonds, J., held that it was relevant to consider whether Fantoni's title to an undivided share in the house had been extinguished by adverse possession by Landi since this extinction would bar any claim at all to rents, no matter when the right to sue for them accrued. Thus was also raised the problem of whether one co-owner can extinguish the titles of his fellow co-owners, the plea on behalf of the adverse co-owner being the second of the pleas set out at the beginning of this article.

Greene, M. R., who delivered the only reasoned judgment in the Court of Appeal would not commit himself to the view that it was necessary to decide the titles to the undivided shares as a preliminary to deciding the claim to an account of the rents, but he nevertheless gave judgment on the footing that it was a relevant preliminary. He held that from midnight on December 31, 1925, when the Law of Property Act, 1925, imposed a statutory trust for sale on all cases of undivided shares in land[17] the receipt of

17. s. 34; Sched. I, Pt. IV.

rents by Landi was as a trustee for sale and not, therefore, adverse.[18] This reasoning would, of course, be equally applicable to a pre-1926 beneficial joint tenancy, since a statutory trust for sale is also imposed in such a case.[19] The learned Master of the Rolls, therefore, held that the claim of Fantoni's personal representative succeeded for the period from January 1, 1926, onwards, though for the period from July 1923 to the end of 1925 it was barred by the independent limitation period of six years for an action for an account.[20]

It would perhaps be facile to distinguish Re Landi as not being a binding decision in relation to adverse possession of land, since the claim was for an account of moneys and it would presumably have been perfectly possible to have arrived at the same conclusion by applying section 19(1) to exclude any period of limitation for a claim to trust moneys received by a trustee and converted to his own use. But the judgment of Greene, M. R., was intended to apply equally to adverse possession of land. He said,

> "The previous relationship of tenants in common, or joint tenants, had nothing in the world to do with trusteeship. It was, of course, possible for tenants in common by appropriate conveyancing methods to introduce the conception

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18. Cf., Re Milking Pail Farm Trusts [1940] 1 Ch. 996.
19. Law of Property Act, 1925, s. 36.
20. Now the Limitation Act, 1939, s. 2(2).

> of trusteeship into their relationship, but the mere fact that they were tenants in common introduced no fiduciary element at all. Under the Law of Property Act, 1925, that fiduciary element unquestionably came into the picture, and it constitutes a trust under which their obligation as trustees is an obligation to sell the property and divide the proceeds, and in the meantime their possession is the possession of trustees because it is in that capacity that they hold the legal title. Their receipts of the rent would be in the same capacity - namely, as reversioners holding the reversion expectant on the determination of the lease. Of course they have another character as well, that of beneficiaries. Each of them is a trustee and each of them is a beneficiary."[21] (Writer's italics.)

In view of this passage, Re Landi may find itself cited as authority for two propositions:

(i) that if an adverse possessor becomes a trustee or a beneficiary of the land his possession will cease to be adverse;

(ii) that a beneficial tenant in common or joint tenant can since 1925 never possess adversely to his co-tenants.

It is respectfully submitted that Re Landi is no authority for either of these propositions. Let us take each in turn:

(1) It is true that the generality of Greene, M. R's remarks just cited[21] is sufficient to cover the situation of an adverse possession by Landi before 1926, followed by a statutory appointment of him as trustee, and indeed

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21. [1939] Ch. 828, at p. 835.

Simonds, J. had held in the court below that Landi's pre-1926 possession was adverse. However, there was evidence that Landi in that early period had admitted to Fantoni that he was receiving the rents for them both and, indeed, he kept a record of them in an account-book headed with their two names. Bearing this in mind, Greene, M. R. doubted whether the pre-1926 period was one of adverse possession by Landi, "...it appears to me that there are very formidable arguments in support of the contrary opinion."[22] The point did not have to be decided in view of the actual ground for disallowing the claim to the pre-1926 rents - namely, that an action for an account was barred by the six-year period.

There is indeed a passage in argument in Re Landi in which Clauson, L. J., who concurred in Greene, M. R's judgment, seems to indicate that he would have been in favour of the contention that possession does not cease to be adverse because subsequently the possessor becomes beneficiary or trustee. Counsel for the plaintiff was arguing that even if Landi's possession had throughout been adverse, the last few months of the twelve years had been possession by his executors, whose possession "should be attributed to a rightful title - namely, that of trustees of the will."[23]

22. Ibid. at p. 834.
23. Ibid. at pp. 830-1. Cf., the Trustee Act, 1925, s. 18(2).

He argued that: "For the Act of 1833 to apply there must be unequivocal possession for the possessor's own benefit. A possession in a different character cannot be added to an earlier period of adverse possession to make up the twelve years."[23a] But to this Clauson, L. J. retorted: "The executors seem to have been receiving Fantoni's share of the rents as mere trespassers, and if no action is brought to oust them before the period of adverse possession running at the testator's death has been made up to twelve years, any subsequent action must fail."[23a]

It is, of course, true that "possession is never adverse if it can be referred to a lawful title,"[24] but the case from which this celebrated dictum comes, Thomas v. Thomas,[24] was one where the possessor had possessed ab initio as bailiff or trustee for the infant owner. Similarly in Doe d. Miller v. Brightwen[25] the husband who took possession as a fee simple owner of his wife's land, when unknown to him he was a tenant by the curtesy of it, failed in his claim to a fee simple by adverse possession because his unwanted tenancy by the curtesy was already in existence when first he entered the land intending to

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23a. [1939] Ch. 828, at pp. 830-1. Cf., the Trustee Act, 1925, s. 18(2).
24. Per Page-Wood, V.-C. in Thomas v. Thomas (1855), 2 K. & J. 79, at p. 83.
25. (1809), 10 East 583.

claim it for his own. Again in Lister v. Pickford[26] the trustees who took possession of land, thinking that they held it for the wrong beneficiary under the will, were ab initio also trustees for the correct beneficiary under the will, and it was for that reason that their possession on behalf of the wrong beneficiary was not adverse to the correct one. In Murchison v. Murchison,[27] a Canadian court held that: "A judgment appointing a cestui que trust as trustee cannot be extended beyond its ordinary meaning so as to take away a property of which the cestui que trust has become owner by adverse possession and put it back into the estate."[28] It is submitted that there is no obstacle, either in section 7(5) of the Limitation Act, 1939, or in Re Landi,[29] to extending this proposition of law to a case where the appointment of a trustee or the conferring of a beneficial interest occurs after possession is first taken adversely, in whatever way that appointment or conferring takes place.

(2) The second proposition, for which Re Landi is certainly cited, is the statement that a beneficial tenant in common or joint tenant can since 1925 never possess adversely to his co-tenants. It may well not be possible

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26. (1865), 34 L.J.Ch. 582.
27. (1889), 17 O.R. 254.
28. Citation from English and Empire Digest, Vol. 32, p. 528.
29. [1939] Ch. 828 (supra).

to refute this statement by calling in aid the arguments advanced in (1) above, since there may be a case where the co-ownership came into existence only after 1925, so that ab initio trusteeship was superimposed on co-ownership by the Law of Property Act, 1925. If, indeed, Re Landi did decide this point, it is a distinctly odd decision, since it was well established before 1926 that one co-owner could by an actual or presumed ouster of his fellows extinguish their titles.[30] In fact the matter was made explicit by section 12 of the Real Property Limitation Act, 1833, which read:

> "And be it further enacted, That when any One or more of several Persons entitled to any Land or Rent as Coparceners, Joint Tenants, or Tenants in Common, shall have been in possession or Receipt of the Entirety, or more than his or their undivided Share or Shares of such Land or or the Profits thereof, or of such Rent, for his or their own Benefit, or for the Benefit of any Person or Persons other than the Person or Persons entitled to the other Share or Shares of the same Land or Rent, such Possession or Receipt shall not be deemed to have been the Possession or Receipt of or by such last-mentioned Person or Persons or any of them."

This section was, together with the rest of the 1833 Act, repealed by the Limitation Act, 1939, which itself contains no corresponding provision.[31] It is submitted, however,

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30. See Halsbury's Laws of England, 2nd ed., Vol. XX, p. 711, para. 942.
31. The Statute of Limitations, 1957 (Eire), s. 21 and the Statute of Limitations (Northern Ireland), 1958, s. 25 both enact provisions similar to those of s. 12 of the 1833 Act, but in those countries co-ownership does not have to take effect behind a trust for sale.

that the repeal of section 12 does not ipso facto revive the technicalities of the pre-1833 doctrine of non-adverse possession, with its ancestry in the mists of disseisin at election, which the 1833 Act was concerned, and not only in this context, to abolish.[32] We have it on the authority of ~~Lord~~ Sir Raymond Evershed, then Master of the Rolls, that: "The notion of adverse possession, which is enshrined now in section 10 [of the 1939 Act], is not new; the section is a statutory enactment of the law in regard to the matter as it had been laid down by the courts in interpreting the earlier Limitation Statutes."[33] There is no indication, either in the Report of the Law Revision Committee[34] or in the debates on the Bill in Parliament, that by the simple omission of a section corresponding to section 12 of the 1833 Act, it was intended to take the drastic step of restoring the old doctrine of automatic non-adverse possession by an ousting co-owner. Probably the wording of section 12 was dropped because of its antiquity and of its being inappropriate to the modern notion of co-ownership taking effect behind a trust for sale, but, as will be seen later in this Chapter, it is suggested that other provisions in the Limitation Act, 1939, were intended to take its place.[35]

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32. For an account of the pre-1833 doctrine of non-adverse possession, see Pollock and Wright, Possession in the Common Law, 1888, pp. 88-9.
33. Per Evershed, M. R. in Moses v. Lovegrove [1952] 2 Q.B. 533, at p. 539 (C.A.).
34. Fifth Interim Report, 1936, Cmd. 5334.
35. See p. 60 et seq., infra.

It cannot be argued that the omission of a provision corresponding to section 12 of the 1833 Act was due to Parliament's awareness of the decision in Re Landi, since the Act of 1939 had already been a month on the Statute Book before Re Landi was decided.

It is, therefore, not merely out of historical curiosity that one examines the reasons given by Greene, M. R. in Re Landi for rejecting the application of section 12 of the 1833 Act to the case before him. He said: "Section 12 is contemplating a quite different state of affairs from that which now exists. It is contemplating the legal ownership of land owned by joint tenants, tenants in common or coparceners, carrying with it those rights which those interests conferred. The language is quite inapt to cover the case of one of two trustees who are also their own beneficiaries, and for this reason, if none other, that a trustee in possession can never be possessing for his own benefit."[36] In another passage, he said: "I may add in passing that where there are more than four co-owners the effect is to vest the land in the Public Trustee[37] and,

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36. [1939] Ch. 828, at p. 836; cf., s. 31 of the Limitation Act, 1939, referring to the Trustee Act, 1925, s. 68, for definition of trustee whereby it includes "cases where the trustee has a beneficial interest in trust property."
37. i.e., in the case of undivided shares in possession before 1926: Law of Property Act, 1925, Sched. I, Pt. IV, para. (iv).

assuming that he receives the necessary request to act, there can be no question that in respect of his possession his capacity is that of a trustee and none other."[38]

This is, of course, true so far as it goes, but, all that the learned Master of the Rolls is saying is that a trustee in possession qua trustee cannot claim the benefit of any limitation period - this is expressly enacted in section 19(1) of the 1939 Act[39] - but there is nothing in this argument to prevent a co-owner qua beneficiary from claiming that his exclusive possession is adverse. With regard to the example of the Public Trustee, is it not likely that although the legal estate may be vested in him, that physical possession which alone counts under the Limitation Acts would be in one or more of the owners of the undivided shares? A fortiori in such a case an ousting beneficiary should be allowed to extinguish the titles of his fellow co-owners. He can be sued in trespass[40] or restrained from evicting his co-tenant,[41] and if no such action is brought against him for the statutory period, he should be held to have extinguished the titles of those of his fellows who could have sued him but did not. A bare recital of the relevant provisions of the Limitation

38. [1939] Ch. 828, at p. 836.
39. See p. 49.
40. See, e.g., cases cited in Clerk and Lindsell on Torts, 12th ed., p. 600, para. 1148.
41. Law of Property Act, 1925, ss. 28(3) and 30; Re Buchanan-Wollaston's Conveyance [1939] Ch. 738; Bull v. Bull [1955] 1 Q.B. 234.

Act, 1939, seems to carry the point inescapably:

> Section 4(3). No action shall be brought by any... person to recover any land after the expiration of twelve years from the date on which the right of action accrued to him...
>
> Section 31(1). "Land" includes...any legal or equitable estate or interest therein, including an interest in the proceeds of the sale of land held upon trust for sale...
> "Action" includes any proceeding in a court of law...
>
> Section 31(5). References in this Act to a right of action to recover land shall include references to a right to enter into possession of the land...
>
> Section 16...at the expiration of the period prescribed by this Act for any person to bring an action to recover land...the title of that person to the land...shall be extinguished.

Perhaps the strongest weapon of all in the armoury of the pleader for the ousting co-owner is the categorical provision of section 12 of the Law of Property Act, 1925, that: "Nothing in this Part of this Act affects the operation of any statute, or of the general law for the limitation of actions or proceedings relating to land..."

The Part of the Act referred to is of course Part I, which also contains those provisions (ss. 34-38) which first imposed a trust for sale on all cases of co-ownership. Taken at face value, the section seems to be the clearest possible indication that the conveyancing machinery of the statutory trust for sale was not to affect the substantive rights of an ousting co-owner. And yet section 12 was rejected as inapplicable in Re Landi.[42] Why? It is

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42. [1939] Ch. 828 (supra).

submitted that an examination of the reasons given by Greene, M. R. for rejecting section 12 of the 1925 Act will show that, even if that rejection were right, in relation to the Real Property Limitation Act, 1833, it cannot prevent the application of section 12 to the Limitation Act, 1939.

In his judgment in Re Landi, Greene, M. R. gave two reasons for rejecting section 12 of the 1925 Act. The first was that Parliament could not have intended to preserve the rule that one co-owner could possess adversely to the other(s) because of the change in the rights of co-owners effected by the statutory trust for sale. The arguments against this ground of rejection have been set out above.[43] The second reason was highly legalistic. It will be recalled that section 12 of the 1925 Act saves, "the operation of any statute, or of the general law for the limitation of actions or proceedings relating to land" (writer's italics). Greene, M. R., however, turned to the definition section (s. 205) of the 1925 Act, the relevant parts of which read: "In this Act unless the context otherwise requires, the following expressions have the meanings hereby assigned to them respectively, that is to say... 'Land' includes land of any tenure...but not an undivided share in land." From this, Greene, M. R. concluded that

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43. Supra, p. 59.

in so far as the Real Property Limitation Act, 1833, dealt with undivided shares it was not a "statute...for the limitation of actions...relating to land." With great respect, this seems wrong even on the law as it then stood because the whole of the definition section is prefaced by the words, "unless the context otherwise requires" and it is submitted that the context of co-ownership required that the whole of the Real Property Limitation Act, 1833, should have been preserved by section 12 of the 1925 Act.[44] Only an undivided share is excluded from the definition of "land" in the 1925 Act. Is it therefore to be deduced from the reasoning of Greene, M. R. that in so far as the 1833 Act dealt with the interest of a beneficial joint tenant, as distinct from that of a beneficial tenant in common, it was preserved by section 12 of the 1925 Act?

Does not the context of section 12 of the 1925 Act at least require that in asking whether any statute of limitation is one "relating to land," one should pay the statute of limitation itself the compliment of looking at its own provisions? It is true that the definition of "land" in the 1833 Act (s. 1) merely speaks, as one would expect, of "any share, estate, or interest in" land and not of an

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44. Cf. Law of Property Act, 1925, s. 205(1)(xii), "'Limitation Acts' mean the Real Property Limitation Acts, 1833, 1837 and 1874."

interest in the proceeds of a trust for sale of land. However, as we have seen,[45] the definition of "land" in the Limitation Act, 1939, does expressly include, "an interest in the proceeds of the sale of land held upon trust for sale," (s. 31(1)), and it seems now beyond argument that the 1939 Act is a "statute of limitation...relating to land." This being so, the conveyancing machinery of the statutory trust for sale must, by section 12 of the 1925 Act, be ignored when construing the Limitation Act, 1939.[46] It follows that the provisions in the 1939 Act preventing the possession of a beneficiary under a trust for sale being adverse (s. 7(5)),[47] and removing any limitation period in an action against a trustee to recover trust property or its proceeds,[48] must be confined to cases where the trust for sale is imposed otherwise than by Part I of the Law of Property Act, 1925, that is, where the trust

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45. Supra, p. 62.
46. Cf., Danckwerts, J. in Re Howlett Deceased [1949] Ch. 767 (a limitation case) at p. 774, "On January 1, 1926, the legal estate in the property was vested in the husband in his capacity as administrator, and the beneficial interests were divided between himself and the plaintiff. Accordingly, para. 1(1), of Pt. IV of Sched. I to the Law of Property Act, 1925, applied and made him a trustee for sale, possibly on the statutory trusts in s. 35 of that Act, but I think that that really makes no difference. It is quite possible that he merely continued to hold in the character of personal representative" (writer's italics).
47. Supra, p. 45.
48. Supra, p. 46.

for sale is express (including the case where the conveyancer adopts the common practice of creating an express trust for sale in a conveyance to co-owners), constructive, or implied according to the rules of equity.[49]

(3) The infant entitled to an absolute interest in land or in the proceeds of sale of land held upon trust for sale.

An infant cannot of course hold a legal estate in land,[50] and his absolute interest must take effect behind a strict settlement or a trust for sale.[51] If his absolute interest were created by a strict settlement, including a settlement by will and an attempted conveyance on sale of a legal estate, it will nevertheless be construed as an entailed interest if he dies under twenty-one unmarried, because of the imperative provision to that effect in section 51(3) of the Administration of Estates Act, 1925. This provision does not appear to apply where the infant's absolute interest takes effect behind a trust for sale.[52] Where it does apply, no possession by the infant, even if

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49. See the Limitation Act, 1939, s. 31(1) - definitions of "trust" and "trust for sale" referring to the Trustee Act, 1925, s. 68(17). Cf., Law of Property Act, 1925, s. 205(1)(xxix).
50. Law of Property Act, 1925, s. 1(6).
51. Law of Property Act, 1925, s. 19; Settled Land Act, 1925, ss. 1 and 27.
52. Cf., Administration of Estates Act, 1925, ss. 51(3), 55(1)(xxiv); and Settled Land Act, 1925, s. 1.

it is capable of being adverse to the holder of the legal estate, could extinguish the title of the settlor to whom the land will revert by virtue of the deemed entail, since that title is to a future interest which the infant could not have barred by disentailing.[53] In other cases, however, there seems no reason why an infant "owner" of land should not by reason of possession by himself or by his bailiff[54] for the requisite period extinguish the legal estate vested in statutory owners or trustees for sale on his behalf and thus acquire the legal estate automatically, provided he is over twenty-one when the period of adverse possession ends, without the need for any conveyance from the statutory owners or trustees for sale. He is a "person solely and absolutely entitled" to the land or the proceeds of sale and thus within the exemption of section 7(5) of the Limitation Act, 1939, from the general rule therein enacted that a beneficiary's possession cannot be adverse to his co-beneficiaries or the trustee.[55] In Bridges v. Mees[56] Harman, J., though concerned with a case where there was no trust for sale or strict settlement, but only a bare

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53. Limitation Act, 1939, s. 6(1) and (3).
54. Other than a statutory owner or trustee for sale who would be deemed to hold possession in that capacity - Lister v. Pickford, p. 56, note 26, supra. For an account of the infant's bailiff see, e.g., Preston and Newsom: Limitation of Actions, 3rd ed., pp.90-1.*
55. s. 7(5) is set out in full at p. 45, supra.
56. [1957] Ch. 475; see p. 44, supra, and see Chap. 2, pp. 28-30 and 39-42. supra.

[* and Chapter 4, infra.

trust, was nevertheless clearly of opinion that the possession of a beneficiary absolutely entitled under a trust for sale or strict settlement could be adverse to the trustee(s).[57]

It may perhaps be argued that an infant does not have the necessary intention to possess adversely, but it is suggested that it is irrelevant to ask subjectively whether the infant intended his possession to be hostile. All that is required for time to run against the trustees for sale or statutory owners is that a theoretical right of action to recover the land from the infant should have

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57. [1957] Ch. 475, at pp. 481 and 486; one ought perhaps in seeking to extend Bridges v. Mees to remember the cautionary obiter dictum of Lord Westbury in Knox v. Gye (1872), L.R. 5 H.L. 656, at p. 675, "The advantage of correcting by familiar practice an inaccurate use of a word, although that use may be found in treatises of reputation, I remember to have seen singularly illustrated in a case that occurred some years ago in a court of law, where the court of law was told that in an agreement for the sale of a house the vendor was trustee for the purchaser, and the judges were called upon to apply a rule which is quite right as between a complete trustee by declaration and the cestui que trust, but quite wrong where the vendor is called a trustee only by a metaphor, and by an improper use of the term; and it required some trouble to convince them that though the vendor might be called a trustee he was a trustee only to the extent of his obligation to perform the agreement between himself and the purchaser...The application to a man who is improperly, and by metaphor only, called a trustee, of all the consequences which would follow if he were a trustee by express declaration - in other words a complete trustee - holding the property exclusively for the benefit of the cestui que trust, well illustrates the remark made by Lord Mansfield, that nothing in law is so apt to mislead as a metaphor."

accrued to them. It is immaterial that the action might not have succeeded because the infant was equitable owner of the land.[58] In Re Michael Daily,[59] the Court of Appeal in Northern Ireland held that two infant children, aged fourteen and sixteen at the beginning of the period of alleged adverse possession, had jointly with their mother extinguished their father's title to the farm where they lived.

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58. Bridges v. Mees [1957] Ch. 475, at p. 485.
59. [1944] 1 N.I. 1, at p. 6.

CHAPTER 4.

INFANTS' AND INSANE PERSONS' BAILIFFS.

I. THE INFANT'S BAILIFF.

The peculiar phenomenon of the infant's bailiff is a concept by which, in certain circumstances, an adult can be said to be in possession of an infant's land as the infant's bailiff and therefore not in adverse possession for the purposes of the law of limitation. The infant's bailiff was a frequent feature of cases throughout the nineteenth century, particularly Irish ones, but seems to have lain dormant for some years until his reapparance in Re Howlett[1]. In that case Danckwerts, J. was concerned with a father who, prior to 1926, was a tenant in common with his infant son of gavelkind land, this having been inherited by them under the mother's intestacy. The principal ratio decidendi of Danckwerts, J., in holding that the father could not plead the Limitation Act to his son's claim to his share of the rents and profits of the land, was that the father, being his wife's administrator, was a trustee within the meaning of Section 19 of the 1939 Act.[2] In addition, however, Danckwerts, J. held that, as the son had been aged only fifteen when his father had taken

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1. [1949] Ch. 767.
2. See Chap. 3 , p. 64, supra.

possession of the land, the father was the infant son's bailiff and for this reason also time did not run in his favour.[3]

Apart however from Re Howlett[3a] in 1949, in which the question of infant's bailiffship was really incidental, there has been a dearth of authority on the concept since the early years of the twentieth century. It is therefore proposed to re-examine the concept and some of its problems and to see to what extent it can be fitted into the proposition at the beginning of this thesis[4] that the presumption of hostility should be rebuttable by proof that the possession has, throughout the limitation period been clearly referable to an existing lease, licence, trust, agency, or easement, the actual intention or belief of the possessor being irrelevant.

Does the relationship of bailiff and infant fall into any of the above categories or is it sui generis? Although the expression "bailiff" is used in many of the cases and although in the text books the topic is treated as being in a compartment of its own[5], it is submitted that to-day it

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3. Danckwerts, J. was dealing with a claim for arrears of the son's share of rents and profits of the land, but the principles of trusteeship and bailiffship are also relevant to adverse possession. In earlier proceedings in the Probate Division the father had been ordered to hand the title deeds over to the son - [1949] 1 Ch. 767, at 769.

3a. [1949] 1 Ch. 767.

4. Chap. 1, pp.4-5, supra.

5. Cf., Preston and Newsom, Limitation of Actions, 3rd. ed., pp. 90-1, and Halsbury's Laws, 3rd ed. Vol. 24, p. 295, para. 586.

is logical to include it under the rubric of either "trust" or "agency." In some cases, agency has been said to underly the concept of the infant's bailiff. For example, in Wall v. Stanwick,[6] Kekewich, J., holding a mother to be a bailiff for her daughter, formerly an infant and single but then adult and married, said,

> "My view, however, is that she is accountable as bailiff and will continue to be so accountable until the relation of principal and agent has been dissolved. How that can be done I do not for the moment consider."[7]

A difficulty, however, about this basis for the infant's bailiffship is that there are serious doubts that the capacity of an infant validly to appoint an agent - indeed Lord Justice Denning (as he then was) has gone so far as to say,

> "It has been the law of this country for many centuries that an infant cannot appoint an agent to act for him."[8]

In any event cases of infant's bailiffship usually occur where the infant has inherited the land on a death and may never himself have been in possession - it is difficult to visualize any initial agency in such a case and the infant cannot, even when adult, ratify and thereby retrospectively create an agency.[9] A further difficulty

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6. (1887), 34 Ch.D. 763.
7. Ibid. at p. 768.
8. Shephard v. Cartwright [1953] Ch. 728, at 755; see (1955), 18 M.L.R. 461.
9. Infant's Relief Act, 1874, s. 2.

is that, infants apart, an agent's possession can become adverse to his principal,[10] whereas it is at least arguable that the possession of an infant's bailiff can never become adverse; in Re Howlett[11] for example, Danckwerts, J. said,

> "...having come into the position of bailiff for the plaintiff, the husband could not divest himself of the character in which he held the property."[12]

A further difficulty about resting the concept of the infant's bailiff on agency is that it is then difficult to predict which possessors will be deemed to be bailiff for the infant. Near relations, such as parents, uncles, brothers, and sisters have been held to be bailiffs but it is not always clear whether this has been due to the relationship or to some prior fiduciary obligation. On the one hand, there are suggestions that relationship is irrelevant and that,

> "if a stranger enters into possession of an infant's property, he is to be regarded as acting as a bailiff or agent for the infant in respect of that property."[13]

On the other hand there is a decision that a brother had entered adversely to his infant brother and was not a

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10. Ward v. Carttar (1865), L.R. 1 Eq. 29; Markwick v. Hardingham (1880), 15 Ch.D. 339.
11. [1949] 1 Ch. 767 - see p. , supra.
12. Ibid. at p. 774; contra In Re Maguire and M'Clelland's Contract [1907] 1 I.R. 393 and McMahon v. Hastings [1913] 1 I.R. 395.
13. Per Romer, L.J. in Re Biss [1903] 2 Ch. 40 at 61.

bailiff for that brother - Lambert v. Browne.[14] In Willis v. Earle How,[15] a mother was alleged to have entered adversely to her own child by taking possession on behalf of a suppositious child, but the Court considered only whether the mother had been guilty of concealed fraud and must have assumed that she entered adversely and not as bailiff.

An attempt to rationalise the concept was made as early as 1868 by Chatterton, V. C. in the Irish case of Quinton v. Frith[16] when he said, after reviewing the cases,

> "The conclusion I draw from all these cases is that, when any person enters upon the property of an infant, whether the infant has actually been in possession or not, such person will be fixed with a fiduciary position as to the infant - 1st. whenever he is the natural guardian of the infant; 2ndly, when he is so connected by relationship or otherwise with the infant as to impose upon him a duty to protect, or at least not to prejudice his rights; and, 3rdly., when he takes possession with knowledge or express notice of the infant's rights. Indeed, the last ground is but an instance of the application of the general principle that a person entering into possession of trust property, with notice of the trust, constitutes himself a trustee, in which case, unless he enters as a purchaser for value, and continues in possession for twenty years from his purchase, or unless the trust be merely constructive,[17] the Statute will afford no defence."[18]

It is submitted that the third ground in the learned Vice-Chancellor's judgment is the one which should now be

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14. (1870), I.R. 5 C.L. 218, at 225-6.
15. [1893] 2 Ch. 545.
16. (1868), 2 Ir.R. Eq. 396.
17. For this narrow use of the phrase "constructive trust", see p. 76, infra.
18. (1868), 2 Ir.R. Eq. 396, at 415.

exclusively selected as the basis of all cases of an infant's bailiff, i.e., that the concept should be based uniformly on trust. The consequences of this on some controverted questions relating to infants' bailiffs will be indicated shortly, but for the moment to set out the reasons for this contention.

So far as the Vice-Chancellor's first ground, guardianship, is concerned, this is no longer a satisfactory test of the existence of a bailiff for an infant - the nature and duration of guardianship depend on complicated considerations of status, unsuitable for being adapted to questions of ownership of land. Indeed, as early as 1851, a testamentary guardian was held to be an infant's bailiff, not simply ex officio, but because,

> "the relationship of guardian and ward is strictly that of trustee and cestui que trust."[19]

The Vice-Chancellor's second ground, connection,

> "by relationship or otherwise with the infant so as to impose upon him a duty to protect, or at least not to prejudice his rights"[19a]

is open to the objection of uncertainty also.

However, if, as contended, the third ground is the sole one applicable in modern law, then that irregularly shaped piece of law entitled "infant's bailiff" fits neatly

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19. Per Romilly, M. R. in Mathew v. Brise, (1851), 14 Beav. 341, at 345.
19a. (1868), 2 Ir.R. Eq. 396, at 415.

into the jigsaw puzzle of adverse possession since if there is a trust for the infant in such cases, one simply applies Section 19(1) of the Limitation Act, 1939, enacting, it will be recalled,

> "No period of limitation prescribed by this Act shall apply to an action by a beneficiary under a trust, being an action
>
> (a) in respect of any fraud or fraudulent breach of trust to which the trustee was a party or privy; or
>
> (b) to recover from the trustee trust property or the proceeds thereof in the possession of the trustee, or previously received by the trustee and converted to his use."

If the possessor is an express trustee for the infant, then caedit questio, he is incapable of entering adversely upon the trust land, nor can his possession become adverse afterwards.[20] In point of fact, where an infant is, since 1925, entitled to land, whether in fee simple, for a term of years absolute, or for some lesser interest, the land must be held on an express trust for him. If the infant's interest arises under a will or intestacy, the personal representatives will be trustees for the purposes of the Limitation Act, 1939,[21] whereas if it arises under a disposition inter vivos, the land is ipso facto settled land, when there must be an express trusteeship, either by the

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20. Limitation Act, 1939, s. 19(1).
21. Trustee in s. 19(1) of the 1939 Act includes a personal representative - 1939 Act, s.31(1) referring to Trustee Act, 1925, s. 68(17) of Succession Act, 1965 (Eire), s. 123 referred to p. 79, infra.

trustees of the settlement, if any,[22] or if none, by the grantor.[23] This being so, if such express trustees take possession of the land, their possession can never become adverse, because of the provisions of section 19 of the 1939 Act cited above.[24] If any person other than the express trustee or trustees takes possession of the infant's land, then on principle that possession should therefore be presumed to be adverse, whether the possessor is or is not a near relative of the infant, unless it can be shown that the possessor holds on a constructive trust for the infant, since the definition of trust for the purposes of section 19 of the Limitation Act, 1939[24] includes, by reference to the Trustee Act, 1925, "implied and constructive trusts and...cases where the trustee has a beneficial interest in the trust property."[25] The present case-law

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22. Settled Land Act, 1925, ss. 1 and 26.
23. Settled Land Act, 1925, s. 27.
24. Supra, p. 75.
25. 1939 Act, s. 31(1) referring to Trustee Act, 1925, s. 68(17). In Ireland, the definition of trustee for the purposes of the Limitation Statutes is different, it being provided that "trustee" does not include, "a person whose fiduciary relationship arises merely by construction or implication of law and whose fiduciary relationship is not deemed by any rule of law to be that of an express trustee" (see e.g., Soar v. Ashwell [1893] 2 Q.B. 390 - Solicitor receiving moneys from client held to be an express trustee) - Statute of Limitations, 1957 (Eire), s. 2(2)(a); Statute of Limitations (Northern Ireland), 1958, s. 74(2).

in fact tends to establish such a result, since in Young v. Harris,[26] a purchaser with notice of the infant's beneficial interest was held not to have taken possession adversely to the infant, whereas in Lambert v. Browne,[27] an elder brother of an infant devisee was held, despite the relationship, to have taken possession adversely to the infant, since he was ignorant of the devise.

It would seem that a person, not an express trustee, who took possession of an infant's land without notice of the infant's beneficial interest would not be regarded as a constructive trustee merely because of the constructive trust that in one sense always arises from the very unauthorised taking of the property of another. In construing an Ontario Statute, the relevant provisions of which closely corresponded to those of the Limitation Act, 1939, the Privy Council has held that the Statute's provision denying the benefit of a limitation period to a "constructive trustee" applied, "not to a case where a person having taken possession of property on his own behalf, is liable to be declared a trustee by the Court; but rather to a case where he originally took possession upon trust for or on behalf of others. In other words they refer to cases where a trust arose before the occur-

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26. (1891), 65 L.T. 45.
27. (1870), I.R. 5 C.L. 218, at 225-6; cf., Garner v. Wingrove [1905] 2 Ch. 233.

rence of the transaction impeached and not to cases where it arises only by reason of that transaction...in their Lordships' opinion it does not apply to a mere constructive trustee."[28] In the case of such a possessor, who is neither an express nor a constructive trustee within the meaning of s. 19 of the 1939 Act, his possession would be adverse to the infant, but hardship to the infant owner would of course still be partly alleviated by the general provision of s. 22 of the same Act, whereby time does not run against a plaintiff while he is under a disability, including infancy, which was in existence at the time the right of action accrued to him.

The contentions set out above seem to have received some recognition in Eire in that country's Succession Act, 1965, s. 124 of which provides,

> "Notwithstanding any rule of law, 'trustee' in the Statute of Limitations, 1957, shall not include a person whose fiduciary relationship arises merely because he is in possession of property comprised in the estate of a deceased person in the capacity of bailiff for another person."

This, by the marginal note to the section, is stated to over-rule Rice v. Begley,[29] but this case merely

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28. *[1920] A.C. 636, 653; see also Clarkson v. Davies [1923] A.C. 100 (P.C.) and cf., Shephard v. Cartwright [1953] 1 Ch. 728 (C.A.) at 739, 740, 742 and 756; [1955] A.C. 431 (H.L.) at 440, 443, and 450; cf., the Irish position referred to in note 25, supra.

29. [1920] 1 I.R. 243.

attributed the possession of a brother to a bailiffship for his sister, rather than to a trust as such.

However, by the same Act, it is provided (by s. 123) that,

> "(1) A personal representative in the capacity of a personal representative shall not... be a trustee for the purposes of the Statute of Limitations, 1957"

which is, of course, contrary to English law[30] and would enable a personal representative in Eire to claim title by adverse possession against an infant beneficiary who did not sue within three years[31] of attaining majority. Perhaps here the pendulum has swung rather too far against the infant beneficiary?[32]

II. THE INSANE PERSON'S BAILIFF.

It is commonly said by the text-book writers that the concept of the infant's bailiff, discussed in the immediately preceding section, is by analogy extended in some circumstances to a person who takes possession of an insane

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30. See note 21, supra.
31. Period halved from six years by s. 127 of the 1965 Act.
32. Cf., Statute of Limitations, 1957 (Eire), s. 22 and Statute of Limitations (Northern Ireland), 1958,* both of which provide that where heirship is still possible (i.e., entailed estates or interests) possession of land by a relative of the heir is not deemed to be the possession of the person entitled as heir.

* s. 26,

person's land. Preston and Newsom for example base the concept of an insane person's bailiff on an "antecedent moral obligation to look after the [insane person's] interests."[33] However, as we have seen before in discussing the basis of infant's bailiffship[34], antecedent moral obligations or close family relationships are rather nebulous notions when dealing with ownership of land and it may be questioned whether there really exists any special tenderness of the law of limitation towards insane plaintiffs apart from

(i) Section 19(1) of the Limitation Act, 1939 forbidding express and constructive trustees to plead any period of limitation to a claim for the return of trust property;[35] and

(ii) Section 22 of the 1939 Act suspending the running of time in favour of a plaintiff under disability at the time of accrual of a right of action to him. Under this Section time starts to run only on cessation of the plaintiff's disability or his death, and there are six years thereafter for action to be brought.

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33. Preston and Newsom - Limitation of Actions, 3rd ed., p. 90; cf., Franks - Limitation of Actions, 1st ed., p. 118.
34. See Part.I of this Chapter, supra.
35. S. 19(1) is set out verbatim at p. 75, supra.

In the case of an infant's land, as we have seen in the preceding section, there will inevitably be a preceding trust of the land, either under the Trustee Act, 1925, or the Settled Land Act, 1925, or under e.g., an express trust for sale, but this will not be so in the case of an insane person's land, unless the making of a control and management order or a receivership order under the Mental Health Act, 1959 can be regarded in this light.[36] It is suggested therefore that in the ordinary case there is no harm in leaving the insane plaintiff suing for recovery of land to the considerable protection or Section 22 of the 1939 Act, and that the insane person's bailiff should die a legal death, if indeed he ever lived. The cases said to illustrate his life history are three in number and hardly conclusive. They are Lewis v. Thomas,[37] Smyth v. Byrne,[38] and Leonard v. Walsh.[39]

Lewis v. Thomas[37] was a case where a woman, insane for thirty years prior to her death, had lived with the alleged adverse possessor's family on the land in question for many years. Under the Limitation Statute then applicable, the Real Property Limitation Act, 1833, there was a provision (s. 16) for suspension of time for disabled

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36. Mental Health Act, 1959, ss. 103-5.
37. (1848), 3 Hare 26.
38. [1914] 1 I.R. 53.
39. [1941] I.R. 25.

plaintiffs similar to Section 22 of the Limitation Act, 1939, but the relevant period[40] after the death of the insane person had expired. Nevertheless one of the insane person's beneficiaries sued for a declaration that a conveyance of part of the land and a devise by will of the other part, both alleged to have been executed by the insane person before her death, were void and procured by fraud. The defendant claimed, as a defence (inter alia), that she had acquired title to the land by adverse possession. In a short judgment, Wigram, V. C. held that the defence of Limitation had been disposed of sub silentio in earlier proceedings which had been ordered by the Master of the Rolls to be heard before a jury and designed to ascertain whether in fact the deceased was insane before her death. Wigram, V. C. did however add, obiter,

> "Looking at the case on the merits, I have not the slightest doubt of the justice of the decision, which determined that [the defendant] did not acquire an adverse title to any part of this property; nor have I any doubt that I should have come to the same conclusion if the question had been now open for my decision. It would have been greatly to be lamented if the law had permitted [the defendant], under such circumstances to have acquired a title to the property. She has herself, as appears by the instruments in question in the suit, put her title upon those instruments. Those deeds are conclusive evidence that she did not claim against, but, on the contrary, that she claimed under [the deceased insane woman]: they are direct acknowledgments of [her] title...(see

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40. Now 6 years.

> 3 & 4 Will. 4, C.27, s.14); it is not a case of adverse possession. I do not know whether the Master of the Rolls had under his consideration the question whether the case was or not one of concealed fraud within the meaning of the statute, but I think I should have had no difficulty in concluding that it was such a case."[41]

The care with which the learned Vice-Chancellor enumerates three distinct reasons (two of them express statutory provisions) for opining that the defence of limitation would fail, viz.

(i) possession derived from documents whose validity the defendant was estopped from denying;

(ii) written acknowledgment of plaintiff's title to start time running anew;

(iii) concealed fraud to suspend the running of time,

shows, it is submitted, that in no sense did he base his obiter dicta either on the fact (i) that the defendant possessed the land of an insane person and knew her to be insane or (ii) that the insane person lived with the family for many years and the defendant might, in a kind of agency sense,[42] be said to hold on behalf of the defendant.

Lewis v. Thomas[43] is the only English authority on the supposed insane person's bailiffship but, on examination, it hardly supports any such concept. The other two

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41. (1843), 3 Hare 26, at 33-4.
42. Would not insanity revoke any agency? Cf., Yonge v. Toynbee [1910] 1 K.B. 215 and Drew v. Nunn (1879), 4 Q.B.D. 661.
43. (1843), 3 Hare 26, at 33-4.

decisions, Smyth v. Byrne[44] and Leonard v. Walsh[45] are Irish cases and, in view of their persuasive force, it behoves us to examine them.

Smyth v. Byrne is a decision of the Irish Court of Appeal which technically has nothing whatever to do with adverse possession since the problem in that case was whether a new tenancy of a farm granted to the female defendant and subsequently assigned by her to the male defendant, her husband, was held on constructive trust for the plaintiff who had been a yearly tenant of the farm before his removal on insanity to an asylum. The landlord had purported to determine the plaintiff's tenancy for non-payment of rent[46] and had then granted a new tenancy to the female defendant who was the plaintiff's sister and who had, shortly after the plaintiff's removal, come to live on the farm with the plaintiff's other brothers and sisters. The Court of Appeal held that there was a fiduciary relationship between the female defendant and the plaintiff and therefore, on well-known equity principles,[47] the new tenancy was a "graft" on the old and held on a

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44. [1914] 1 I.R. 53.
45. [1941] 1 I.R. 25.
46. Although it would appear doubtful whether the tenancy had been determined, the County Court Judge had made a possession order in favour of the landlord.
47. See, e.g. Keech v. Sandford (1726), 2 Eq. Cas. Abr. 741, pl. 7 (renewal of lease).

constructive trust for the plaintiff. The defence of limitation was not raised, doubtless because the proceedings were brought well within twelve years from the plaintiff's discontinuance of possession. The only relevance of the case therefore is the decision that a fiduciary relationship existed between the female defendant (from whom the male defendant was held to have taken with notice, actual or constructive, of all relevant facts) and the plaintiff, but this may well be explicable by reference to the family relationship and the fact that, to quote the report,

> "Shortly after the plaintiff was certified to be of insane mind, [the female defendant] who was then a spinster, came to live on the farm, and took over the working and management thereof."[48]

In so far as there are wide statements in the judgments equating the position of an infant's bailiff with that of a defendant entering on the land of a person known by him to be insane, since both infant and insane person are said to be equally "helpless",[49] it is submitted that the case is no authority on the question whether, in the law of limitation, possession is adverse. The "helplessness" of an insane person and the fact that possession may be taken of an insane person's land without the Court of Protection

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48. [1914] 1 I.R. 53 at 55.
49. [1914] 1 I.R. 53 at 58 (per O'Brien, L. C.).

becoming aware of it are adequately reflected in the Limitation Act, 1939 by the Sections providing for postponement of time running for disability and for concealed fraud.[51]

The other Irish case cited in the books as authority for the proposition that possession of an insane person's land will not be adverse if by some mysterious process the possessor is constituted bailiff for the insane person is Leonard v. Walsh[52]. This is a first instance case and again is not a direct decision on acquisition of title by adverse possession. The facts are rather complicated but the essence of them is that a widowed mother and her two adult children, brother and sister, lived on a farm and worked it jointly. Two other adult children had left the farm more than twelve years before and had made no claim to their fractional shares of the farm which they had inherited from their father. Consequently, and this was agreed on all sides, their title to those shares was barred by more than twelve years' adverse possession, but the question for decision was, by whom were they barred? Who had acquired title to the shares by adverse possession? The problem arose because, during the relevant twelve

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51. 1939 Act, Ss. 22 and 26.
52. [1941] I.R. 25.

years' period, the brother who had been living on the farm became insane and was removed to a mental home. It was argued on his behalf that, although he had gone out of possession while the twelve years' period was still running, the continuing possession of his mother and sister was on his behalf so that when, at the end of the twelve years, title to the shares of the absent children was acquired by adverse possession, he, as well as his mother and sister, had acquired that title. All that his mother and sister claimed was that as he personally had not been in possession for twelve years he had not himself acquired title by adverse possession but Maguire, J. held that the mother and sister's continuous possession was not for themselves alone but as bailiffs for him since,

> "They remained in possession of what was undoubtedly his property. They never accounted to him for rents and profits. They knew, or must be presumed to have known, of Patrick's mental condition and they did nothing to bring him under the care of the Court. He was helpless and could do nothing to protect his property. They entered into possession of his property in circumstances allowing him (had he been well enough) to call for an account at any time. I am of opinion that by doing so, they became themselves bailiffs of his interests for all purposes."[53]

Even if the breadth of this dictum were to be said to comprehend the question of adversity of possession, with which in fact it had nothing to do, emphasis must again be

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53. [1941] I.R. 25 at 31.

placed on the fact of family circumstances and the duty to bring the insane person under the care of the Court, which tend to limit this case to its own facts and make it but little authority for any general principle of insane person's bailiffship.

In any event, a side issue in the case leads to the conclusion that the dicta of Maguire, J. have no relevance to acquisition of title by adverse possession. The insane brother in the case had, in common with all the other children, inherited his own share of the farm on his father's death and more than twelve years had elapsed since he left the farm to go into the mental home. It was not however claimed that the mother and sister, by remaining at the farm, had barred the brother's title to his inherited share - it was conceded by their Counsel that they had not. But why not? It is necessary to examine with some particularity the language in which Counsel on both sides are careful to clothe their concession. It was as follows,

Counsel for the insane brother: - The mother and the sister "entered into receipt of the rents and profits of [the brother's] shares and, as he was under a disability, they could not claim (and it is not argued) that this amounted to adverse possession in respect of [the brother's] original shares."[54]

54. [1941] I.R. 25 at 26-7; (Writer's italics).

Counsel Opposing: - Admittedly, no title was acquired by the mother and sister against the brother in respect of his original...shares: see s. 3 of the Real Property Limitation Act, 1874."[54a]

The significance of this becomes immediately apparent when one examines Section 3 of the 1874 Act - it was in fact, so far as real property was concerned, the predecessor of Section 22 of the Limitation Act, 1939, which suspends the running of time when a plaintiff is under a disability when the right of action accrues to him. Nevertheless the right of action accrues to him ab initio - all that Section 22 does is to suspend the running of time. A defendant who takes possession of a disabled person's land is immediately an adverse possessor but the disabled person has, or may have, longer than twelve years to sue - that is all. It is clear that Counsel opposing the insane brother's claim conceded no more than that Section 3 of the 1874 Act applied. He argued of the mother and sister that they,

> "did not enter into possession of the holding or of the disputed shares as bailiffs, but by virtue of their own respective rights in the holding."[55]

It is perhaps unfortunate, therefore, that Maguire, J. seems to have misunderstood the extent of the concession

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54a. [1941] I.R. 25 at 26-7.
55. Ibid. at 27.

which he described as a concession that the mother and sister,

> "entered upon [the brother's property] as bailiffs to the extent of his original share."[56]

This is precisely what Counsel did not concede. He was careful to contend that the mother's and sister's notional entry into possession was adverse. As Maguire, J. appeared to have founded his entire judgment on this mistaken view of the concession,[57] the persuasive force of the authority of the case is to say the least of it weakened.

In conclusion it is therefore submitted that none of the three cases just reviewed justifies the promotion of the insane person's bailiff into a separate category in the law of adverse possession. He is not a constructive trustee within the meaning of Section 19 of the Limitation Act, 1939,[58] nor can he be an agent since an insane person cannot validly appoint an agent and the insanity revokes any authority previously given.[59] He is in truth an adverse possessor but he may find that he has to wait more than twelve years before he has acquired title to an insane person's land by his adverse possession, because of the

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56. [1941] I.R. 25 at 30.
57. Cf. his remarks at p. 31 of the Report.
58. See cases cited at p. 78, note 28 supra; cf., Succession Act, 1965 (Eire), s. 124 (cited at p. 78, supra.
59. See cases cited at p. 83, note 42 supra.

suspension provisions of Section 22 of the 1939 Act described above. By virtue of a proviso to that Section however, the insane person will be irretrievably barred and his title extinguished after thirty years have passed from the first entry into adverse possession, even though he is still insane.[60] It is suggested that it is not open to the Courts to repeal in effect this proviso by reviving the ghost of the insane person's bailiff, whose ever having lived is in so much doubt.

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60. Limitation Act, 1939, s. 22(1)(c).

CHAPTER 5.

ADVERSE POSSESSION, EASEMENTS, AND PROFITS.

In this country, acquisition of easements and profits-à-prendre in the land of another by positive prescription has always been kept entirely separate from acquisition of title to another's land by the negative prescription now embodied in the Limitation Act, 1939, although the two systems of "prescription" have affinities e.g. between the nec...precario insistence of easement/profit prescription and the requirement of hostility for adverse possession of land. Indeed the Limitation Act, 1939, makes the matter explicit, by giving the following limited definition of "land" for the purposes of that Act,

> " 'Land' includes corporeal hereditaments, tithes (except tithes belonging to a spiritual or eleemosynary corporation sole) and rentcharges, and any legal or equitable estate or interest therein, including an interest in the proceeds of sale of land held upon trust for sale, but save as aforesaid does not include any incorporeal hereditament."[1]

Logically and from the point of view of legal theory, this complete separation of the two systems of "prescription" is correct, since the essence of easements or profits

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1. Limitation Act, 1939, s. 31(1).

is that they are jura in re aliena, whereas the adverse possessor throughout claims the land as his own. In a comparatively recent case, Copeland v. Greenhalf[2] for example, where a claim was made to the acquisition by prescription under the Prescription Act, 1832, of an easement to store and repair vehicles on a strip of land, Upjohn, J. (as he then was) carefully delineated the two systems of "prescription." He said,

> "I think that the right claimed goes wholly outside any normal idea of an easement, that is, the right of the owner or the occupier of a dominant tenement over a servient tenement. This claim (to which no closely related authority has been referred to me) really amounts to a claim to a joint user of the land by the defendant. Practically, the defendant is claiming the whole beneficial user of the strip of land...; he can leave as many or as few lorries there as he likes for as long as he likes, he may enter on it by himself, his servants and agents to do repair work thereon. In my judgment that is not a claim which can be established as an easement. It is virtually a claim to possession of the servient tenement; if necessary to the exclusion of the owner; or, at any rate, to a joint user, and no authority has been cited to me which would justify the conclusion that a right of this wide and undefined nature can be the proper subject matter of an easement. It seems to me that to succeed, this claim must amount to a successful claim of possession by reason of long adverse possession. I say nothing, of course, as to the creation of such rights by deeds or by covenant; I am dealing solely with the question of a right arising by prescription."[3]

However, although the separation may be theoretically and logically justifiable, it does cause difficulty in the not

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2. [1952] 1 Ch. 488; cf., A. G. for S. Nigeria v. John Holt & Co. Ltd. [1915] A.C. 599 (J.C.).
3. Ibid. at p. 498.

inconsiderable number of factual borderline cases where it is on the evidence extremely hard to say whether the long-continued use proved by the claimant is great enough in quantum to amount to a claim to adverse possession itself or whether it is merely a claim to that interest, lesser in quantum but more definite in delineation, which is an easement or a profit-à-prendre. Of course, if the long continued user and the surrounding circumstances are adequate to satisfy the tests of either system of "prescription," i.e. in effect either under the Prescription Act, 1832 (or lost modern grant or common law prescription) or under the Limitation Act, 1939, then it may well be immaterial to a claimant into which legal category his claim falls, so long as he takes care to plead both. An early example of this is Wilkinson v. Proud (1843),[4] where a claim to a substratum of coal was framed as being a right acquired under the Prescription Act, 1832, by thirty years' taking of the coal, i.e. a profit-à-prendre, but on demurrer, the Court of Exchequer held that the claim could be maintained, if at all, only as a claim to the land itself. To quote Baron Parke,[5]

> "This is not a claim of a prescriptive right to take coal in the plaintiff's close, but a prescription for all the strata and seams of coal lying under it, that is, for a part of the soil itself, and not for the right to get the coal, which would be the subject of a grant. Possibly, the defendants may be able to amend, by pleading a seisin in fee in the strata of coal..."

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4. (1843), 11 M. & W. 33; 152 E.R. 704.
5. (1843), 11 M. & W. 33 at 40; 152 E.R. 704 at 707.

Leave to amend was in fact given, and doubtless the claimants were able to put their house in order by claiming twenty years' adverse possession under the then recently-passed Real Property Limitation Act, 1833.

The decision makes an interesting contrast with the Irish case of Convey v. Regan,[6] where Black, J. held that a claim for a declaration that the plaintiff had acquired a fee simple interest by more than thirty years' turf-cutting from a peat bog failed, although the learned judge clearly was of the opinion, obiter, that the evidence would have amply established a claim to a profit of turbary, had such a claim been made.[7] But no such claim was made and it may well be that there is a class of plaintiff who is rightly content with nothing less than the fee simple. An easement or profit will not suffice. To such a plaintiff, the separation between the two systems of prescription is critical.[8] In addition there are two classes of case where the separation may cause considerable problems:

I. Where the legal requirements for prescriptive acquisition of an easement or profit differ from those for prescriptive acquisition of title to land by adverse

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6. [1952] I.R. 56.
7. Ibid., at p. 61.
8. Cf., Grose v. West (1816), 7 Taunt. 39; 126 E.R. 16; Doe d. Bennett v. Turner (1840), 7 M. & W. 226; 9 M. & W. 643; Littledale v. Liverpool College [1900] 1 Ch. 19 (C.A.); G. Wimpey & Son Ltd. v. Sohn [1966] 2 W.L.R. 414 (C.A.).

possession, and a claim that would succeed under one of the two systems of prescription might fail under the other.

II. Where after an easement or profit has already come into being, the owner of the dominant tenement claims to have acquired title itself to the servient tenement by the requisite number of years of adverse possession. The owner of the servient tenement resists the claim on the ground that the acts on which the claimant relies to establish adverse possession are referable to the exercise by him of his existing easement or profit and lack therefore the element of hostility necessary for adverse possession.

The number of cases in which these problems occur are likely to increase in view of the blurring by the Court of Appeal in Re Ellenborough Park[9] of the dividing line between the exercise of an easement, in that case to "joint occupation" of a pleasure garden, and acts amounting to possession.[10] Moreover, if legislative effect is given to the recommendation in 1966 of the Law Reform Committee that easement and profit prescription be abolished but that acquisition of title by adverse possession be retained,[11] the importance of

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9. [1956] Ch. 13, esp. at pp. 176-7; Cf., Copeland v. Greenhalf, note 2 supra.
10. Since this prediction was originally written, it has been fulfilled by the case of Geo. Wimpey Ltd. v. Sohn [1966] 2 W.L.R. 414 (C.A.); see p.131-8 infra for a discussion of the case.
11. Law Reform Committee, 14th Report (Acquisition of Easements and Profits by Prescription) 1966, Cmd. 3100: The Committee unanimously recommended that profit prescription be abolished, but recommended only by a small majority that easement prescription be abolished.

this branch of the law of adverse possession will greatly increase. An examination of the relevant paragraphs of the Law Reform Committee's Report makes a fitting prelude to a comparison of easement/profit prescription and acquisition of title by adverse possession. The view of the majority of the Committee in recommending the abolition of easement prescription[12] is,

> "We do not consider that it is necessary or appropriate for the same legal rules to apply to the acquisition of easements by prolonged enjoyment as apply to the acquisition of title to land by adverse possession. Certainty of title to land is a social need and occupation of land which has long been unchallenged should not be disturbed. Moreover, a squatter's occupation of land is sufficiently notorious to invite preventive action. There is no comparable need to establish easements, and user even "as of right" may be insidious. The creation of easements, which may limit the user or development of the servient land, should not be encouraged. No serious hardship would result if in future, subject to appropriate transitional safeguards, no easement could be acquired by prescription."[13]

The minority view of the Committee in favour of retaining a modified system of easement prescription[14] is,

> "There is no less moral justification for the acquisition of easements by prescription than there is for obtaining a title to land by adverse

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12. Lord Pearson, Lord Justice Diplock, Mr. Justice Orr, Sir John Burrows, The Hon. H. A. P. Fisher Q.C., Lord Lloyd, Mr. G. W. R. Morley, and Mr. R. J. Parker Q.C.
13. Law Reform Committee's Report above referred to, p. 12, para. 36.
14. Winn, L. J., Buckley, J., Professor A. G. Guest, Mr. R. E. Megarry Q.C., Professor F. J. Odgers, Mr. R. H. Walton Q.C.

> possession: to represent prescription as a process of 'easement stealing' is to ignore the fact that it involves open enjoyment over a long period in the assertion of a right, and that it is a process designed to give legal recognition and validity to a state of affairs of long standing, in which successive servient owners may have acquiesced...
>
> In spite of the differences between adverse possession and prescription, the same fundamental considerations apply to them. Anyone who has for a sufficient period had undisputed and uninterrupted enjoyment of something capable of subsisting as a property right, notwithstanding the actual or constructive knowledge of him who might otherwise claim to be the true owner, should be allowed to retain the subject matter (whether corporeal or incorporeal) as his own property and the other party should be barred from disputing his ownership. If it is accepted that a status quo of long standing ought to be given legal recognition, prescription has not outlived its usefulness. Conveyancers are frequently faced with the question whether a prescriptive title cannot be established: in other words, the de facto position often does not accord with the known documentary title."[15]

It is outside the scope of this thesis to comment on the respective merits of the majority and minority views on the desirability of retention of easement prescription. Suffice to observe that if easement prescription is abolished, a very large additional reason will arise to distinguish between adverse possession and a mere attempt to exercise an easement, whereas if easement prescription is retained, the unanimous recommendations of the Law Reform Committee as to a modified system of prescription will iron out some of the differences between adverse possession and easement prescription referred to below.[16]

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15. L. R. Committee's Report, above referred to, pp. 12-13, para. 38.
16. p. 99 et seq., infra.

Let us, therefore, consider in turn each of the two classes of problem as set out above:-

I. The legal requirements for prescriptive acquisition of an easement or profit differ in a number of ways from the legal requirements for acquisition of title to land by adverse possession. For example, the rules for the extension of time for disabilities or for the falling into possession of future interests differ considerably in detail between the Prescription Act, 1832, and the Limitation Act, 1939.[17]

Another difference between adverse possession and easement prescription is that if the true owner is forcibly ejected and is completely dispossessed, the ejector is an adverse possessor, whereas alleged prescription for an easement must be "nec vi etc"[18]

If the recommendations of the Law Reform Committee on an amended system of easement prescription[19] are implemented, yet another difference will arise in that the Committee say,

> "We think that the statute should provide expressly that enjoyment of the easement should only count for the purposes of prescription if it has actually been known to the owner of the servient tenement for the time being, or if the circumstances were such that he ought reasonably

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17. and will continue to do so even if the recommendations of the Law Reform Committee as to a modified form of prescription become law - see their Report above referred to, paras. 44 to 55.
18. The Law Reform Committee in its 14th Report (above cited) expressly recommend (para. 57) that "any new statutory system of prescription should be so framed as to provide expressly that enjoyment by force should not count in favour of a dominant owner."
19. In its 14th Report (1966) above referred to.

> to have known of it. Any enjoyment which is of this open character and which is not referable to any express consent or agreement on the part of the servient owner should, we consider, suffice as the basis of a prescriptive claim without the introduction of any such expression as 'claiming right thereto.' These words in sections 1 and 2 of the Act of 1832 are the basis of all the case law on the question whether a dominant owner's enjoyment which is not referable to consent or agreement is in itself a sufficient indication of the assertion of a right adverse to the servient owner's estate."[20]

This is to be a statutory declaration (and amendment) of the existing "nec clam" principle of easement prescription, but in the case of adverse possession under the Limitation Act, 1939, it is immaterial whether the documentary owner of the land knows or ought to know of the adverse possession. If, for example, he discontinues his possession and subsequently a stranger takes possession without the knowledge of the documentary owner in circumstances where there is no concealment of the right of action, then knowledge or means of knowledge of the documentary owner are immaterial.[21]

The most obvious difference between the twosystems of prescription is, however, in the periods of long-continued user required under the two systems of "prescription." Under the Limitation Act, 1939,[22] the normal period needed

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20. Law Reform Committee, 14th Report (1966), above referred to, para. 58.
21. Cf., Limitation Act, 1939, ss. 5, 10 and 26, and Rains v. Buxton (1880), 14 Ch.D. 537.
22. Limitation Act, 1939, s. 4(3).

to extinguish the title of an owner (other than the Crown or a spiritual or eleemosynary corporation sole) is twelve years, which is much shorter than any of the periods under the Prescription Act, 1832, which vary from twenty to sixty years. It is perhaps therefore a paradox that one may by 'prescription' acquire the entire land more quickly than an easement or profit over it, a fact which will encourage claimants to try to claim that their equivocal acts amount to more than a mere exercise of an inchoate easement or profit but do in fact amount to adverse possession itself.[23]

In the case of a prescriptive claim over the land of the Crown or of a spiritual or eleemosynary corporation sole, however, the Limitation Act, 1939 requires adverse possession for thirty years, or sixty years in the case of a claim to bar the Crown's rights to the foreshore[24] and these periods are (to be contrasted with ~~less than~~ the twenty years uninterrupted enjoyment that will suffice in certain circumstances under the Prescription Act, 1832[25] to acquire an easement over the land of the Crown or a corporation sole. Here, it will be to the advantage of the claimant to deny that he ever went so far as to take adverse possession and to confine himself

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23. This paradox would disappear if legislation gives effect to the recommendation of the Law Reform Committee that, in a modified system of easement prescription, the period of prescription should be twelve years and, moreover, a period in gross, not a period "next before action brought" - 14th Report above referred to, paras. 41 and 42.
24. Limitation Act, 1939, s. 4(1) and (2).
25. Prescription Act, 1832, s. 2.

to the modest allegation that he sought to prescribe only for an easement. In this class of case, in which the legal tables are turned, is the illuminating decision of the Privy Council in Attorney General for S. Nigeria v. John Holt & Co. Ltd.,[26] where the respondents, the owners of land in Lagos bordered by the sea's high-water mark, had, for a period of between thirty and firty years, used a strip of Crown land reclaimed from the foreshore by their own protection works such as the erection of stakes, a wharf, and piers. The user consisted of storage of cooper's stores, casks, and trade goods on the land, and the building of stores, sheds and other works thereon. Both appellants and respondents agreed that the respondents had had exclusive possession of the land. To have acquired the land itself, sixty years adverse possession would have had to have been shown,[27] but the respondents could show no more than fifty, which would have sufficed for prescriptive acquisition of an easement of storage which was, indeed, claimed. The Privy Council's reasons for rejecting this claim are instructive. They accepted the Crown's contention that,

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26. [1915] A.C. 599 (J.C.); cf., Lyell v. Hothfield [1914] 3 K.B. 911.
27. Crown Suits Acts, 1769 and 1861, repealed by L. A. 1939, s. 34(4) and schedule.

> "...the use to which the land was put by the respondents and their predecessors in title could not be the foundation of any easement, as it was not a right assumed to be taken or asserted over the land of another; the possession founded upon was possession founded upon as owner thereof."[28]

This at once raises a problem which is fundamental to the separation of easement/profit prescription and prescription by adverse possession of land. The problem is whether the difference between the two is simply a question of the factual quantum of acts done on the land in question by the adverse possessor irrespective of his intentions or whether the difference is to be measured by the intention of the claimant when he did the acts in question. The latter view would hold that exactly the same long-continued acts could amount to a claim to an easement/profit or to a claim to adverse possession of the land according to the subjective intention of the actor.

In Attorney General for S. Nigeria v. John Holt & Co. Ltd.,[29] the Privy Council appear to have adhered to the latter view, since of the claim to an easement of storage they first said,

> "Their Lordships see no reason why upon the first point a right of easement should be exclusive of the storage claim. The law must adapt itself to the conditions of modern society and trade, and there is nothing in the purposes for which the easement is claimed inconsistent in

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28. [1915] A.C. 599, at p. 617.
29. [1915] A.C. 599 (J.C.); cf., Lyell v. Hothfield [1914] 3 K.B. 911.

principle with an easement as such."[30]

but then added,

> "It seems to be undoubtedly true that what was done by the respondents was done by them as in their opinion upon their own lands. There was much in the nature of affairs and the legal situation to induce this opinion, and it is not to be wondered at that not only they, but all parties on the island, appeared to have considered that these operations, which were clearly beneficial to the general interest, in no way to be of the nature of wilful appropriation or of trespass, but merely of making good and proper use of their rights as owners of property abutting upon the sea. An easement, however, is constituted over a servient tenement in favour of a dominant tenement. In substance, the owner of the dominant tenement throughout admits that the property is in another, and that the right being built up or asserted is the right over the property of that other. In the present case, this was not so."[30]

However, the evidence appears to have been quite equivocal. The probability is that the respondents probably had no idea in whom was the formal title to the reclaimed land - the answer depended on complicated questions of the application of native law and English common law. They were content with their exclusive possession of the land until the Government of Lagos sought to interfere with it by constructing a public road along the strip of land in question. This threat clearly had precipitated the litigation, which actually took the form of the Crown's asking for a declaration of Crown ownership of the land. It is not therefore

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30. [1915] A.C. 599 at p. 617.

unnatural to find Counsel for the respondents claiming both that the reclaimed land was included in the original Crown grant to them and in the alternative that they had an easement of storage. It seems unfair that they should by reason simply of claiming the greater interest, lose the lesser interest, which, from an objective view of the facts, they had acquired.[31] Instances are not lacking in the reports of cases where claims to title by adverse possession having failed, the Court has nevertheless been careful to declare that the unsuccessful claimant has acquired an easement.[32]

The artificiality of trying to find the intention of a lay claimant as to a matter which has often puzzled lawyers, i.e. did he mean to claim an easement or adverse possession, is demonstrated when one considers the reverse situation from that in the Attorney General for S. Nigeria v. John Holt & Co. Ltd. case, i.e. the situation in which the Court regards itself as compelled to say in effect, "These long-continued acts could have amounted to adverse possession but we find that the intention of the claimant was merely to claim an easement - therefore his possession was not adverse."

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31. In fact, the injustice in Attorney General for S. Nigeria v. John Holt & Co. Ltd. was avoided by holding that there was to be implied "an irrevocable licence" from the Crown but this device, even if legitimate, is not necessarily available in other factual situations.
32. See, e.g. Waddington v. Naylor (1889), 60 L.T. 480: Duke of Beaufort v. John Aird & Co. (1904), 20 T.L.R. 602; Philpot v. Bath [1905] W.N. 114.

Typical is the Irish case of Convey v. Regan, cited above,[33] where Black, J., faced with a claim by the plaintiff for a declaration that he had acquired title by adverse possession to an acre of Irish bog, clearly felt extreme difficulty in trying to find whether by his long-continued cutting of turf, the claimant had an intention to possess adversely. The learned Judge appears to say that the facts undoubtedly would justify the claim, were it not that "rights of turbary, as distinct from rights to the soil, are very widely understood in the country"[34] and there might therefore be a possibility, as to the existence of which Black, J. felt "much trouble and doubt,"[35] that the claimant meant only to claim a profit of turbary.

It seems unjust, and out of accord with the policy of the law of adverse possession as for quieting titles and making legal ownership follow the factual situation, that a claim to adverse possession should fail simply because the law happens to recognize an easement or profit whose characteristics chance to bear some resemblance to the long-continued acts of the claimant. If those acts amount to a dispossession of the original owner for the statutory period,[36]

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33. P. 95 supra. [1952] I.R. 56.
34. [1952] I.R. 56, at 60.
35. Ibid., at p. 61.
36. Cf., Limitation Act, 1939, s. 5(1).

as they seem to have done in Convey v. Regan,[37] the claimant should succeed in his claim to title and not be fobbed off with an easement or profit which he did not claim and does not want. The same problem occurs even more starkly, as we shall see later in this chapter, when before the beginning of the period of alleged acts of adverse possession the claimant already has an undoubted easement or profit and, because of this fortuitous circumstance, is denied the title he would otherwise have gained because his possession is referred to an intention by him merely to use his existing easement or profit and that possession is declared not to be adverse.[38] That is category II referred to above[39] but to confine ourselves for the moment to category I referred to above,[39] i.e., where at the beginning of the period of long user, no easement or profit exists and the Court has to refer the long user to an easement/profit or adverse possession.

A bizarre illustration of the peculiar effects of attributing possession, otherwise adverse, to an intention to claim an easement or profit instead is the decision of the Court of Appeal in Phillipson v. Gibbon.[40] A purchaser of a house in the City of London, having made numerous

37. [1952] I.R. 56.
38. See cases cited at p.123 et seq., infra.
39. P. 96 supra.
40. (1871), L.R. 6 Ch.App. 428.

objections to the title which had all been over-ruled, was suddenly presented with what he might have regarded as a deus ex machina, namely the discovery by his solicitor that, set into one of the outside walls of the house itself, abutting directly on the street, was an inscribed stone bearing a legend to the effect that the wall had originally been erected by the East India Company nearly a century before and was their property. It appeared that nearly forty years before, the wall had been rebuilt by a tenant of the house and the stone reinserted, but no acknowledgment of the East India Company's title had ever been given, nor had any rent for the wall been paid. The purchaser objected that the title of the vendor to the wall was bad, since, he argued, it was still owned by the East India Company. The vendor met the objection by pleading that he had extinguished the title of the East India Company by adverse possession. Malins, V. C. at first instance had no doubt that this was so. He regarded the suggestion that it could be otherwise as "ridiculous and contemptible,"[41] yet almost equally vehement language the other way was used by the Court of Appeal in over-ruling Malins, V. C. and rejecting the claim of adverse possession. They said of the purchaser's objection to the vendor's title to the wall,

> "This objection appears to us to be a very serious one. It was, in truth, a statement on

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41. (1871), L.R. 6 Ch.App. 428, at 431.

> the property itself that the wall, forming a substantial part of the property, had been erected by, and was the boundary wall of the adjoining owner; for the East India Company of course continued to be the owners of the soil of the street, although dedicated to the public.[42] There was nothing whatever to lead to the presumption that any title had been gained adverse to that of such adjoining owner by adverse possession. When there is a boundary-wall and that boundary-wall remains undisturbed, and an inscription is allowed to remain on it which states to all the world that it is the boundary-wall of the adjoining proprietor, it seems to us idle to suppose that any question of the Statute of Limitations, or of adverse possession, or of cesser of possession, could properly arise."[43]

But this was not purely a boundary-wall in the ordinary sense - it was one of the actual walls of the house and incorporated into its structure. It is difficult to follow the reasoning of the Court of Appeal. It sounds like a revival of the obsolete doctrine of "continual claim" by which a dispossessed owner could stop time running by making a "continual or other claim upon or near any land,"[44] but this doctrine was abolished as long ago as 1833 by the Real Property Limitation Act of that year.[44] Another possibility is that the Court of Appeal accepted the argument of Counsel for the purchaser who said,

> "though, no doubt, the [vendor has] acquired an easement of support, there was no ouster of the

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42. The inscribed stone recited that, when the wall was built, a portion of the ground in front of it belonging to the East India Company had been dedicated by them for street-widening.
43. Ibid., at p. 433-4.
44. See now Limitation Act, 1939, s. 13 replacing Real Property Limitation Act, 1833, ss. 10 and 11.

> East India Company, so as to give a title to the wall by virtue of the Statute of Limitations."[45]

It is difficult to follow, however, how much more complete an ouster there could be in relation to a wall than for the claimant to incorporate it into his own house. It is true that there was a subsidiary point in Phillipson v. Gibbon[46] relating to a 'watchbox' in the wall, the key of which was retained by the successors of the East India Company, but this does not seem to have been regarded by the Court of Appeal as a decisive factor.[47] Might one not say that, had the law not recognized an easement of support of buildings, there would have been no doubt but that the owners of the house had acquired ownership of the wall? In 1871, when Phillipson v. Gibbon was decided, the period of adverse possession necessary to extinguish the original owner's title was twenty years,[48] the same as the shorter period under the Prescription Act, 1832, for acquiring an easement.[49] When, however, the Real Property Limitation Act, 1874, reduced the period of adverse possession to twelve years,[50] it became possible to predicate that, given a sufficient quantum of

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45. (1871), L.R. 6 Ch.App. 428, at 431.
46. (1871), L.R. 6 Ch.App. 428.
47. Ibid., at p. 434.
48. Real Property Limitation Act, 1833, s. 2.
49. Prescription Act, 1832, s. 2.
50. 1874 Act, s. 1, repealed by Limitation Act, 1939, s. 34 (4) and Schedule, and replaced by s. 4(3) of 1939 Act.

adverse acts to constitute dispossession of the original owner, title could be acquired by 'prescription' before an easement could. If, therefore, in a Phillipson v. Gibbon situation to-day, litigation as to the ownership of the wall were to ensue between the twelfth and twentieth years, could not Phillipson v. Gibbon be distinguished on the ground that at this juncture it would not be possible to refer the incorporation of a wall into a house as a claim to an easement of support? And if it would not be possible to do this between the twelfth and twentieth years, it ought not in common justice to be possible to do it thereafter.

It is true that there is a decision of Chitty, J. after the 1874 Act, the case of Waddington v. Naylor,[51] where the learned Judge held that no title by adverse possession had been gained to a house-wall built by the claimant's predecessor some fifty to sixty years before on top of the original owner's house-wall. A reason given by Chitty, J. for his decision was that the claimant had merely acquired an easement of support [52] but, on the facts of the case, it is clear that, unlike the Phillipson v. Gibbon[53] situation, there was no evidence that the claimant had ever had

51. (1889), 60 L.T. 80.
52. Ibid., at p. 482.
53. (1871), L.R. 6 Ch.App. 428.

exclusive possession of the wall, because of the presumption that, if A builds on top of B's land, the building automatically belongs to B as owner of the land, by virtue of the maxim, quicquid plantatur solo, solo cedit. Chitty, J. had concluded that the wall was probably originally built by permission.[54] It does not appear quite how an easement of support could therefore have been gained. Not by prescription, the user would have been precario but possibly by express grant or by a lost modern grant. If, however, the permission was merely a licence, it would presumably have been in the rare category of irrevocable licences[55] and this would effectively have scouted any notion of adverse possession.

A further question which arises from such cases as Phillipson v. Gibbon[56] and Waddington v. Naylor[56] is to what extent title by adverse possession can be obtained to the air-space occupied by the claimant's building, structure, tree, etc., over the land of another, so as to give the claimant an indefeasible right in rem to keep the building, etc., in that place. An analogous problem is the extent to which title by adverse possession can be obtained to subterranean strata, but this will be examined later in this chapter.[57]

54. (1871), L.R. 6 Ch.App. 428, at 481.
55. Cf., Attorney General for S. Nigeria v. John Holt & Co. Ltd. [1915] A.C. 599; Inwards v. Baker [1965] 2 Q.B. 29; E. R. Ives Investments Ltd. v. High [1967] 1 All E.R. 504.
56. Pp. 105, 107, 110 and 111, supra.
57. P. 118 et seq., infra.

The problem of projections into another's airspace presents another variant of the easement/adverse possession dichotomy. So far as static structures are concerned, there are many dicta in the authorities to the effect that long user can give a right in rem to maintain the projection ad infinitum but they do not clearly indicate whether this right is merely an easement or amounts to acquisition of title to the occupied airspace itself. To take one or two instances. In Harvey v. Walters,[58] and Fay v. Prentice[59] for example, the dispute concerned the dripping of rainwater on to land from adjoining house-roofs that projected over the land in question. In Harvey v. Walters,[60] the dispute was as to the effect of increasing the height of the eaves; in Fay v. Prentice as to whether the intrusion of a newly-built cornice was actionable in nuisance or in trespass; but in both cases it was assumed by Counsel on both sides and by the Court that there could be "the event of the cornice being permitted to remain up so long as to give the owner of the house a right to keep it there"[61] or that "the plaintiff had become entitled by user to a right of having the eaves of buildings on his land project over the defendant's land,"[62]

58. (1873), L.R. 8 C.P. 162.
59. (1845), 1 C.B. 828.
60. (1873), L.R. 8 C.P. 162.
61. Fay v. Prentice (1845), 1 C.B. 828 at 830.
62. Harvey v. Walters (1873), L.R. 8 C.P. 162, at 163.

but the nature of the right is undefined. Similarly, in the well-known case of Lemmon v. Webb, the House of Lords affirmed the Court of Appeal's rejection of a claim to a right derived from long user to maintain overhanging branches of trees for the reason that because of the continual growth and movement of the trees there was no definite area of air-space occupied. The dicta in both Courts however, do not indicate whether in the case of a static structure, the right would be an easement or acquisition of title by adverse possession. Lindley, L. J. said in the Court of Appeal, for instance,

> "It was contended on behalf of the Plaintiff that, having regard to the age of the trees and of the projecting branches, he had acquired a right to the exclusive possession of so much of the space above the Defendant's soil as the branches actually filled, and that either under the Statute of Limitations or by prescription the Plaintiff had a right to keep the branches when they had grown. It was contended that if a man erected on his own land, something which projected over his neighbour's land, and it remained undisturbed for a sufficient length of time, his neighbour could not remove it nor maintain any action in respect of it. This is true. But to plant a tree on one's own land infringes no rights, and, if the tree grows over the soil of another, I cannot discover that any action lies for the encroachment unless damage can be proved. I can find no authority for the proposition that an action for trespass would lie in such a case..."[63]

There is at best here and in the other dicta a suggestion that a static overhanging projection, filling the air-space it occupies, is a symbol of its owner's exclusive

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63. [1894] 3 Ch. 1 (C.A.) at pp. 11-2 (Writer's italics); Cf., Ibid., at pp. 15, 16 and 18; [1895] A.C. 1. (H.L.) at pp. 6-7.

possession so as to enable him to acquire title by adverse possession and not merely an easement. It is submitted that should it become necessary to decide the exact nature of the right to maintain an overhanging structure, e.g. where the structure has been there for twelve but not for twenty years,[64] its proper basis is title by adverse possession and not merely an easement. In this way, the shorter period of twelve years will give greater certainty at a time when, with skyscraper and office block construction, ownership increasingly is divided into vertical as well as horizontal strata and will avoid the technical limitations of easement prescription that were so evident in Waddington v. Naylor and Phillipson v. Gibbon, discussed above.[65] It is true that Megarry and Wade, in their work on the Law of Real Property[66] assert that,

> "The law of easements may protect projecting buildings, or even the projecting bowsprits of ships using a dock."[66]

but for this proposition they cite Suffield v. Brown[67] which was in fact confined to the projecting bowsprits of ships whose casual incursions could not of course amount to a claim to adverse possession and the dictum in that case of Lord Westbury citing the analogy of two adjoining houses is clearly by its terms confined to easements of support and

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64. See analysis of differences between easement/profit prescription and title by adverse possession - pp. 99-101 supra.
65. See pp. 107-17 supra.
66. Third Edition (1966), p. 808.
67. (1864), 4 De G. J. & S. 185.

does not refer to unsupported projections.

As it is now recognized that a simple intrusion or projection into one's airspace is immediately actionable in trespass, no damage needing to be proved,[68] there is no reason in principle why adverse possession of the airspace occupied should not start to run from then. Indeed one suspects that in Kelsen v. Imperial Tobacco Co.[68] the defendants who had erected an advertising sign jutting some four inches into the plaintiffs' airspace could have claimed title by adverse possession were it not for the fact that the plaintiff commenced proceedings in trespass for an injunction for the removal of the sign well before twelve years had elapsed from the first erection of the sign.

There is indeed one reported case where a claim to acquisition of title by adverse possession was made in respect of a loft possessed for many years by the occupiers of property "A" but which overhung the ground-floor room of adjoining property "B" and was supported by it. This is the case of Laybourn v. Gridley[69] which, surprisingly enough, is reported in the Law Reports only on the point of construction of the parcels of conveyances of the two adjoining properties, and it is to the Law Journal report that one must turn for an account of the limitation point.[70] North, J., having decided that the conveyance of property "B"

68. [1957] 2 K.B. 335. Kelsen v. Imperial Tobacco Co.
69. [1899] 2 Ch. 53; (1892), 61 L.J. Ch. 352.
70. (1892), 61 L.J. Ch. 352, at pp. 356-7.

carried with it the overhanging loft, so that the owner of property "A" had no paper title to the loft, the owner of property "A" claimed title by adverse possession. His claim failed but only because the loft had been leased for 21 years and the lease had expired only shortly before the owner of property "B" commenced proceedings claiming (inter alia) that the loft was his. This meant, of course, that time had not begun to run against the owner of property "B" until the expiry of the lease[71] and the only argument in the case was as to whether time had started to run earlier because the owner of property "B" had not received the rent for some years.[72] What is important from our point of view is that no-one sought to challenge the assertion that the overhanging loft and the airspace that it occupied could be the proper subject of title by adverse possession, even though it was supported by the ground-floor room of the "servient tenement" and the adverse user of the loft might well have been attributed to a prescriptive easement of support.[73] A fortiori where the projecting structure is unsupported but merely juts into the airspace it ought in principle to be able to acquire title by adverse possession

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71. See, now, Limitation Act, 1939, s. 6.
72. As to this point, see (1892), 61 L.J. Ch. 352, at pp. 356-7 and now Limitation Act, 1939, s. 9(3).
73. Cf., Waddington v. Naylor (1889), 60 L.T. 480 and Phillipson v. Gibbon (1871), L.R. 6 Ch.App. 428.

to the airspace it occupies.[74]

There is a similar vagueness in the authorities on acquisition of title to subterranean land by adverse possession. It was assumed, without argument, in Rains v. Buxton,[75] before Fry, J., that title to an underground cellar could be acquired by adverse possession - the only argument in that case was whether time could run against a plaintiff who was unaware of the existence of the cellar, though his lack of knowledge was not due to any concealment by fraud.[76] Apart from that case, there is an interesting trilogy of cases on underground tunnels. The cases, in chronological order, are Bevan v. London Portland Cement Co.,[77] Midland Railway Co. v. Wright,[78] and S. E. Ry. v. Associated Portland Cement.[79]

The first case, Bevan v. London Portland Cement Co.[80] is the most interesting for the purpose of this chapter, since it involved Romer, J. in having to decide whether long-continued exclusive user of a subterranean tunnel would confer merely a right of way by prescription or title by adverse possession. The point was critical since the tunnel in question had been used by the defendants (for carting chalk,

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74. For a discussion of the concept of ownership of airspace, see e.g. Winfield on Tort, 7th ed. (1963), pp. 373-4.
75. (1880), 14 Ch.D. 537.
76. As to "concealed fraud" see now Limitation Act, 1939, s. 26. Fry, J. held that time ran from the construction of the cellar.
77. (1892), 67 L.T. 615.
78. [1901] 1 Ch. 738.
79. [1910] 1 Ch. 12.
80. (1892), 67 L.T. 615.

soil, and other substances through on their private railway to a wharf) for only nineteen years before the plaintiff, who claimed to be the owner of the subsoil through which the tunnel ran, issued his writ contesting the title to the tunnel. Nineteen years was, of course, more than enough to establish title by adverse possession, but insufficient to establish a right of way by prescription, for which the minimum period under the Prescription Act, 1832, is twenty years. Once more therefore there occurred the paradox of the claimants having to establish the greater quantum of interest, viz. adverse possession, in order to take advantage of the lesser period of "prescription," viz. twelve years. The claimants, the London Portland Cement Co., succeeded in establishing that they had acquired title by adverse possession since they had appropriated the chalk and soil used in excavating the tunnel, had had exclusive use of the tunnel when excavated, and had turned back strangers who had wandered into the tunnel. Moreover, if this were relevant, they had originally constructed the tunnel under a licence (later revoked)[81] from the trustees of the

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81. The licence was treated by Romer, J. as revoked when, by an Act passed shortly after the licence was granted, the highway ceased to be under the jurisdiction of the trustees. Thus the case is an early example of the licensee's possession becoming adverse because the licence was not regarded as operating in rem - see Chapter 2, supra.

highway under which the tunnel ran[82] and of that licence Romer, J. said,

> "it does not purport to give the licensee merely power to use the tunnel, when formed, as a way; it gives power to the licensee to use it for all purposes."[83]

According to the Report, the actual wording of the licence was a grant,

> "to excavate, construct, and use the tunnel in question"[84]

and it is instructive to compare this wording with that of the grant in S. E. Ry. v. Associated Portland Cement[85] which read,

> "to construct a tunnel or archway under the said proposed railway...for the purpose of conveying chalk or other materials or for any other purpose."[86]

The wording is clearly as wide, if not wider, than that in Bevan v. London Portland Cement Co.[87] and yet in the S. E. Ry. case, it was assumed by both Swinfen Eady, J. and by the Court of Appeal that the grant was of an easement only. It was not suggested that it could have been a grant of the fee simple in the tunnel. The assumption may well have been because the argument in the case was as to whether or not the grant was void for uncertainty or perpetuity. The tunnel

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82. The plaintiff claimed, as the owner of property adjoining the highway, title to the subsoil underneath it.
83. Ibid.
84. (1892), 67 L.T. 615 at 616.
85. [1910] 1 Ch. 12.
86. Ibid. at p. 14.
87. [1910] 1 Ch. 12.

had not been constructed at the date of the action and there was no factual quantum of user for the Court to judge by as there had been in Bevan v. Portland Cement Co.[88]

In view of this comparative paucity of authority on whether the exclusive use of a tunnel constitutes merely jus in re aliena or is, further, ownership of the land itself, it is interesting to see that Midland Railway Co. v. Wright[89] casts some indirect light on the possibility of acquiring title by adverse possession to subterranean strata or a subterranean airspace. The case itself concerned a claim to the acquisition by adverse possession of the land above a railway tunnel, all the land, both surface and subsoil, having originally been conveyed by the claimant's predecessor to the railway company. The claim succeeded and, in his judgment, Byrne, J. made the following observations of general interest concerning the possibilities of different ownership of the surface of land and subterranean strata,

> "It is sufficient for the purposes of the present case to say that I consider that the defendant and his predecessors in title have acquired by possession title to the surface of the land, with so much of what is beneath as is necessary for the enjoyment of it, subject to the right of the plaintiffs to the tunnel and to so much of the underlying and superincumbent strata as is necessary for its due and proper enjoyment as and for a tunnel.

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88. [1910] 1 Ch. 12.
89. [1901] 1 Ch. 738.

> I do not think it is necessary for me to attempt to draw a division in the strata between the surface of the land and the top of the tunnel, and to define precisely where the property of the surface owner ends and the property of the railway company begins. A number of illustrations were put, and a number of hypothetical cases were presented, some of them involving points of nicety, and it was argued that though a man may acquire by possession title to a cellar, though no part of the house above belongs to him, that although he may acquire title by possession to a single room in the house, that although he may acquire title to a cave in a bank or in the ground, nevertheless it is necessary that whatever is acquired by means of this exclusive possession should be measurable by precise metes and bounds and in some way cubically...If this be true, then I think it would follow that the ordinary rights of the owner of the soil would apply and that the possession of the soil above would carry everything beneath except that which was the property of another party."[90]

There are of course many cases recognizing that adverse possession may be taken of mines and seams in mines[91] but normally no conflict arises with easement/profit prescription, though we have noted earlier in this chapter in discussing Wilkinson v. Proud[92] an example of conflict between a claim to a prescriptive profit of taking coal and a claim to adverse possession of the coal seams themselves.

Let us now turn to the second of the two classes of case mentioned earlier[93] as causing difficulty because of the separation in law of easement/profit prescription and

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90. [1901] 1 Ch. 738, at 744.
91. For an account see e.g. Preston and Newsom: Limitation of Actions, 3rd ed. pp. 108-9.
92. (1843), 11 M. & W. 33; supra pp. 94-5. Cf., Sutherland v. Heathcote [1891] 3 Ch. 505.
93. Supra, p. 96.

acquisition of title by adverse possession. This, it will be remembered, is the case where, after an easement or profit has already come into being, the owner of the dominant tenement claims to have acquired title itself to the servient tenement by the requisite number of years of adverse possession. The owner of the servient tenement resists the claim on the ground that the acts on which the claimant relies to establish adverse possession are referable to the exercise by him of his existing easement or profit and lack therefore the element of hostility necessary for adverse possession.

In this context, it will be recalled that we have discussed earlier in our examination of Attorney General for S. Nigeria v. John Holt & Co. Ltd.[94] the problem of whether the difference between easement/profit prescription and acquisition of title by adverse possession is simply a question of the factual quantum of acts done on the land in question by the adverse possessor irrespective of his intentions or whether the difference is to be ascertained from the intention of the claimant when he did the acts in question. We saw that in Attorney General for S. Nigeria v. John Holt & Co. Ltd.[95] the Privy Council appeared to regard the intention of the claimant as all-important, with the

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94. [1915] A.C. 599; supra p.103 et seq.
95. Ibid.

consequence that the same quantum of acts could confer title by adverse possession or not, according to the intention of the possessor. It is however submitted that the reasons given above[96] for the rejection of the test of intention are equally relevant to the second class of case that we are now discussing, with the consequence that if a man's long continued acts over another's land factually constitute the taking of exclusive possession of that land, he should automatically acquire title by adverse possession. The fortuitous fact that he also had an easement over the land should be irrelevant, unless the presumption of adversity can be rebutted by showing that the sum of all the continuous acts over the land is clearly referable, irrespective of the actor's subjective intention, to the easement in question.[97] The same ought equally to be true of a claimant whose alleged acts of adverse possession are in fact referable to the exercise by him of a public right. This was indeed decided in the Irish case of Re Duffy's Estate,[98] where a claim was made to title by adverse possession of the track of a derelict railway running over quays to a dockside. The claimant's agent had for many years carted loads of coal and salt across the track, the rails of which were partly

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96. Supra, pp. 104-5.
97. See Chapter I for the suggested general application of this proposition.
98. [1897] 1 I.R. 307.

covered with debris and partly covered up. This complete disregard of the railway company's ownership, that company having discontinued possession of the line, might have conferred title by adverse possession - indeed, so far as the agent's intention was in evidence, it would have seemed to have been an animus possidendi as owner.[99] Nevertheless, Ross, J. held that the claim failed for the reason that the sum of all the acts of carting across the track was clearly referable to a section of the railway company's private Act requiring the Company so to construct the railway,

> "as not to unnecessarily interrupt and inconvenience the general traffic on the quays...or the roads leading therefrom and thereto, and so as not to interfere with the due accommodation to each of the said quays."[100]

The same reasoning would presumably forestall claims to title by adverse possession of land to which the public has access by virtue of an access order or agreement under the National Parks and Access to the Countryside Act, 1949. The point is made explicit, so far as the acquisition of easements is concerned, by Section 66(4) of the 1949 Act which provides,

> "For the purposes of an enactment or rule of law as to the circumstances in which the dedication of a highway or the grant of an easement may be presumed, or may be established by

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99. See Ibid. at pp. 144 and 147. Cf., Norton v. L.N.W.R. (1879), 13 Ch.D. 268 at 274.
100. See the provisions of the Act set out at p. 310 of the Report.

> prescription, the use by the public or by any person of a way across land at any time while it is comprised in an access agreement or order shall be disregarded."

So far as title by adverse possession of such land is concerned, however, it may be questioned whether acts great enough in quantum to constitute exclusive possession could ever be completely referable to the rights of the public under the 1949 Act which are confined to entering upon the land in question,

> "...for the purpose of open-air recreation without breaking or damaging any wall, fence, hedge, or gate..."[101]

A claimant who had been continuously in possession for twelve years could hardly, even in these days of a leisured society, be said to have been there all that time simply for "open-air recreation."!

Apart from Re Duffy's Estate,[102] which is in any event in a rather special category of its own, there are but three authorities directly on the problem of existing easement followed by acts of alleged long-continued adverse possession. These are the Court of Appeal's decisions in Littledale v. Liverpool College[103] Geo. Wimpey & Co. Ltd. v. Sohn[104] and Thomas W. Ward Ltd. v. Alexander Bruce Ltd.,[105]

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101. 1949 Act, s. 60(1).
102. Discussed above, p. 124-5.
103. [1900] 1 Ch. 19.
104. [1966] 2 W.L.R. 414.
105. [1958] 2 Lloyd's Rep. 412 (Vaisey, J.); [1959] 2 Lloyd's Rep. 472 (C.A.).

These cases show the uncertainties and possible injustices caused by the "intention" test.

In Littledale v. Liverpool College,[106] the claim was to title by long-continued adverse possession of a narrow strip of grassland, bordered by hedges, leading from a public road to the claimant's field. The documentary title to the strip was in the owner of the fields that bordered the strip and were separated from it by the hedges, but the claimants alleged that they had extinguished that documentary title by many years' acts of exclusive possession. This claim, however, was apparently an afterthought since at the beginning of their action, the claimants had merely claimed a right of way over the strip and no more. The acts of alleged adverse possession on which the claimants relied were principally the erection and locking of gates at each end of the strip, the keys being retained by the claimants and the letting by the claimants' tenants of grazing over the strip to the documentary owners' tenants. Looked at in isolation, these acts might well have constituted possession adverse to the documentary owners of the strip - indeed Jeune, P. said of them,

> "These are the undoubted facts, and, if they stood alone, I confess that, when we find on the one side acts of user, and on the other side none or practically none, I should be much inclined to say that there had been a dispossession - that is,

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106. [1900] 1 Ch. 19.

> that legally the plaintiffs have been in possession. And, if the defendants during the past twelve years had sought to bring an action of trespass against anyone who had trespassed on the land, I think they would have found it difficult to prove that, although they had a proper legal title, they were in possession sufficiently to bring the action."[107]

Lindley, M. R., with whom Romer, L. J. concurred,[108] was of the same opinion. However, all three learned judges concurred (Jeune, P., with some hesitation) in holding that, as it was admitted by both parties that the claimants had always had a right of way over the strip to their own field, all their acts were referable to the exercise or protection of this right of way and not to adverse possession. Consequently, the claim failed. Lindley, M. R. attributed the claim's failure to the intention of the claimants when they erected and locked the gates. He deduced that they were put there merely to keep out the public from entering from the public highway (though quite why this needed a gate at <u>both</u> ends of the strip does not appear) on to the private right of way. One would, however, have thought that an inchoate owner by adverse possession would equally have tried to exclude the public as well as to exclude the true owner.[109] Lindley, M. R. also laid stress on the fact that the claimants had originally claimed only a right of way, but there

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107. [1900] 1 Ch. 19 at 25.
108. <u>Ibid</u>. at pp. 22 and 26 respectively.
109. See discussion of a similar point in <u>Geo. Wimpey & Co. Ltd. v. Sohn</u>, p. 138 <u>infra</u>.

seems no reason why a claimant should not claim an easement or adverse possession in the alternative,[110] as ultimately these claimants had done.

Jeune, P. steered clear of the treacherous test of intention and was content, with considerable hesitation, to relate factually what the claimants had done to the exercise of their right of way. He felt, however, moved to confess that,

> "If there had been no right of way I should have thought that, when a man puts gates at each end of a strip of land and locks them, he has done as strong an act as he could do to assert his right to the ownership of the land. Such an act, which is, in fact, an enclosure, had always been held to be one of the strongest things that can be done to assert ownership."[111]

With these observations, we respectfully agree. It seems hard that where a claimant "has done as strong an act as he could do to assert his right to the ownership of the land" it is yet not strong enough, merely because he is unlucky enough to have had throughout an existing easement. As a matter of interest, one may speculate whether in fact the claimants in Littledale v. Liverpool College[112] really did have an existing right of way before they erected the gates and locked them. In the action (to restrain trespasses by the documentary owners) they had originally

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110. Cf., the same point in an earlier context, p.105 supra.
111. Ibid., at p. 25.
112. Ibid.

claimed a right of way, which hardly shows that they were convinced that they had one. The existence of a right of way for agricultural purposes had, however, been admitted by the documentary owners.

The right of way had, however, never, so far as one can tell from the Report, been the subject of an express grant. If it had been acquired by prescription, the period of user immediately prior to the action would be the relevant period,[113] in which case Littledale v. Liverpool College would need reconsideration as belonging to category I discussed above,[114] i.e. where the possible periods of easement/profit prescription or adverse possession are contemporaneous. And yet, the Court of Appeal clearly considered that the right of way was already in existence before the erection and locking of the gates and letting of the grazing - "all through there has been an undoubted right of way."[115]

It appears from the Report[116] that at one time the strip constituted the only access from the highway to the claimants' field, in which case there might originally have been a way of necessity. However, afterwards and before the erection etc., of the gates, other roads were made to

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113. The statutory periods under the Prescription Act, 1832, are those "next before action brought."
114. Supra, p. 99 et seq.
115. [1900] 1 Ch. 19 at 25 (per Jeune, P.).
116. Ibid., at p. 20.

the field and there is authority,[117] admittedly criticised,[118] which holds that the way of necessity would then have ceased. The case then would properly fall in that category where a claimant takes possession under the mistaken belief that he is entitled to under a grant, instrument, etc. As will be submitted in a later chapter,[119] such possession should be considered adverse, since the intention of the claimant should be irrelevant.

An even more extreme example of a claimant whose acts would undoubtedly have constituted adverse possession but for the fact that he had an easement over the land in question is the Court of Appeal case of Geo. Wimpey & Co. Ltd. v. Sohn.[120] Here the easement was that nebulous right to use a garden as a pleasure ground which had first been fully recognized some ten years before by the Court of Appeal in Re Ellenborough Park.[121] But whereas the garden in Re Ellenborough Park was, in the case of some of the houses benefited, some 100/150 yards away and accessible from them only by public roads, the garden in Geo. Wimpey & Co. Ltd. v. Sohn was on open space in Brighton bordered on the East and West by the benefited houses, and on the North by the former

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117. Holmes v. Goring (1824), 2 Bing. 76.
118. See Proctor v. Hodgson (1855), 10 Exch. 824; Berkshire v. Grubb (1881), 18 Ch.D. 616, at 620; 3 Conveyancer (N.S.) 430.
119. Infra, Chapter 6.
120. [1966] 2 W.L.R. 414.
121. [1956] 1 Ch. 131.

mansion-house, now an hotel, the title to which originally included the freehold of the open space. Through the centre of the open space from North to South ran a private road which joined a public street. One infers that the open space was separated from this public street by a wall, through which there had at one time been a passageway immediately adjoining the houses on the West side allowing the public access from the street to the open space.

The defendants in the case were the owners of the benefited houses (which had also been converted into an hotel) on the West side of the open space, and in common with the owners and occupiers of the houses on the East side of the open space, the defendants enjoyed, qua owners of their hotel, a right already existing when it was referred to in a conveyance of 1833 as (the wording being important), a right

> "to the use of the garden ground" [i.e. the open space] "as a pleasure ground to be laid out as they should direct".

Not only was this right enjoyed in common with the owners and occupiers of the houses on the other (East) side of the open space, who originally at least could enjoy their easement all over the open space on both sides of the private road running down the middle but also it was enjoyed in common with the owners and occupiers of the hotel on the North side of the open space i.e. the freeholders. Nevertheless, as far back as 1930, the gardens on either side of

the private road had been fenced or hedged off (the defendants having the key to a locked gate in the hedge on the Western side) from the road and in 1940 the defendants' predecessors in title had stopped up the passageway leading from the public street on the South, so that in effect the defendants and their predecessors had for more than twelve years treated the western half of the open space (abutting on their hotel) as the private garden of the hotel and had erected in it a greenhouse, a flagpole base, and a windscreen around a bench.

Nevertheless, the Court of Appeal unanimously held that the defendants had not acquired title by adverse possession to the western half of the open space, i.e. what had been treated as the hotel garden, because, despite "most cogent evidence of adverse possession and of dispossession of the true owner,"[122] the acts of the defendants and their predecessors were equivocal, since they might equally be referable to a protection by them of their garden-easement from invasion by the public and to "a tacit partition of the easement in common among the...householders [on both sides of the open space]."[123] Moreover, it was only during the negotiations for the sale to the plaintiffs of the hotel that the defendants for the first time alleged that they owned

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122. [1966] 2 W.L.R. 414 at 429 (per Russell, L. J.).
123. Ibid.

the fee simple of the garden (the plaintiffs needing to do constructional work on it to further their scheme of re-development of the hotel as a block of flats). Previously, they had been content to claim an easement only. Consequently, the Court of Appeal refused to allow the defendants' appeal from Buckley, J's refusal to decree specific performance of the contract to sell the fee simple of the hotel and garden.

This was not, however, the only, or indeed the main, ratio decidendi, since the Court also held that, even if the defendants had acquired title to the garden by twelve years' adverse possession, this would not fulfil their contractual obligation (under a Special Condition of the contract) to support their title to the garden by evidence,

> "that the...property has for a period of 20 years and upwards been in the undisputed possession of the [defendants] or their predecessors in title."

This part of the decision may have unfortunate conveyancing implications[124] but it is outside the scope of our present inquiry. The existence of this ratio decidendi does, however, weaken a little that other ratio which we are discussing.

As to that ratio, it seems unfortunate that the chance that the defendants had this easement of use of the garden

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124. See criticism by the author in (1966), 29 M.L.R. 436.

prevented their acquisition of title to it by adverse possession by acts of enclosure which, viewed in the abstract, were acknowledged by the Court to have been ample to have constituted adverse possession. Russell, L. J. recognized this when he qualified his judgment by the statement that,

> "It must, of course, be a very exceptional case in which enclosure of the order indicated will not demonstrate the relevant adverse possession required for a possessory title, But where there is an easement as against the landowner to use the land as a garden, it seems to me that a very clear case must be made to establish possession adverse to the landowner so long as the land continues to be used as a garden."[125]

Indeed, Russell, L. J. had (obiter) doubts whether or not adverse possession might not have been constituted by the defendants' own acts, assuming in their favour that they had regarded themselves as owners of the garden since they bought the hotel (less than 12 years before the contract date for completion but more than 12 years before the hearing of the appeal).

Lord Justice Harman was more definite in dismissing the defendants' appeal, citing Lord Lindley in Littledale v. Liverpool College,[126] and also Leigh v. Jack[127] which was not a case of an easement at all, but simply depended on what constituted dispossession of the owner of vacant land not used for any specific purpose by the owner.[128] He

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125. [1966] 2 W.L.R. 414, at 430.
126. [1900] 1 Ch. 19 - see discussion of the case at p.127 supra.
127. (1879), 5 Ex.D. 264 (C.A.).
128. Similarly in Williams Bros. Direct Supply Co. v. Raftery [1958] 1 Q.B. 159, also cited by Harman, L.J.

distinguished Seddon v. Smith,[129] where a claimant was held to have acquired title by adverse possession over a strip of farmland over which he had a right of way, as being a decision that the claimant had "used...it for years as if it was part of his farm in a way entirely inconsistent with the ownership of any other."[130] The user in Seddon v. Smith, however, consisted of growing crops on the land, ploughing it up for the purpose. It does seem, however, that had the claimant in that case substantiated an allegation of fencing and gating the land, this would a fortiori have sufficed as evidence of adverse possession, Cockburn, C. J. saying in this context,

> "Enclosure is the strongest possible evidence of adverse possession, but it is not indispensable."[131]

One has, therefore, rather more difficulty in distinguishing Seddon v. Smith from Geo. Wimpey & Co. Ltd. v. Sohn than apparently Harman, L. J. found. It is also a little hard to follow the reasoning of Russell, L. J. (see p. 133, note 122 supra) that the apparent acts of adverse possession in Geo. Wimpey & Co. Ltd. v. Sohn were referable to "a tacit partition of the easement in common among the...householders [on both sides of the open space]" (see p. 133, note 123 supra). Surely, any such tacit partition would not be

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129. (1877), 36 L.T. 168 (C.A.).
130. [1966] 2 W.L.R. 414, at 427.
131. (1877), 36 L.T. 168, at 169.

justified by an easement to use the garden as a pleasure-ground and would therefore be adverse to the servient owner, being ultra vires the easement? It is to be observed that in defining the easement of garden-use in Re Ellenborough Park[132], Evershed, M. R., delivering the judgment of the Court of Appeal, said that the easement did not give the right "to interfere in the laying out or upkeep of the park,"[133] but this was precisely the interference that the defendants and their predecessors in Geo. Wimpey & Co. Ltd. v. Sohn had committed. One would not have thought that their easement was capable of partition in this way without the concurrence of the freeholder and the acts of "partition" ought, therefore, perhaps, to have been regarded as adverse to him. Presumably the words in the original grant of the easement in Geo. Wimpey & Co. Ltd. v. Sohn,

> "the use of the garden ground as a pleasure ground to be laid out as they should direct."

i.e. as the dominant owners should direct, did not authorise interference with the established layout of the gardens a century after the original grant? At least, no point seems to have taken on this wording in the case.

The other reason given by the Court of Appeal in Geo.

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132. [1956] 1 Ch. 131, see pp. 96 and 131 supra.
133. Ibid., at p. 168.

Wimpey & Co. Ltd. v. Sohn for holding that the acts of enclosure did not evince an intention to exclude the freeholder was, as we have seen, that they were referable to a desire to exclude the public from the gardens. The comment made earlier on this chapter on a similar point in Littledale v. Liverpool College,[134] namely that an inchoate owner by adverse possession would be equally concerned to try to keep the public out, seems to be equally applicable here. Otherwise, it may be that it will be harder to acquire title by adverse possession by enclosing land that abuts on a public highway than by enclosing land which does not.

The third of the Court of Appeal decisions, Thomas W. Ward Ltd. v. Alexander Bruce (Grays) Ltd.[135] is in some respects an unsatisfactory case. The plaintiffs were the owners of a wharf adjoining the defendants' dock and were entitled, by an express grant in a conveyance in the title, to a right in common with the defendants "to use" one-half of the dock. For many years, their use had taken the form of grounding ships at low tide on a bed of silt which had partly built up naturally and partly been artificially reinforced by the plaintiffs. The ships thus grounded were then broken up by the plaintiffs in their trade as ship-

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134. [1900] 1 Ch. 19 (C.A.), see p.128 supra.
135. [1958] 2 Lloyd's Rep. 412 (Vaisey, J.); [1959] 2 Lloyd's Rep. 472 (C.A.).

breakers. Because of a threat by the defendants to dredge the entire dock and thus remove the bed of silt, the plaintiffs brought an action for an injunction to forbid the defendants from carrying out the threatened dredging. The plaintiffs based their claim alternatively on the acquisition of a prescriptive easement of stranding hulks on the silt or on acquisition by adverse possession of title to one-half of the dock. Vaisey, J. rejected both claims, apparently on the ground that all that the plaintiffs had done was "within the framework" of the express grant by conveyance of the right "to use" one-half of the dock. Although they affirmed his decision, the Court of Appeal did not agree that the plaintiffs' acts were within a right "to use" the half of the dock, which the Court confined to ordinary use for the purpose of loading and unloading vessels. Nevertheless, the Court of Appeal concurred with Vaisey, J. in rejecting both the claim to a prescriptive easement and to title by adverse possession. They rejected the claim to the prescriptive easement on the ground that the plaintiffs had not proved, the onus being on them, that their acts were not precario i.e. under a supposed permission given by the defendants under a mistaken construction of the right of use in the conveyance. We have, of course, seen earlier[137] that

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137. Supra, Chapter 1, p. 16-7.

the onus is on the claimant to a prescriptive easement or profit to prove that he acted nec vi, nec clam, nec precario, but we have also demonstrated that the reverse ought on principle and, indeed on the authorities, to be the position with regard to acquisition of title by adverse possession viz. that possession should be presumed to be adverse, until the contrary is proved by the documentary owner. Yet, in Thomas Ward Ltd. v. Alexander Bruce Ltd.,[138] the Court of Appeal went on to dismiss the claim to title to half the dock by adverse possession on the ground that,

> "It seems to us fatal...that there was no evidence of any intention on the part of the plaintiffs to exclude the defendants."[139]

A reference, in the next following sentence, to the judgment of Lindley, M. R. in Littledale v. Liverpool College[140] leads one to suppose that the Court of Appeal in the Ward[141] case were applying the test of whether the plaintiffs intended to strand hulks on the silt in pursuance of their right under the conveyance, or as a claim to ownership of one-half of the dock. If this is so, the application of the test of intention would seem to have worked unjust results in the Ward[141] case for the first mention of the conveyance was in the defendants' defence and the

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138. [1958] 2 Lloyd's Rep. 412 (Vaisey, J.); [1959] 2 Lloyd's Rep. 472 (C.A.).
139. [1959] 2 Lloyd's Rep. 472, at 478 (per Harman, L. J.).
140. [1900] 1 Ch. 19. Discussed supra pp. 126-131.
141. See note 138 supra.

Court of Appeal themselves were of the opinion (i) that the conveyance did not confer a right to strand hulks, and (ii) that there was no evidence that the plaintiffs and defendants allowed the ship-breaking activities to continue in pursuance of the right under the conveyance. There being no evidence on that point, ought not a presumption of hostility to have prevailed?

It may be, however, that Harman, L. J. delivering the judgment of the Court of Appeal in the Ward[142] case meant only, in the passage just cited,[143] to emphasize the non-exclusiveness of the plaintiffs' possession since, later in his judgment, he laid great stress on the uncertainty of the area of land claimed (the bed of silt was not co-terminous with one-half of the dock) and on the fact that at high tide the entire dock was covered with water and navigated by the defendants' barges.

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142. See note 138 supra.
143. [1959] 2 Lloyd's Rep. 472, at 478 (per Harman, L. J.).

CHAPTER 6.

POSSESSION BY MISTAKE.

In the first chapter of this thesis, as part of the advocacy of a principle of a presumption of hostility and a principle of the irrelevance of the actual belief or intention of the possessor, there was advanced the proposition that,

> "Possession should be adverse when taken under the mistaken belief that the right to possession was conferred by an instrument or transaction which in fact conferred no such right."[1]

It is now intended in this chapter to examine this proposition in greater detail, bearing in mind the wise words of Vice-Chancellor Bacon speaking ninety years ago of the then relevant statute of limitation,

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1. Supra, p. 15 . It may be, where possession of land is transferred by mistake that, though that possession is adverse, time may be postponed from starting to run until the plaintiff discovers or ought with reasonable diligence to have discovered the mistake, if the plaintiff's action is "for relief from the consequences of mistake" - Limitation Act, 1939, s. 26. This section (or its earlier equivalents) has never, however been pleaded in any of the mistaken possession cases and it is submitted that it either does not apply at all, on the ground that the section is confined to quasi-contractual claims for money paid or pure personalty transferred under a mistake of fact (cf., Phillips-Higgins v. Harper [1954] 1 Q.B. 411 at 419 and Re Diplock [1948] Ch. 465 at 507 and 515), or, even if it does apply, the kind of mistake that a grantor makes as to the validity of a transaction is one that he should diligently have discovered at the date of the transaction.

> "There may, indeed, be cases in which that protection which the statute extends is hardly reconcilable with strict morality. Nevertheless, the law is established upon principles of the soundest public policy, to which, for the common good, private rights and interests must in all cases yield; and it is unquestionably the policy of the law that it is better in all cases that rights, the assertion of which has been neglected for a long period of years, should be disregarded, than that a course of transactions honestly conducted should be set at nought by permitting a captious chicanery to prevail against the good faith with which they have been conducted."[2]

Even to-day when conveyancing is simplified by the 1925 property legislation and illuminated by the ever-spreading light of compulsory registration of title, there are many cases when for purely technical reasons a document or transaction is either a complete nullity and transfers no legal estate nor equitable interest contrary to the intentions of the parties or carries within it the seeds of its own destruction in the form of its avoidability for some reason. It is in these classes of cases that the doctrine of adverse possession is seen in its most benign aspect.

The essence of the different factual circumstances of possession taken by mistake is that A takes possession of B's land under a document executed or words spoken by B in A's favour which purport to render lawful the taking of possession, whether it be a conveyance, lease, licence, devise, assent or other transaction but which in fact is

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2. Per Bacon, V. C. in Yardley v. Holland (1875), L.R. 20 Eq. 428, at p. 442.

ineffective. It may be a complete nullity, void ab initio, or it may be merely voidable so that it is effective until avoided. A similar situation arises where A, and possibly B also, mistakenly think that a transaction authorizing the taking of possession relates to more land than in fact it does.

It is possible to adopt towards such mistakes the attitude of some American jurisdictions that they negate the requisite claim of right that it is said to be essential for adverse possession. The idea underlying this attitude is that the concept of hostility means that a "mere squatter" who claims no title to the land cannot be entitled to the benefits of adverse possession for he did not claim them. But, as the American writer Ballantyne points out,[3]

> "There can indeed hardly be such a thing as possession in law, entitling one to the possessory remedies, without a claim of title, at least to some limited or temporary proprietary interest."

The American concept of a claim of right as being an essential of adverse possession is not dissimilar to the requirement of Section 9(3) of the English Limitation Act, 1939, for adverse possession of land leased in writing (for an annual rent of not less than £1 per annum) where the statute defines an adverse possessor as one who receives the rent "wrongfully claiming to be entitled to the land in

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3. "Title in Adverse Possession" - (1918), 28 Yale, L.J. 219 at 220.

reversion immediately expectant on the determination of the lease" (author's italics) and, on this very wording in the statutory predecessor of the 1939 Act,[4] Lord Romilly, M. R. decided in Williams v. Pott[5] that a receipt of rent, under the mistaken belief by the recipient that she was entitled under a devise in a will to the fee simple when in fact the land was not devisable by the testator, was nevertheless a receipt by a person "wrongfully claiming to be entitled." The short judgment of Romilly, M. R. clearly disposes of the subjective view of hostility so far as English law is concerned. He says,[6]

> "The...argument - that the word "wrongfully" excludes the receipt by mistake, or any matters of that description, and must mean an intentional and improper claiming of the rent - I reject altogether; and I am satisfied that it is not the true construction of the statute. It means a person not entitled, who makes a claim to the rents against the person who is entitled."

Williams v. Pott[7] is an excellent illustration of the principle that possession taken by mistake is in English law adverse, since the recipient of the rents, who thought she was a valid devisee, when in fact she was not, had collected the rents through an agent who mistakenly did not realize

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4. Real Property Limitation Act, 1833, s. 9.
5. (1871), L.R. 12 Eq. 149.
6. Ibid., at p. 152. cf. as to prescriptive acquisition of an easement or profit - Earl de la Warr v. Miles (1881), 17 Ch.D. 535, at 591, 593-4 and 597.
7. (1871), L.R. 12 Eq. 149.

that, under a settlement, he was beneficially entitled himself to the land. He had, therefore, in a sense extinguished his own title, but only because his possession of the rents was solely as agent for his principal and he never repudiated his agency.[8]

A further justification put forward for the subjective attitude towards the adversity of adverse possession is that it is essential for a man who claims title by adverse possession to state what title it is that he thus claims. In the American case of Ricard v. Williams, for example, Justice Story said,[9]

> "if the party claim only a limited estate and not a fee, the law will not, contrary to his intentions, enlarge it to a fee."

and he held, in accordance with this dictum that possession under a void lease for 1500 years could not ripen into an estate in fee simple.

It is submitted, however, that this ought to be no part of English law and, indeed, so far as the case of taking possession under a void lease is concerned, there is direct English authority against it in the shape of the House of Lords' decision in Magdalen Hospital v. Knotts,[10] in which

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8. His heir-at-law claimed the land.
9. 20 U.S. 59, 5 L.Ed. 398 (1822).
10. (1879) 4 App.Cas. 324 (H.L.); (1878), 8 Ch.D. 709 (A.C.); (1877), 5 Ch.D. 175 applied in Webster v. Southey (1887), 36 Ch.D. 9; cf., Low Moor Co. v. Stanley Coal Co. (1876), 34 L.T. 186 (contract of sale followed by void conveyance - purchaser treated as tenant-at-will and therefore acquired title thirteen years after contract).

was considered a lease of land, the site of a public house subsequently built, granted by the Governors of Magdalen Hospital (for penitent prostitutes) in 1783 for 99 years at a peppercorn rent in contravention of Section 3 of the Dilapidations and Frauds, Leases by Colleges etc., Act, 1571,[11] which renders such a lease, "utterly void and of none effect, to all intents, constructions and purposes; any law, custom or usage, to the contrary anywise notwithstanding."[11] The Governors commenced proceedings in 1876 (93 years after possession was first taken under the lease) for a declaration that the lease was void and for possession accordingly but the defendants, present possessors of the public house deriving title from the original lessee, pleaded that 93 years' possession had extinguished the fee simple reversion of the Governors and that the defendants had title by adverse possession. This plea was stigmatized by Jessel, M. R., in characteristically sturdy language, as "absurd." He added,

> "The mere statement of such a proposition shocks one's intellectual conceptions."[12]

Nevertheless, when the case reached the House of Lords, their Lordships must have heeded the words of Fry, J. in the earlier stages of the case,

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11. 13 Eliz. C. 10, s. 3.
12. (1876), 5 Ch.D. 175, at 180.

> "I should be very glad if the Plaintiffs should be able to recollect that charity may be shewn to publicans as well as to sinners."[13]

for they held unanimously that the lease being void ab initio, possession taken under it was ab initio adverse and the defendants had indeed title by adverse possession, the plaintiff's fee simple reversion being extinguished.

Throughout the various stages of the case, at first instance, before the Court of Appeal, and in the House of Lords, the arguments turned on whether a lease in contravention of the 1571 statute was void or voidable and no-one sought to deny that if it were void, possession taken under it would be ab initio adverse. Even Jessel, M. R., whose vigorous language we have just noted said,

> "How then was that absurdity got rid of? Simply by holding that the lease was voidable."[14]

It is proposed therefore to examine in further detail two questions posed by this decision,

(1) How far does the principle apply to other instruments or words of transfer which are void ab initio so far as the land in issue is concerned?

(2) What is the answer to a question deliberately left open by the House of Lords in the Magdalen Hospital case - viz. is possession taken under a voidable instrument adverse ab initio?

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13. (1878), 8 Ch.D. 709, at 720.
14. (1876), 5 Ch.D. 175, at 180.

(1) In this category, void instruments or words, we shall examine the modern application of the doctrine of adverse possession to the following situations:-

(a) Mistakes as to the land actually comprised in an instrument or words of transfer;

(b) Mistakes as to the validity of grants inter vivos and of interests taken by testate or intestate succession.

(a) Mistakes as to the land actually comprised in an instrument of transfer.

As we saw in the introduction to this thesis,[15] too literal an interpretation of the word "adverse" in the phrase "adverse possession" may lead to the absurd conclusion that the deliberate "thief" of land can acquire a squatter's title by adverse possession, whereas an innocent possessor, with no right to the land but there because of a mistake as to the effect of a document, cannot acquire a squatter's title. This is indeed the case in some jurisdictions in the U.S.A. In Preble v. Me. Cent. Ry. Co.,[16] for example, possession was held not to have conferred a title when the claimant testified, "Occupied it on account I thought it was my own land."

The reasoning in such a case is that possession is not adverse unless there is a claim of right. The requisite intention to claim title is absent if there is uncertainty as

15. Chapter 1, p.12-3 supra.
16. (1893), 85 Me. 260.

to the boundary showing an intent "only to claim the true line, whatever that may be"[17] and "the holding is contingent and in subordination to the true title."[17] However it is submitted that English law should regard this reasoning as "unsound historically, inexpedient practically, and as resulting in better treatment for a ruthless wrongdoer than for the honest landowner."[18] The better view seems to be that of a Connecticut Court when, in a mistaken boundary case in 1831, it said,

> "Into the recesses of his [the adverse claimant's] mind, his motives or purposes, his guilt or innocence, no inquiry is made...The very nature of the act (entry and possession) is an assertion of his own title, and the denial of the title of all others. It matters not that the possessor was mistaken, and that had he been better informed, would not have entered on the land."[19]

We would respectfully prefer the attitude of the Canadian Court in Doe d. Taylor v. Sexton[20] the decision of which was that,

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17. Ballantyne: "Title in Adverse Possession" (1919), 28 Yale L.J. 219.
18. Powell on Real Property (1965), Vol. 6, p. 723, summing up the views of writers specified in his footnote (79) (p. 723). It is interesting to note that even in those American jurisdictions which are prepared to hold mistaken possession not to be adverse, the rigour of the rule is mitigated by a presumption of hostility rebuttable by proof of no intention to claim title - Anderson v. Richards 100 Ore 641, 798, p. 570 (1921).
19. French v. Pearce, (1831), 8 Conn. 439.
20. (1851), 8 U.C.R. 264.

> "A possession inadvertently held under an erroneous impression as to boundary, with no intention of claiming the land otherwise than as it was supposed to form part of a certain lot covered by the party's deed, would by mere lapse of time ripen into a title."[21]

There seems little, if any, authority in English law on adverse possession and mistaken boundaries but in Chisholm v. Hall,[22] the Privy Council appears to have assumed that sufficient hostility existed in a mistaken boundary case. In Hopgood v. Brown[23] the Court of Appeal considered a case where for four years possession had been held by one plot-owner of a small strip of land encroaching on to his neighbour's plot owing to a mistake by both owners as to the true line of the boundary between the two plots, indicated with no very great precision in the conveyances of the two plots. The encroaching owner had built his garage partly on his own land and partly encroaching over the boundary, and the mistake had arisen because the line of the garage wall had been fixed by informal agreement between the encroaching owner and the owner of the plot encroached upon before building had commenced. Moreover, the owner of the plot encroached upon was a building company which had for a consideration built the garage for the encroaching owner. In these special circumstances it is not surprising to find that the Court of

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21. Statement in English and Empire Digest, Vol. 32, p. 516, note 705. cf., McFatridge v. Griffin (1875), 27 N.S.R. 421, cited in Digest Vol. 32, p. 516, note 723.
22. [1959] A.C. 719.
23. [1955] 1 A.E.R. 550; [1955] 1 W.L.R. 213.

Appeal upheld the County Court Judge's decision that the owner encroached upon was estopped from denying that the far garage wall was the true boundary.[24] However, the normal rule with regard to divergence between the physical boundary between plots and the boundary as shown in the deeds is that,

> "...the mutual intentions of the parties to a deed cannot override or distort its language, though intentions may give rise to the right of one or other of the parties to have that language rectified."[25]

This being so, it is doubly important that when twelve years have elapsed, the physical boundary should supersede the documentary one. In this context the doctrine of adverse possession fulfils a similar function to estoppel but without its insistence on an actual misrepresentation by the documentary owner to the adverse possessor as to the whereabouts of the boundary. In the writer's experience, it is extremely common for divergencies to occur on dwellinghouse building estates between the boundaries as shown on the estate plan (and ergo in the conveyances of the individual plots) and the actual physical boundaries. It is vital to the peace of the dwellers on such estates that after twelve years settled physical boundaries shall not be disturbed by reference to the parcels and plans of the conveyances. Nor

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24. A similar approach, based on "mutual acquiescence" has occurred in some American cases, see e.g. Shaw v. Williams 50 So. (2) 125 (Fla. 1950).
25. Per Evershed, M. R. in Hopgood v. Brown [1955] 1 W.L.R. 213, at 220.

ought the kind of admissions the encroaching owner made in Hopgood v. Brown[26] to make any difference. He admitted that "he had no intention of encroaching upon the company's boundary,"[27] and that,

> "No question of company giving me any extra land. If in fact it was built on adjoining land this was a mistake."[27]

The arguments against allowing such admissions to negate the hostility of adverse possession have, it is hoped, been marshalled above.[28]

We have seen that possession taken under a lease mistakenly believed to be valid, but in fact void, is nevertheless adverse to the lessor.[29] We have also seen that it is probable that possession taken of land under a mistake that it is comprised in a conveyance of the fee simple is nevertheless adverse to the grantor.[30] One would therefore expect that a natural combination of these two principles would be that possession of land taken under the mistaken belief that it was comprised in a lease (valid, but not extending to the land in question) should be adverse to the owner of that

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26. [1955] 1 A.E.R. 550; [1955] 1 W.L.R. 213.
27. [1955] 1 W.L.R. 213, at 217-8.
28. See Chapter 1, p. 12 supra; Cf., as to registered land, Chowood v. Lyall (2) [1930] 1 Ch. 426; [1930] 2 Ch. 156; Re Chowood's Registered Land [1933] Ch. 574; Re Boyle's Claim [1961] 1 W.L.R. 339; [1961] 1 A.E.R. 620; Curtis and Ruoff: Registered Conveyancing, 2nd Ed., p. 737.
29. Magdalen Hospital v. Knotts (1879), 4 App.Cas. 324; see p.146-8 supra.
30. See cases cited at pp. 146-8 supra.

land, even if he chances to be the lessor, so as to extinguish the lessor's whole interest in that land. There would not seem to be any logical distinction between land thought to be leased, but in fact not so, because the parcels in the lease did not extend to the land in question.

However, this simple deduction is considerably complicated, if not negated, by a branch of the law of landlord and tenant relating to tenant's "encroachments." It is typically stated thus,

> "Where a tenant takes possession of land adjacent to that which he holds as tenant, there is a presumption that the encroachment is for the landlord's benefit, and that the land encroached upon is to be added to the holding."[31]

> "Whether the inclosed land is part of the waste or belongs to the landlord or a third person...the encroachment must be considered as annexed to the holding unless it clearly appears that the tenant made it for his own benefit."[32]

Literally read, these statements would mean that the 999 year leaseholder for example could never gain his landlord's adjoining land by long continued possession, whether taken under a mistaken belief as to the land being comprised in the lease or under no mistake but with the deliberate intention of annexing it. Yet such "encroachments" by a purchaser of a freehold against his vendor's adjoining land would undoubtedly constitute adverse possession.

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31. Preston and Newsom: Limitation of Actions, 3rd Ed. p.129.
32. Per Parke, B. in Kingsmill v. Millard (1955), 11 Ex. 313, at 318.

It is therefore proposed critically to examine this doctrine of tenant's encroachments to see how far it exists in modern law and to what extent it militates against a rule that possession taken by mistake as to effect of a document is nevertheless adverse.

The doctrine has a somewhat chequered history. In the eighteenth century, Lord Kenyon denied its existence altogether, if Espinasse is to be believed, for Lord Kenyon is reported as being

> "revolted at the idea that the tenant could make the landlord a trespasser"

laying it down that,

> "if a tenant inclose part of a waste, and is in possession thereof so long as to acquire a possessory right to it, such inclosure does not belong to the landlord."[33]

These remarks apply, of course, to the case of the tenant encroaching on the land of a third party and not on the landlord's own adjoining land, but the moral disapproval of "land-stealing" on behalf of the landlord[34] has caused the Courts to try to find some other basis for the presumption that encroachments by the tenant ensure for the benefit of the landlord. The usual reason given is that of estoppel. In Andrews v. Hailes[34] for example, Lord Campbell said,

> "I do not adopt the doctrine that the tenant steals for his landlord, and that therefore the landlord at the end of the demise is entitled to

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33. Doe d. Colclough v. Mulliner (1795), 1 Esp. N.P. 460.
34. Cf., Andrews v. Hailes (1853), 2 E. & B. 349, at pp. 353-5.

> claim the stolen property: but I think that, when the property is taken and used as part of the holding, the tenant can as little dispute the title to it as he can dispute the title to any other part of the premises...In the present case it appears that the defendant got possession of the incroachment by virtue of being tenant of the demised premises, and that he occupied it as part of the demised premises."[34a]

This reasoning was subsequently adopted in Kingsmill v. Millard[35] and Lisburne v. Davies,[36] the latter being a case of encroachment on the landlord's own adjoining land. It is, however, difficult to see how it prevents what would normally be adverse possession from being adverse merely because it is possession by an encroaching tenant. If the landlord agrees to the encroachment and the tenant encroaches by virtue of that agreement this would be in itself enough on general principles to prevent possession being adverse and one can then understand that in so far as, in equity at least,[37] there is thereby created a tenancy of the encroached land, the tenant is bound by the usual estoppel with regard to his landlord's title. If, however, the tenant takes possession without the landlord's consent, to invoke the estoppel rule seems to assume what it seeks to prove, namely that the encroached land has been added to the demised land.

34a. Cf., Andrews v. Hailes (1853), 2 E. & B. 349, at pp. 353-5.
35. (1855), 11 Ex. 513.
36. (1866), L.R. 1 C.P. 259.
37. See Law ~~and~~ Property Act, 1925, ss. 52 and 54, and Walsh v. Lonsdale (1882), 21 Ch.D. 9.

In Perrott v. Cohen,[38] where a tenant of business premises encroached on some adjoining lavatories belonging to the landlord and was at the end of the lease sued on the repairing covenant in relation to dilapidations in the lavatories, Denning, L. J. seized on his (then) newly discovered doctrine of promissory estoppel to give a new explanation for the doctrine that a tenant's encroachment was presumed not to be adverse to the landlord. The learned Lord Justice said,[39]

> "The principle underlying the cases on encroachment is not perhaps strictly an estoppel but is akin to it. If a tenant takes possession of adjoining property and by his conduct represents that he is holding it under the demise, then, if the landlord acts on that representation by allowing the tenant to remain in possession, the tenant cannot afterwards assert that he is holding it adversely to the landlord so as to acquire a title under the Limitation Act of 1939...The reason is because the tenant has by his conduct made a representation that was intended to be binding, was intended to be acted on, and was in fact acted on; and he cannot be allowed to go back on it. The representation was an assertion which was equivalent to a promise or assurance that the terms of the lease should apply to the adjoining piece of land of which he was in possession and is binding on the principle which I endeavoured to state in Central London Property Trust Ltd. v. High Trees House Ltd.[40]....I know that this looks like treating an estoppel, almost, as if it were a cause of action, but it is habitually done in cases of waiver: see Rickards (Charles) Ltd. v. Oppenheim;[41] and I see no reason why we should not do the same here."

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38. [1951] 1 K.B. 705 (C.A.).
39. Ibid. at p. 710.
40. [1947] K.B. 130.
41. [1950] 1 K.B. 616, 623.

With great respect to the learned Lord Justice, however, this reasoning is rather difficult to accept as a basis for the alleged non-adversity of a tenant's encroachment. To begin with, as Denning, L. J. himself confesses, it resulted in Perrott v. Cohen[42] in a promissory estoppel being used as a cause of action, contrary to the "shield, now sword" principle enunciated a year or so later by a Court of Appeal, of which Denning, L. J. was a member, in Combe v. Combe.[43] Similarly, it might be that to use promissory estoppel in the context of non-adversity of a tenant's encroachment is to allow it to be used as a cause of action in that an action for possession against the tenant would be on his promise (by conduct) to deliver up possession of the notionally demised premises at the end of the (fictional) "term."[44]

Again, the doctrine of "quasi-estoppel," as Denning, L. J's principle is sometimes known, results in the formation of a "quasi-contract," which emphasizes that the cases on tenant's encroachment really depend on the consent of the landlord being given to the encroachment and the tenant deriving title under that consent, so to speak. In Perrott v. Cohen,[45] for example, the tenant expressly claimed that

42. [1951] 1 K.B. 705 (C.A.).
43. [1950] 1 K.B. 616, 623.
44. But cf., however, a lease by estoppel where the landlord has no title to the land he purports to demise - here the 'tenant' is liable on the 'covenants' in the 'lease' - Gouldsworth v. Knights (1843), 11 M. & W. 337.
45. [1951] 1 K.B. 705 (C.A.).

the lavatories were demised to him under the lease and the landlords tacitly consented to the continued use of the lavatories on this basis, though they denied that they were comprised in the original demise.[46] Indeed the trial judge, Birkett, J., had held that the lavatories had been brought within the demise by an informal variation of the original lease.[47] It may well be, therefore, that the encroachment cases are nothing but an illustration of the rule that possession derived under an existing licence or tenancy (in this context of the Walsh v. Lonsdale[48] variety) is not adverse to the licensor or the lessor. Support for this view is found in the fact that in Doe d. Baddeley v. Massey[49] it was held that where a tenant enquired of his landlord if he might take a lease of the landlord's adjoining land, was refused, and then took possession of the land, he acquired the fee simple by long continuance of that possession, which was adverse.[50] Moreover, in Dixon v. Baty,[51] it was held

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46. See [1951] 1 K.B. 705, at pp. 706, 708 and 710.
47. Citing Berry v. Berry [1929] 2 K.B. 316, Counsel for the landlords did not rely on this reasoning before the Court of Appeal, presumably because it was felt that Section 40 of the Law of Property Act, 1925, might not have been complied with so far as an orthodox contractual variation was concerned.
48. (1882), 21 Ch.D. 9.
49. (1851), 17 Q.B. 373.
50. Cf., King v. Smith [1950] 1 All E.R. 553 (C.A.) where a tenant who encroached, held possession for twelve years, and then enquired of his landlord for a purchase or lease of the encroachment, was held to have shown retrospectively that he had encroached on the landlord's behalf and could not claim the fee simple. In Kingsmill v. Millard (1855), 11 Ex. 313, it was said by Parke, B.

(continued at foot of next page)

that where the defendant first took possession of the plaintiff's land adversely, his subsequently becoming tenant to the plaintiff of nearby land before he had acquired a possessory title to the original piece did not prevent continuance of possession of the original piece ripening into a possessory title to it.

Counsel for the plaintiff tried in Dixon v. Baty[51] to persuade the Court to apply the presumption of encroachment automatically wherever the owner of the land and the 'squatter' on it had the relationship of landlord and tenant, but the Court significantly refused to apply it in this way or to hold that the possession of the original piece had become non-adverse, unless there was evidence that the defendant had "paid rent, or otherwise acted as tenant in respect of it."[51] i.e. unless there were evidence of holding under a licence or equitable tenancy.

A difficult case to reconcile with the contention now being advanced is Whitmore v. Humphries[52] and in particular the following observations on the basis of the encroachment rule from the judgment of Willes, J.,[53]

> "This rule undoubtedly applies when the encroachment is made over land belonging to the

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50. (continued from previous page).
(at p. 319) that a conveyance of the encroachment by the tenant to a third party does rebut the presumption, but only if the conveyance is known to the landlord (and presumably he acquiesces in it).
51. (1866), L.R. 1 Ex. 259.
52. (1871), L.R. 7 C.P. 1 (appeal from County Court)
53. (1871), L.R. 7 C.P. 1 at pp. 4-6.

> landlord, and no enquiry appears to have been made in such cases, whether it was made with the consent of the landlord or not...
>
> The rule is based upon the obligation of the tenant to protect his landlord's rights, and to deliver up the subject of his tenancy in the same condition, fair wear and tear excepted, as that in which he enjoyed it...The reason of the rule appears on the one hand to be entirely independent of any notion of encroachment being a wrong done, and so also on the other hand it appears to be quite independent of the question, whether the encroachment was made with the assent of the landlord. It might be otherwise if the rule applied only to land belonging to the landlord, because in that case the assent of the landlord might be taken to create some new relation; but when it is considered that the rule is a general one, it does not appear that the fact of assent has any distinct bearing on its operation."

Cited in the abstract, these words seem very unfavourable to the contention being made in this chapter that a tenant's encroaching possession of the landlord's adjoining land should be presumed adverse, unless proved to be exclusively referable to an existing licence or tenancy of the land encroached upon. However, when their context is examined, it can be seen that they have a narrower meaning than at first sight appears. Willes, J. was concerned to refute an argument by Counsel for an encroaching tenant that where the landlord had given an express oral consent to the encroachment, this created a tenancy at will so that adverse possession started to run from the end of the first year of the tenancy, under the statutory provision that is now Section 9(2) of the Limitation Act, 1939.[54] In other words,

54. Then Section 7 of the Real Property Limitation Act, 1833.

Willes, J. was concerned to demonstrate that a tenant was not an adverse possessor when he had an express consent, which of course fits in with the above-mentioned contention. The purpose of the learned Judge's observations is further shown by this later extract from his judgment,[55]

> "If the general provisions of the statute [i.e. the Limitation Statute] apply when the encroachment is on the land of the landlord, what becomes of the general rule of law applicable to all encroachments, namely, that the tenant is estopped from denying that the encroachment forms part of the holding - which, with reference to such a case, is really only another way of saying that he holds in such a way as that the Statute of Limitations does not apply? The case of an encroachment is a peculiar case in the law, which treats it as being part of the holding. It follows obviously that the general provisions of the Statute of Limitations do not apply to it."

This clearly means, shortly put, that where the tenant is estopped from denying the landlord's title to the encroachment, his possession is not adverse to the landlord. This simply takes us back to estoppel as a basis for the rule and our discussion of this above.

The difficulty about the judgment of Willes, J. in Whitmore v. Humphries[56] is that his arguments were based on the concord of both counsel for the landlord and counsel for the tenant on the point that an oral consent by the landlord

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55. (1872), L.R. 7 C.P. 1 at p. 8.
56. (1872), L.R. 7 C.P. 1.

to the encroachment created only a tenancy at will, not being by deed.[57] However, since Whitmore v. Humphries,[58] there have occurred the Judicature Act, 1873, and the Court of Appeal's decision in Walsh v. Lonsdale,[59] with the result that on the facts of Whitmore v. Humphries to-day, a Court would probably hold that the tenant had an equitable tenancy of the encroached land for the same length of term as the original lease of the adjoining land. This equitable tenancy would arise from an oral tenancy, specifically enforceable by reason of part performance by both landlord and tenant, in taking and giving possession.[60] Where the terms of the consent were insufficient to create a Walsh v. Lonsdale tenancy or an effective licence, then the tenant's possession should be adverse. Why else does S. 55(c) of the Law of Property Act, 1925, provide

> "Nothing in the last two foregoing sections[61] shall ...(c) affect the right to acquire an interest in land by virtue of taking possession." ?

Does this not clearly contemplate that a 'tenant' taking possession under an arrangement that is neither lease,

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57. By virtue of the provisions of s.1 of the Statute of Frauds, 1677, now re-enacted in s. 51(1) of the Law of Property Act, 1925.
58. (1872), L.R. 7 C.P. 1.
59. (1882), 21 Ch.D. 9.
60. Cf., Law of Property Act, 1925, s. 55(d) and the remarks in Whitmore v. Humphries of Willes, J. (1871), L.R. C.P. 1 at 6, as to the lack of valuable consideration for the "new tenancy" - s.q.
61. Ss. 53 and 54 requiring writing for the creation of transfer of interests in land.

equitable tenancy, nor licence, may take possession adversely to his 'landlord'?[62] Indeed, it would seem that the very existence of any presumption of the non-adversity of an encroaching tenant's possession was called in question by a Divisional Court, on appeal from a County Court, in the case of Lord Hastings v. Saddler in 1898.[63] In that case, the tenant of an island about half a mile offshore had taken possession of some inclosed gardens on the mainland belonging to his landlord and had held possession of them, without paying rent for them, for more than twelve years. He then sold his interest in the gardens to the defendant who was sued for possession of them by the landlord, Lord Hastings, who alleged that the tenant's possession of the gardens had never been adverse, because of his being tenant of the offshore island. The Divisional Court held that the County Court judge gave a wrong direction to the jury when he told them that the defendant must rebut a presumption that he had taken possession of the gardens as "an addition merely to [the] original holding."[64] The Lord Chief Justice said of the so-called doctrine of encroachment,[64]

> "It is a doctrine that I do not think should be extended."

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62. But see the judgment of Brett, J. in Whitmore v. Humphries (1872), 7 C.P. 1. at 8-9.
63. (1898), 79 L.T. 355.
64. Ibid. at p. 356: cf., King v. Smith [1951] 1 All E.R. 553, where the Court of Appeal, in a case of encroachment on waste, held there to be a rebuttable presumption, but without referring to Hastings v. Saddler.

and held that the jury should simply have been directed,

> "Do you think that the land was occupied by the tenant as a mere extension of the locus of his tenancy? If you do you should find a verdict for the landlord. If you think the tenant took possession not as tenant, but with the object or desire simply of benefitting him himself, and so as to acquire the ownership of the land occupied under the Statute of Limitations, you should find for the tenant."[65]

Clearly, in the light of such a judgment that "peculiar case" of encroachment which Willes, J. had referred to some twenty years before[66] had ceased almost to have any individuality let alone peculiarity. The watering-down process was carried even further by Wills, J. in Lord Hastings v. Saddler[67] when he said,[68]

> "The doctrine that land occupied by a tenant in addition to his holding is to be regarded prima facie as an encroachment for the benefit of his landlord, has hitherto been confined to cases fulfilling two conditions - cases where the land occupied is waste, and where it is adjoining, or at any rate adjacent, to the land demised. There is no case where it has been applied where either of these conditions was absent. In this state of the reports it is a strong thing to say that the same doctrine has all along applied to cases such as this...I think it is too late now to say that in principle it should apply."

To sum up the cases so far discussed, then, it would seem that where a tenant encroaches on other land belonging to his landlord but not included in the original demise,

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65. See note 64 supra.
66. In Whitmore v. Humphries, see p. 162, note 55 supra.
67. See note 63 supra.
68. See note 64 supra.

his possession can legitimately be regarded as adverse unless:

(i) The land adjoins or is adjacent to the demised land[69] AND

(ii) semble, it is waste land (Lord Hastings v. Saddler)[70] AND

(iii) the encroachment is with the licence of the landlord or under a specifically enforceable contract with the landlord for a tenancy.

Where, therefore, the encroachment is under a mistake as to boundaries of the demised land, no consent would normally have been asked or given and the possession would be adverse. This would accord with mistaken boundary cases outside the field of landlord and tenant.

Unfortunately, a comparatively recent decision of the Court of Appeal seems to conflict with the suggestions in the preceding paragraph as well as to throw doubts on the whole question of possession taken under a mistake as to the effect of the instrument. This is the well-known case of Williams Bros. Direct Supply Co. Ltd. v. Raftery,[71] the facts of which require detailed explanation. The plaintiffs made a roadway and between the roadway and the remaining land at the rear they erected a fence with a gate. They

69. Cf., Lisburne v. Davies (1866), L.R. 1 C.P. 259.
70. (1898), 79 L.T. 355.
71. [1958] 1 Q.B. 159 (C.A.).

intended to develop the land thus fenced off when the opportunity arose, but this intention was frustrated by the outbreak of war in 1939. No use of the land at the rear in the meantime was contemplated by the plaintiffs. In 1940, a man called H----, a stranger to the land and the shops and maisonettes adjoining, took possession of a narrow strip of land at the rear of one of the shops/maisonettes, marked its area out by a line of bricks crushed into the ground, and grew vegetables on it, "digging for victory." In 1943, the defendant Raftery became sub-tenant of the maisonette in question, the head tenant of the entire block of shops and maisonettes being the London Co-operative Society. He took over the strip of land informally from H, without obtaining permission from anyone or paying rent for the strip and continued to "dig for victory" on it. Later, Raftery gave up cultivating the strip and instead kept greyhounds in sheds and within a wire 'fence' which he erected on part of the strip. In 1948, a director of the plaintiffs went on to the land without let or hindrance in order to measure it up with a view to preparing a plan to support an application for planning permission to develop, which was at that time refused. In 1953 (more than twelve years after H---- had first entered on the land), the plaintiffs dumped some rubbish on the land, at which the defendant protested to the plaintiffs' director, to which the director, who was not

prevented from going on the land, retorted that the defendant had some cheek in telling the plaintiffs what to do with their own land. In 1957 (17 years after H---- first entered upon the strip), the plaintiffs brought an action in the County Court for (inter alia) possession of the land, which action was defended by Raftery on the ground that he had acquired the fee simple by adverse possession. His defence succeeded in the County Court, the judge holding that the plaintiffs had been dispossessed for more than twelve years and giving Raftery a declaration that he was the owner in fee simple of the strip of land. From this decision the plaintiffs appealed.

The Court of Appeal allowed the appeal, their principal ratio decidendi being that the quantum of the defendant's and his predecessor's acts was not great enough to have constituted a dispossesion of plaintiffs,[72] since they were not inconsistent with the use to which the plaintiffs ultimately intended to put the land - see Leigh v. Jack.[73] With this aspect of the case we are not immediately concerned, but the Court of Appeal also considered whether, even if the factual quantum of the defendant's and his predecessor's acts was sufficient, they were done animo possidendi. Indeed, with

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72. There was no question of a discontinuance of possession by the plaintiffs - the finding of the County Court judge that there was no discontinuance was not the subject of any cross-appeal.
73. (1879), 5 Ex.D. 264.

great respect, the learned Lords Justices seem to veer rather confusingly from the quantum to the quality of the acts done. For example, Hodson, L. J. first cites Bramwell, L. J. in Leigh v. Jack as saying,[74]

> "...in order to defeat a title by dispossessing the former owner, acts must be done which are inconsistent with the enjoyment or the soil for the purposes for which he intended to use it."
>
> (author's italics)

but then Hodson, L. J. goes on,[75]

> "Applying that test to this case, I cannot see that any act which the defendant did is capable of being treated as sufficient to dispossess the plaintiffs. The defendant never even thought he was dispossessing the plaintiffs; he never claimed to do more than work the soil, as he thought he was permitted to do. He had some vague idea in his head, derived from a source which is not clear on the evidence, that it was quite all right for him to work it; but he never, so far as I know, had any intention, nor claimed any intention, of asserting any right to possession of this piece of ground."
>
> (author's italics)

With respect, this latter quotation is not an application of Bramwell, L. J's test, which depends on the intention of the documentary owner of the land, but rather raises a distinct question, namely, what was the intention of the squatter. The significance of this becomes apparent when it is realized that the reason why apparently Hodson, L. J. held that Raftery had no animo possidendi is because of his admissions in cross-examination, viz:-[76]

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74. (1879), 5 Ex.D. 264 at 269-70.
75. [1958] 1 Q.B. 159, at 169; cf., Morris, L. J. at pp. 172-3.
76. [1958] 1 Q.B. 159, at 162.

> "I knew other tenants were cultivating behind their premises. I thought entitled to same. Not trying to take over land, not really. Exercising rights I thought I had as tenant of these premises."

On these admissions, Counsel for the plaintiffs had submitted as follows,[77]

> "...the claimant must take and retain the land animo possidendi. Acts which are referable to some intention falling short of ownership are not enough to establish a squatter's title. The fact that this defendant thought that he was exercising rights as the tenant of [the maisonette] is fatal to his claim...Whitmore v. Humphries[78] sets out a parallel principle in relation to encroachments by a tenant. This defendant was never in possession animo possidendi. This claimant did not go on to the land to assert his possession but merely to 'dig for victory.'"

The Court of Appeal appear to have accepted this submission, or at least it seems to have influenced Hodson, L. J. in deciding the consistency of the defendant's acts with the plaintiffs' plans for the land.

The submission, however, when analysed must mean one of two things:-

Either (i) possession of land taken as the result of a mistake as to the extent of land comprised in a lease can never be adverse, whether or not it is the special case of a tenant's encroachment qua his landlord. If this is meant, it is respectfully suggested for the reasons already given

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77. [1958] 1 Q.B. 159 at p. 164.
78. (1871), L.R. 7 C.P. 1. For a full discussion of this case, see p.160-4 supra.

above,[79] that it is incorrect and inconsistent with the probable position with regard to mistaken boundaries generally and also with the House of Lords decision in Magdalen Hospital v. Knotts,[80]

Or (ii) Williams Bros. v. Raftery[81] is really a case of a tenant encroaching qua his landlord. This can hardly be correct either, however, because Raftery's immediate landlord was the London Co-operative Society Ltd. and, for the doctrine to apply, it would have meant that qua the London Co-operative Society, Raftery had extended the subject-matter of his tenancy to include the strip of land and could not be evicted without that tenancy (the nature of which is not stated in the Report) being properly determined by notice to quit or in other appropriate manner. There is no suggestion anywhere in the report that this was done. And yet, as we have seen, the whole rationale of the doctrine of tenant's encroachment is said to be an extension of the demise. In King v. Smith,[82] for example, Roxburgh, J., delivering judgment in the Court of Appeal on a case where a tenant's encroachment was held to belong to the landlord spoke of the

> "erroneous view that the [tenant] had no interest at all in the disputed parcel - not even a weekly tenancy."[83]

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79. Supra, p. 160-4.
80. (1879), 4 App.Cas. 324; see supra p. 146 et seq.
81. [1958] 1 Q.B. 159.
82. [1950] 1 All E.R. 553 (C.A.); supra, p. 159, note 50.
83. Ibid., at p. 556.

Was this not precisely the erroneous view that the Court of Appeal took of Raftery's interest in the Williams Bros. v. Raftery[84] case?

The only possible distinction is that, in cases such as King v. Smith[85] the tenant is being sued by the landlord for possession of the encroachment, so that the parties to the action are estopped from denying that the lease extends to the encroachment, whereas in Williams Bros. v. Raftery,[86] the tenant was being sued by a third-party documentary owner of the land encroached on, who would not be bound by any estoppel. However, is not the true answer to this that, if the quantum of the tenant's acts over adjoining land belonging to a third party are sufficient to constitute possession (and who can seriously doubt that in Williams v. Raftery[87] they were, looked at in isolation, sufficient?), then that possession, though adverse to the third-party is taken on behalf of the landlord, who can claim so as to speak that the tenant has acquired a squatter's title on behalf of the landlord? If this is correct, then the real effect of Raftery's admissions in cross-examination[88] would be that a tenancy of the strip was vested in him until determined by the London Co-operative Society who subject to

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84. [1958] 1 Q.B. 159.
85. [1950] 1 All E.R. 553 (C.A.); supra, p. 159, note 50.
86. [1958] 1 Q.B. 159.
87. Ibid.
88. Set out at p.170 supra.

that tenancy held the fee simple title by adverse possession? It is clear on general principles that an agent can possess adversely on behalf of his principal[89] and therefore it is hard to share the revulsion of some of the judges of the 19th century, notably Lord Campbell, C. J. to the idea that the tenant steals on behalf of his landlord.[90] It would be even more unfortunate if because of the accidental fact that an adverse possessor of Whiteacre was a tenant of nearby Blackacre, he could never extinguish the documentary title to Whiteacre because it would be immoral that his landlord should then take the squatter's title thus acquired. There are but two obiter dicta on the point and they are contradictory.

In argument in Doe d. Baddeley v. Massey[91] Lord Campbell C. J. said,

> "The principle of law must be that the lessee is estopped from denying that the whole premises are those which were demised to him. It would be strange to lay down that the tenant steals for the benefit of his landlord"

to which Counsel replied,

> "There is nothing here to rebut the presumption that the land was taken in for the landlord's benefit."

Lord Campbell, C. J. answered,

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89. See Williams v. Pott (1871), L.R. 12 Eq. 149.
90. See Doe d. Baddeley v. Massey (1851), 17 Q.B. 373, at 377; Andrews v. Hailes (1853), 2 E. & B. 349.
91. Ibid.

> "If it was so taken, the landlord is entitled as against the tenant who so took, but not as against a third person."

to which Counsel replied,

> "If that person did not interfere for twenty years,[92] the fact might operate against him."

Surely, Counsel was right? He is supported by the following obiter dictum, a hundred years later, of Cohen, L. J. in King v. Smith,[93]

> "I think counsel for the plaintiff supplied the right answer to this point when he said that the true effect of the presumption was that, from the time of the encroachment, the disputed strip became an accretion to the demised premises, and at the expiration of twelve years from the date of the encroachment, the defendant had acquired a leasehold interest in the disputed strip and the landlord had the freehold reversion therein. This reading of the presumption, as he rightly said, would fit not only the case where the land on which the encroachment was made was the property of the landlord,[94] but also the case where it belonged to an outside party who would lose his whole interest at the end of the twelve years period." (author's italics)

The words italicized are clearly in favour of the view that the tenant's encroachment for his landlord will operate, not only in personam between the landlord and tenant, but also in rem so that, after the appropriate period of

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92. The then period of adverse possession necessary to extinguish the owner's title - reduced by the Real Property Limitation Act, 1874, to twelve years.
93. [1950] 1 All E.R. 553 at 557.
94. In fact, it will shortly be submitted that this reading does not fit the case of encroachment on the landlord's adjoining land, see pp.176-81 infra.

adverse possession is past, a third-party owner of land encroached on will lose his title to the landlord and will be unable to sue the tenant in possession who had an effective lease by estoppel now fed by the fee simple his landlord has acquired through him. This is the view taken by Messrs. Preston and Newsom in their work on Limitation of Actions[95] where they say,

> "Where a tenant takes possession of land adjacent to that which he holds as tenant, there is a presumption that the encroachment is for the landlord's benefit, and that the land encroached upon is to be added to the holding.
>
> . . . . . .
>
> Thus, if the land encroached upon belonged to a third party, the landlord acquires the fee simple in it after twelve years."

They then go on to add words similar to those used in the first part of Cohen, L. J's obiter dictum in King v. Smith (cited above),[96]

> "But encroachment by a tenant upon land of the landlord does not destroy the latter's title. However, if the tenant retains possession for twelve years, he does acquire a right to keep it for the rest of the term (Tabor v. Godfrey)[97] and is liable for dilapidations when he finally gives up possession (Perrott v. Cohen)".[98]

The words italicized by the author of this thesis and the dictum by Cohen, L. J.,[99] to the same effect are, it is

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95. Third Edition (1953), p. 129.
96. P. 174 supra, see notes 93 and 94.
97. (1895), 64 L.J. Q.B. 245.
98. [1951] 1 K.B. 705.
99. See p. 174, notes 93 and 94.

respectfully suggested illogical and presumably, therefore, an incorrect statement of the law.

Without, for a moment, looking at the authorities, let us consider this as a matter of principle. If encroachment by a tenant on his landlord's adjoining land does not destroy the landlord's title, this can only be because the possession taken by the encroachment is not adverse to the landlord. If this is so, the period of twelve years becomes wholly irrelevant. It can only be relevant if the possession is adverse, in which case twelve years of such possession by the tenant would bar the landlord's fee simple - there is nothing to oust the ordinary rules in the Limitation Act, 1939, to this effect.[100] Since the cases[101] clearly establish that the tenant does not acquire the fee simple, it must be because his possession is not adverse. Therefore, we are forced to the conclusion that where the doctrine of encroachment applies, it means that the tenant's possession cannot be adverse, and whether he has been in such possession for twelve years, twelve months, or twelve days is legally irrelevant.

It therefore behoves us to consider briefly what is the basis of his entitlement to remain on the encroachment until the expiration of the tenancy of the land from which he has

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100. i.e. 1939 Act, ss. 4, 5 and 10.
101. e.g. Kingsmill v. Millard (1855), 11 Ex. 313; Lisburne v. Davies (1866), L.R.I.C.P. 259; Whitmore v. Humphries (1871), L.R. 7 C.P. 1.

encroached and his consequent extended liability on his tenancy obligations. If the doctrine of encroachment is based on a variation of the original tenancy by a specifically enforceable contract, as has been argued above,[102] we need ask no further - his rights and liabilities in respect of the encroachment date from the time of that contract. Even if the more traditional basis of the doctrine is taken, namely estoppel of the tenant from denying the landlord's title to the encroachment, surely there must be a counter-estoppel binding on the landlord (at least if, with knowledge of the encroachment, he acquiesces in it) by which he is estopped from denying that he regards the tenant's possession of the encroachment as notionally adding the encroachment to the demise.

The case of Tabor v. Godfrey,[103] cited by Preston and Newsom, as authority for the proposition that, only after twelve years of encroaching possession of the landlord's land does the tenant become 'tenant' of the encroachment, does not seem to support this proposition. Indeed, it appears to be a classic case of a misleading headnote, which reads,[104]

> "The tenant under a lease for years encroached upon and occupied a piece of land belonging to his landlord and adjoining the demised premises for a

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102. Supra, p. 163.
103. (1895), 64 L.J. Q.B. 245.
104. Ibid.

> period of more than twelve years. The landlord during the term brought an action for an injunction and damages for trespass:- Held that the action would not lie. The tenant must be deemed to have occupied the piece of ground as part of the holding, and he was entitled so to occupy it during the remainder of his lease."

This headnote would be perfectly in order were it clearly understood that the tenant's encroachment being for more than twelve years was an extraneous fact that formed no part of the ratio decidendi of Charles, J., who tried the case. This is clearly demonstrable from an examination of the relevant passages in the argument of Counsel and in the judgment of Charles, J. These passages are as follows:[105]

Counsel for the Landlord

> "As to the Statute of Limitations," [which had been pleaded in the alternative by the tenant] "the fact that the land has been occupied by the tenant for the landlord stops its running."

Counsel for the Tenant

> "Here the tenant has taken possession of the strip of land and held it; unless he holds in favour of his landlord he would acquire the fee. It is in favour of the landlord, not the tenant, that encroachments are to be treated as forming part of the demised premises. This rule existed before the Statute of Limitations. It is not contended that the defendant has acquired the fee simple of this strip of land."

To interpolate here, it is clear that both Counsel are ad idem on the point that the tenant's possession was not adverse (the tenant's pleading must have been abandoned) and

105. (1895), 64 L.J.Q.B. 245 at 246-7.

that the Statute of Limitations had therefore no application. Where Counsel joined issue was whether the presumption of encroachment on behalf of the landlord so as to add the encroachment to the demise applied during the subsistence of the original term or only at its end.[106] The decision that it did apply during the term and created a kind of tenancy by estoppels binding on landlord and tenant alike was the ratio decidendi of Charles, J. An examination of the passage of his judgment in which he deals with the relevance of the twelve years' period shows that he regarded it as irrelevant,

> "From first to last the lessee...has occupied the strip just as if it were included in the demise...[Counsel for the landlord] says it is no matter, as twelve years have not elapsed. But I think twelve years have elapsed of occupation of this strip of land...; and I should, apart from the legal question here, have to hold...that the defendant has acquired a right to the freehold under the statute. But that is not the true inference, nor do I think the Statute of Limitations has anything to do with the case. But I do think that in the events which have happened, both the landlord and the tenant have treated this strip as part of the land demised...by what has happened the landlord has indicated by the mode in which he has allowed the tenant to use it that the strip is included in the holding."[107] (author's italics)

It is quite clear from this that the only possible legal relevance of the fact that the tenant had possessed the encroachment for twelve years was that this showed acquiescence by the landlord to raise an estoppel against him and

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106. See the rest of their arguments (1895), 64 L.J. Q.B. 245, at 246-7.
107. (1895), 64 L.J. Q.B. 245, at 246-7.

it is submitted that acquiescence for a much shorter period than this, even for a few weeks, would serve to raise the estoppel. The dictum of Cohen, L. J. in King v. Smith, previously cited[108] was clearly obiter[109] and must be treated as per incuriam since Charles, J's judgment in Tabor v. Godfrey[110] was not cited to the Court of Appeal in King v. Smith[111] nor mentioned in the judgments.

The other case cited by Preston and Newsom is the Court of Appeal's decision in Perrott v. Cohen,[112] the facts of which have already been given above.[113] Here the Court of Appeal, following Tabor v. Godfrey[114] held that a lessee of business premises, who encroached on adjoining lavatories belonging to the landlord, with the landlord's passive acquiescence in the tenant's incorrect assertion that they were included in the original demise, was liable for the cost of repairs to the lavatories at the end of the original lease on the dilapidations covenant in that lease, because he had a kind of tenancy by estoppel of the lavatories.

From beginning to end of the Report of the case, there is no allusion to the question whether the tenant had been

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108. See p. 174, notes 93 and 94 supra.
109. Because it was a case of a claim by a landlord against his tenant for possession of an encroachment after the original tenancy had determined.
110. (1895), 64 L.J. Q.B. 245, at 246-7.
111. See p. 174, notes 93 and 94 supra.
112. [1951] 1 K.B. 705 (C.A.).
113. Supra, p. 157-9.
114. (1895), 64 L.J. Q.B. 245, at 246-7.

there for twelve years or not. Indeed, so far as one can tell from the Report, the tenant probably did not possess the lavatories for twelve years because he took possession of the adjoining business premises under a lease for twelve years less one day and appears to have surrendered possession of the premises (and presumably the lavatories, too) at the exact expiry of the lease. Moreover, the landlord did not realize until five years after the lease had commenced that the tenant was using the lavatories, which suggests that they were not so used until some time after the lease commenced. One might almost therefore be justified in saying that Perrott v. Cohen[115] is an authority sub silentio for the proposition that a tenant can acquire a right to retain possession of an encroachment as against his landlord by less than twelve years encroaching possesion.

So far we have considered under the main heading of "void instruments" mistakes as to the land actually comprised in an instrument of transfer - classification (1)(a) referred to above.[116] It is now proposed to move on to the second type of possession taken under a "void instrument," namely:-

(b) Mistakes as to the validity of grants inter vivos and of interests taken by intestate or testate succession.

Under this heading, it will be recalled,[117] it is

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115. [1951] 1 K.B. 705 (C.A.).
116. Supra, p. 149.
117. Ibid.

intended to discuss only those grants or successions which are void ab initio and to postpone to a later stage of this chapter discussion of the separate problem whether possession taken under a voidable grant or succession is capable of being adverse.[118]

There are two possibilities for this kind of mistake; they are:-

(i) The grant inter vivos, will, or intestate succession may be perfectly in order, but the grantor, testator, or intestate had no title to the land in question, or at best only an inchoate possessory title;

OR (ii) The title of the grantor, testator, or intestate was unimpeachable but the supposed grant, will, or intestate succession was a nullity.

Let us take an illustration of each of these possibilities.

(i) Blackacre is settled by John on Kenneth for life, with remainder to Leslie. Kenneth takes possession of Blackacre under the settlement which is valid, but under a mistake as to John's title. In fact John has no title to Blackacre, Adam (a sui juris person) being its true owner. Claiming as life tenant, Kenneth remains in possession of Blackacre for twelve years. By so doing, he has clearly extinguished

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118. Infra, p.218 et seq.

Adam's title and has acquired a fee simple by adverse possession.[119] The result would be the same if John, though having no title to Blackacre, had possessed it adversely to Adam for four years before the settlement and Kenneth then immediately took possession and held it for another eight years; the two periods of four and eight years respectively could be added together.[120]

Kenneth is not however entitled beneficially to the fee simple in Blackacre thus acquired. He has but a life interest in Blackacre, Leslie being entitled to the remainder (now a fee simple remainder) under the settlement. This is because Leslie derives title under a valid settlement from John whose "interest" is prior in point of time to that of Leslie. This is so, only if John's "interest" consisted of his being in possession of Blackacre immediately before he settled it for,

> "Possession being once admitted to be a root of title, every possession must create a title which, as against all subsequent intruders, has all the advantages and incidents of a true title."[121]

A number of nineteenth-century cases on devises and settlements inter vivos carry this result, though the decisions are based on what is said to be an estoppel by the life-

119. Williams v. Pott (1870), L.R. 12 Eq. 149.
120. Asher v. Whitlock (1865), L.R. 1, Q.B. 1; Frazer v. Riversdale [1913] 1 Ir.R. 539.
121. Pollock and Wright: Possession in the Common Law (1888), p. 95; cf., Perry v. Clissold [1907] A.C. 73.

tenant who is said to be no more permitted to deny his settlor's title than a tenant is allowed to deny his landlord's title.[122] It is probably preferable, however, to explain the cases by reference to the maxim "qui prior est tempore, potior est jure" in relation to possession, as has been done above, rather than invoke estoppel, that "much abused solvent," as Ballantyne calls it in this context.[123] The notion of estoppel may cause confusion, as we shall see later.[124]

(ii) In this second illustration, the dramatis personae of the settlement are the same as in illustration (i) above but this time the mistake is not as to John's title to Blackacre which is perfectly good (Adam has therefore no function and does not appear in this illustration) but is as to the validity of his settlement which is in fact a nullity. Nevertheless, as purported life-tenant, Leslie enters and holds possession for at least twelve years. What is Leslie's position then? On general principles, his possession as in illustration (i) above should be adverse to the true owner,

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122. Hawksbee v. Hawksbee (1853), 11 Hare 230; Anstee v. Nelms (1856), 1 H. & N. 225; Board v. Board (1873), L.R. 9, Q.B. 48; Dalton v. Fitzgerald [1897] 1 Ch. 440, 2 Ch. 86.

123. See Ballantyne's valuable critique of these cases in "Title in Adverse Possession" (1918), 28 Yale L.J. 219 at p. 224 et seq.

124. See discussion of Re Ingleton Charity [1956] 1 Ch. 585 infra p. 199 et seq.

but this time the true owner is John, the settlor. Two questions immediately loom large:-

(a) Is Leslie's possession in fact adverse to John or, can it be said to be derivative from John and not under a claim of right?

(b) If Leslie's twelve years' possession has extinguished John's title, is Leslie beneficially entitled to a fee simple, or does he have merely a life interest, Kenneth having a fee simple as in the first illustration (1) above?

Question (a) is a particular variant of the general question posed by this chapter and answered by the submission that possession taken by a grantee by reference to a grant mistakenly thought to be valid is nevertheless adverse to the grantor. In a series of cases in the past hundred years, the Courts have consistently held (or rather assumed) that possession taken under "devises" in invalid wills is adverse to the testator, or rather his next-of-kin entitled on intestacy,[125] and we will look at them again later when discussing how far they can be applied to other types of grant and to the post-1925 rules of testate and intestate succession.[126]

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125. Scott v. Nixon (1843), 3 Dr. & War. 388; Paine v. Jones (1874), L.R. 18 Eq. 320; Yardley v. Holland (1875), L.R. 20 Eq. 428; In re Stringer (1877), 6 Ch.D. 1; Re Lacy [1899] 2 Ch. 149; In Re Anderson [1905] 2 Ch. 70; In Re Tennent's Estate [1913] 1 Ir.R. 280; In Re Coole [1920] 2 Ch. 536.

126. Infra, p. 211 et seq.

Suffice for the moment, however, to assume the answer to question (a) to be in the affirmative, and to proceed to answer question (b) posed above, namely does the life-tenant under an invalid devise or settlement, when he gains title by adverse possession hold it "on trust" for the remainderman under the devise or settlement?

The concept of estoppel of the life-tenant utilised in the cases mentioned under illustration (i) above[127] might be argued to be also applicable here, since the "life-tenant" by entering in that capacity might be alleged to have represented to the remainderman that he (the life-tenant) regards the devise as valid. That the estoppel applies here also has, however, been rejected by the authorities, characteristically vigorous language being used by Jessel, M. R. in one of them, In Re Stringer's Estate,[128]

> "But if [the life-tenant] enters without title, it is said that because he has no title himself his entry gives a new title to the remainderman. I cannot see it. Suppose the defect in the tenancy for life is a different defect from that of the remainderman: suppose the gift to him was void for remoteness, and the gift to the remainderman was void as being to a charity, or vice versa. How can it be said that his entry, though wrongful as tenant for life, estops him from doing anything? Why cannot he set up the defect against the remainderman? Can it make any difference if it happens to be the same defect? Why can he not admit the defect, and say, 'I now find that I have no claim'

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127. Supra, p. 182.
128. (1877), 6 Ch.D. 1 at p. 10 reversed in the Court of Appeal (1877), 6 Ch.D. 1 at p. 9 on a point not affecting Jessel, M. R's reasoning.

> to the property?' It does not appear to me to be within the doctrine of estoppel at all; neither within the principle of the doctrine, nor within the authorities which established the doctrine; and all I can say is, if the doctrine is to be extended, it must be by some other court and not by me."

The distinction thus made between a devise valid in form by a testator who has no title (where the life-tenant is estopped - illustration (i) above) and an invalid devise by a testator who has title (where the life-tenant is not estopped - illustration (ii) above) was first made by Vice-Chancellor Malins in Paine v. Jones.[129] We had better shortly examine the facts and judgment in the case, as the decision was subsequently criticised in Dalton v. Fitzgerald,[130] though in the author's submission Paine v. Jones[131] was correctly decided.[132]

The facts of Paine v. Jones[133] were that in a Will made prior to the Wills Act, 1837, a testator devised all his realty to his wife for life, with remainders over. He subsequently acquired a piece of land which being acquired after the will did not pass under the devise.[134] Nevertheless on

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129. (1874), L.R. 18 Eq. 320.
130. [1897] 2 Ch. 86, at 91.
131. (1874), L.R. 18 Eq. 320.
132. It has since been followed in Re Stringer (1877), 6 Ch. D. 1. (see extract from Jessel, M. R's judgment, p. supra); Re Anderson [1905] 2 Ch. 70; Re Tennant's Estate [1913] 1 Ir.R. 280 and In Re Coole [1920] 2 Ch. 536.
133. (1874), L.R. 18 Eq. 320.
134. After-acquired realty would since the Wills Act, 1837, s. 24, pass under a gift of all the testator's realty, but the problem may still arise in regard to changes in the subject-matter of a specific devise - see Re Evans [1909] 1 Ch. 784.

his death in 1830 the widow took possession of (inter alia) the piece of land thinking herself to be tenant-for-life under the devise in her late husband's will. In 1852 there were Court proceedings by the remaindermen for administration of the trusts of the will and the widow was ordered to convey the testator's land to herself and a new trustee to give effect to the will trusts. Then, to quote the statement of facts in the report,

> "In the preparation of the conveyance necessary to carry this order into effect, it was for the first time discovered that the after-acquired real estate of the testator did not pass by the will, and [the widow], upon being informed of this, refused to convey the same; and by an order [of Court] it was ordered that [the widow] should convey only the property which passed by the will...[In 1853 the widow] who claimed to have acquired the fee simple of the after-acquired property by adverse possession, conveyed the reversion therein expectant on her own life to one Jones, in fee, for valuable consideration."[134a]

The case of Paine v. Jones[135] was, therefore, an action against Jones, the purchaser of what he alleged to be a "squatter's title", by the remaindermen under the void devise in the will. The remaindermen claimed that "the widow..., by entering into possession of the after-acquired property, and dealing with it as part of the property devised to her for life under the will, was estopped from denying that it passed by the will."[136] This plea failed before Malins, V. C. who referring to the estoppel cases[137] said,

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135. (1874), L.R. 18 Eq. 320.
136. Ibid., at p. 322.
137. Cited p. 184, note 122, supra.
134a. (1874), L.R. 18 Eq. 320.

> "All these cases proceed on the principle that if parties have no other title than the will, they are estopped from denying the title of persons under the same will. Under this will the widow had no title whatever...I think this a distinct case of adverse possession, and [Jones] claiming under the widow [has] acquired a title as against those persons whose title is only under the will."[138]

This seems clearly to be correct, particularly if one discards the notion of estoppel and asks instead whether the widow's possessory title was derived from the testator,[139] which clearly it was not.

Malins, V. C. also clearly refuted in this context the subjective idea of the hostility of adverse possession by saying,

> "The widow, though she <u>thought</u> that she was entering into possession under the will, was <u>in fact</u> entitled to treat herself as being in adverse possession."[140]

This is a valuable <u>dictum</u> to support the argument that possession taken under a mistake as to the validity of a devise is nevertheless adverse possession.

Having thus analysed <u>Paine v. Jones</u>,[141] we will examine the criticism of it in <u>Dalton v. Fitzgerald</u>.[142] The criticism is confined to one of the three Lords Justices who delivered judgment in the Court of Appeal, namely Lindley, L. J. He said,

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138. (1874), L.R. 18 Eq. 320, at 328.
139. See p. 187 <u>supra</u>.
140. <u>Ibid</u>. at p. 326: author's italics.
141. (1874), L.R. 18 Eq. 320.
142. [1897] 2 Ch. 86 (C.A.).

> "Paine v. Jones[143] is intelligible having regard to the facts of that case. The widow, who had entered as tenant for life under a will which did not pass the lands in question, was allowed by the Court (under circumstances which do not appear) to exclude them from a conveyance to new trustees, and she was allowed to keep possession of them after it had been ascertained that she held no right to them."[144]

To pause there, this suggested "distinguishing away" of Paine v. Jones (a) was no part of Malins, V. C's ratio decidendi and (b) fails to observe that the widow was allowed by the Court to keep the after-acquired land out of the conveyance to new trustees at a time when she had already been in possession of it for a period (1830-1852) more than the twenty years then necessary to complete title by adverse possession. What more natural inference could there be but that she was allowed to keep the land for herself because she had acquired it for herself beneficially by adverse possession?

Lindley, L. J. then immediately continues,

> "But I am not satisfied of the soundness of the distinction drawn by Malins, V. C. between cases of persons having no title under a will because it does not purport to include the lands they claim although they believe that it does, and persons claiming under a will which purports to deal with land to which the testator had no title although they thought he had."[145]

To pause there, Malins, V. C's distinction seems perfectly sound, because in the first case the "persons having no title under a will" do not derive title from the testator

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143. (1874), L.R. 18 Eq. 320.
144. [1897] 2 Ch. 86 (C.A.) at p. 91.
145. Ibid.

and are not therefore bound by the priority (in point of time) of his testamentary dispositions, whereas the reverse is true in the second case. Lindley, L. J. then continues

> "No doubt a person may by mistake treat himself as tenant for life of property of which he is himself the owner, and such a mistake can be set right unless he has so acted as to render a rectification of the mistake unjust to others. But the distinction drawn by the Vice-Chancellor [Malins], although it would include such a case, goes much further, and unless restricted it seems to me likely to lead to error. That case, which is the one principally relied upon by the defendants, is not really an authority for them owing to its peculiar facts. Nor is the passage read from Sir George Jessel's judgment in Re Stringer's Estate.[146] What he was objecting to was the extension of the doctrine of estoppel to tenants for life who do not dispute their testator's title, but who do dispute the legal validity of their dispositions of property which was their own."[147]

Here the learned Lord Justice appears to be trying to confine Paine v. Jones[148] to the case of a devise to a tenant-for-life of land which did not belong to the testator but belonged to the tenant-for-life even before the testator's death - a case of mistake as to res sua of which Cooper v. Phibbs[149] is a classic example. Presumably Lindley, L. J. is referring again to the fact that the widow in Paine v. Jones[150] was, so to speak, recognised as owner of the after-acquired land by the Court's order in 1852.

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146. (1877), 6 Ch.D. 1 at p. 10 set out at pp. 186-7 supra.
147. [1897] 2 Ch. 86 (C.A.) at p. 91.
148. (1874), L.R. 18 Eq. 320.
149. (1867), L.R. 2 H.L. 149.
150. (1874), L.R. 18 Eq. 320.

But we have already explained that order as presumably recognizing that the widow had already become beneficial fee simple owner by adverse possession. Nor is there anything in the case of Re Stringer's Estate[151] to relate it or confine it to a case of a tenant-for-life who was owner of the land prior to the devise creating the life tenancy.

It is worthy of note that in Dalton v. Fitzgerald,[152] the ratio decidendi of the Court of Appeal was that a tenant-for-life who took under a valid deed of settlement by trustees of a will who had in fact had no title was estopped from denying the remainders under the deed of settlement. This is of course a straightforward case of illustration (i) above[153] and therefore, Lindley, L. J's criticism of Paine v. Jones was strictly obiter. Indeed, Rigby, L. J., in giving his judgment in Dalton v. Fitzgerald[154] went out of his way to say,[155]

> "I will add that I do not for my part desire to express any doubt as to the cases of Paine v. Jones[156] and Re Stringer's Estate.[157] I consider them irrelevant to the present case."

It is now proposed to consider the relevance of the distinction made by Malins, V. C. in Paine v. Jones[158] (and

151. (1877), 6 Ch.D. 1.
152. [1897] 2 Ch. 86 (C.A.).
153. p. 182 supra.
154. [1897] 2 Ch. 86 (C.A.).
155. Ibid. at p. 95.
156. (1874), L.R. 18 Eq. 320.
157. (1877), 6 Ch.D. 1.
158. (1874), L.R. 18 Eq. 320; p. 189, note 38 supra.

subsequently followed in a number of first-instance decisions)[159] to a line of cases on possession of land taken by "trustees" for a charitable purpose under a deed or devise that for some reason is invalid to transfer any estate or interest in the land.[160] The old restrictions on assurances to charities, imposed by the mortmain legislation, were swept away by the Charities Act, 1960, (s. 38) but it is still possible for a gift to charity to fail for defective execution for example or because the charity ceases to function and there is a consequent reverter, e.g. under the School Sites Act, 1841, (s. 2), to the grantor.

On principle, one would expect to find that if the "trustees" under the void deed or devise took possession of the land and held it for twelve years at least, they would acquire for <u>themselves beneficially</u> a fee simple by adverse possession. Their possession taken by mistake as to the effect of an instrument would be adverse to the grantor or testator and,

> "The Statute of Limitations cannot confer a title on anyone except the persons in adverse possession, actual or constructive, and so if possession be held under a void deed or will, the holding will not establish the limitations or remainders created by the deed or will."[161]

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159. Cited at p. 187, note 132 <u>supra</u>.
160. Of course, if the deed or devise is valid to transfer an estate or interest in land but the trusts fail for non-compliance with the legal definition of charity, there will be a resulting trust in favour of the grantor or settlor and time will not run against him - Limitation Act, 1939, s. 19.
161. Ballantyne - (1918), 28 Yale L.J., at p. 234 - summarizing the dissenting judgment of Freeman, J. in <u>Brown v. Brown</u> (1884), 82 Tennessee 253, 268 which is in accordance with Malins, V. C. in <u>Paine v. Jones</u> (<u>ubi supra</u>).

And yet we find the English cases on void gifts to valid charities summarized by one writer, Mr. Franks, thus,[162]

> "Where 'charitable trustees' take possession of land under an assurance which is void and so passes no title, or retain possession of land after their title has determined, such possession will be adverse to the true owner. So long as it continues however, and it may in course of time confer a full possessory title the trustees will hold on to [sic] the charitable trusts which the ineffective assurance purported to establish or which were validly existing prior to the determination of the trustees' title."

If this is the true result of the cases, it is extremely difficult to reconcile them with the line of cases based on Paine v. Jones,[163] and lays down a rule akin to that of the encroaching tenant "stealing for his landlord" which we have argued above[164] is an incorrect basis for the law of relating to tenant's encroachment.

In fact, Mr. Franks cites two cases for the latter part of his proposition - Re Lacy[165] and Re Ingleton Charity.[166] The case of Churcher v. Martin[167] also has a bearing on the problem and it is now proposed to analyse these three cases to ascertain whether Mr. Franks' proposition is justified.

Re Lacy,[168] before Stirling, J., concerned the will of

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162. Franks: Limitation of Actions, 1st Ed. 1959, at pp. 81-2 (present author's italics).
163. pp. 187-9 supra; (1874), L.R. 18 Eq. 320.
164. p. 176 et seq supra.
165. [1899] 2 Ch. 149.
166. [1956] Ch. 585.
167. (1889), 42 Ch.D. 312.
168. [1899] 2 Ch. 149.

a testator who devised and bequeathed all his freeholds and leaseholds to a charity and on his death in 1873 his executor took and held possession of the freeholds and leaseholds for more than twelve years, accounting to the charity for the income thereof.

He actually executed a deed disclaiming any beneficial interest in the land and declaring that he held it on trust for the charity. After the death of the executor, the charity, as plaintiffs, took out a summons to determine whether they were devisees and legatees of the land. A claim was however made in the proceedings by the testator's heir-at-law and next-of-kin claiming that the gift to the charity was void for non-compliance with the mortmain legislation and therefore the land theirs on intestacy. Stirling, J. held that the gift to the charity was void for mortmain but also held that the executor, by his more than twelve years' possession, had acquired a possessory title to the land. The learned Judge did not, however, answer the question whether the title thus acquired was held on trust for the charity - he merely said,[169]

> "I come to the conclusion, therefore, that... neither the heir-at-law nor the next-of-kin are now entitled to claim the property in question."

No doubt, Stirling, J. felt it unnecessary to say further whether or no there was a trust in favour of the charity,

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169. [1899] 2 Ch. 149, at 160-1.

in view of the executor's having executed an express deed of declaration of trust.[170] Indeed Stirling, J. said, in relation to the executor's possession of the freeholds,

> "[He] took no estate or interest whatever under or by virtue of the will. He, however, entered into and continued in possession and receipt of the rents and profits for more than twenty years to the exclusion of the heir-at-law, and thereby acquired, as it seems to me, a legal title, whether absolute, or as agent for the plaintiffs...[the charity] appears immaterial to be considered, for in any event the title of the heir is barred. This is in accordance with the decision in Churcher v. Martin."[171]

Re Lacy[172] is, therefore, far from being a decision that the "trustee's" possessory title is not held by him beneficially - indeed the point was never argued in the case; the sole points for the decision of the Court being whether the gift was to a charity in the legal sense and therefore void for mortmain and whether the executor was an "express trustee" for the next-of-kin, to prevent time running in his favour.[173] It was held on the law then applicable that he was not an "express trustee."[174]

Churcher v. Martin,[175] referred to in Stirling, J's judgment, is an interesting decision of Kekewich, J. concerning a deed inter vivos by which a grantor conveyed land

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170. This would presumably operate on the possessory title gained by the executor - cf., Life Association of Scotland v. Siddal (1861), 3 De G. F. & J. 58.
171. (1889), 42 Ch.D. 312.
172. [1899] 2 Ch. 149.
173. See now Limitation Act, 1939, s. 19; as to this aspect of the case, see p.213 infra.
174. This point would be decided differently now - see p.213 infra.
175. (1889), 42 Ch.D. 312.

to named trustees to hold on certain charitable trusts. The deed was not enrolled and the grantor died within a year of execution of the deed, so that under the mortmain legislation then in force, the deed was ineffective. Nevertheless, the "trustees" took and held possession of the land for more than twelve years, after which the land was claimed from them in this action by those entitled under a general devise of realty in the grantor's will. The plaintiffs argued that there was a resulting trust in their favour under the deed, so that time had not run under the familiar rule that a trustee cannot claim trust property adversely to his beneficiary.[176] The deed, they argued, was effective to create this resulting trust, since the mortmain legislation rendered a deed contravening it voidable only and not void ab initio. This latter argument would also reflect on the general problem of whether and when possession taken under a voidable instrument is adverse, which will be discussed later.[177] Kekewich, J. held that the deed was void, not merely voidable, and that there was therefore no resulting trust created by the deed, merely one arising by operation of law against the deed and therefore not an "express trust" within the meaning of the then relevant Statute of Limitation.[178] It is note-

176. Now Limitation Act, 1939, s. 19.-
177. Infra, p. 218 et seq.
178. Real Property Limitation Act, 1833, s. 25. Probably, such a resulting trust by operation of law is still outside the rule that time does not run in favour of a trustee - see Chapter 4, p. 76 supra, and Tintin Exploration Syndicate Ltd. v. Sandys (1947), 177 L.T. 412, at pp. 419-20.

worthy that Kekewich, J. and all parties assumed that, the question of resulting trust apart, the trustees' possessions, though taken under a mistake as to the effect of the deed, was adverse to the grantor.

On the question we are at present discussing, namely whether the charitable trust was engrafted on to the fee simple by adverse possession that Kekewich, J. held the trustees had obtained, evidence was given before the learned Judge that throughout their period of possession the "trustees" had devoted the income of the land to the charitable purposes of the deed. This was intended to strengthen the "trustees" case by an allegation that,

> "It is quite possible to establish a good charity without any deed or by user, and the actual possession has always been held of importance."[179]

Clearly, then, it was not necessary for Kekewich, J. to hold that the "trustees" fee simple was subject to the charitable trusts. Indeed, very cautiously he said,

> "It has further been proved that [the trustees] have been...in possession on behalf of the charity which the deed purports to constitute, and they say that such charity has been thus established. Into this I need not inquire, because the trustees and the Attorney-General combine in their defence to the action, and no question arises between them."[180]

Clearly, then, the learned Judge abstained from deciding the point, which would be therefore very much an open one,

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179. (1889), 42 Ch.D. 312, at 314.
180. Ibid., at p. 318.

but for the decision of Danckwerts, J. in Re Ingleton Charity,[181] which we must now examine.

In this case a deed of grant was made in 1846 of a site for a school by the Lords of the Manor of Ingleton in favour of the ministers and chapel wardens (later the vicar and churchwardens) of the parish. The grant was made under Section 2 of the School Sites Act, 1841, which provides,

> "any person, being seised in fee simple...of and in any manor or lands...and having the beneficial interest therein...may grant...any quantity...of such land, as a site for a school for the education of poor persons...provided...that upon the said land ...ceasing to be used for...[such purpose], the same shall thereupon immediately revert to and become a portion of the said estate held in fee simple...or of any manor or land as aforesaid, as fully to all intents and purposes as if this Act had not been passed, any thing herein contained to the contrary notwithstanding."

By Section 7 of the same Act, the school was held by and the determinable fee simple vested in the vicar and churchwardens from time to time of the parish without need for transfer to their successors.

The school was closed in 1929 and from then until 1952 was used for a variety of purposes, e.g. parish council meetings, Sunday schools, and Territorial Association functions, and latterly was let to a manufacturing company, to whom the vicar and churchwardens conveyed it on sale in 1952,

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181. [1956] 1 Ch. 585.

without the consent of the Charity Commissioners or the Minister of Education. After the sale, the vicar and churchwardens executed a declaration of trust of the proceeds of sale for the purposes of Ingleton parish. They then applied to the Court asking whether immediately prior to the sale to the manufacturing company they held the school (a) on educational trusts (requiring the consent of the Minister of Education to any sale); or (b) on ecclesiastical trusts for Ingleton parish; or (c) on trust for themselves as beneficial joint tenants.

It is submitted that Danckwerts, J. in answering their question should have answered in favour of alternative (c), since he proceeded,

> "on an assumption that the right of reverter operated [in 1929 when the school closed] but that the title of the Lords of the Manor's successors was ousted by possession for the statutory period and longer by the vicar and churchwardens."[181a]

With this part of Danckwert's J's judgment, we respectfully agree. When the statutory right of reverter operated on the closing of the school in 1929, the trustees' determinable fee came to an end automatically, and, on general principle, exemplified in particular by Paine v. Jones,[182] not cited to or considered by Danckwerts, J., any continued possession by them must have been adverse to the Lords of the Manor, just as if they had first taken possession

182. (1874), L.R. 18 Eq. 320 - see pp.187-9 supra.
181a. [1956] 1 Ch. 585, at 590.

in 1929 under a deed void ab initio, as in Churcher v. Martin.[183]

Where, however, we must take issue with Danckwerts, J. is in his holding, further, that the educational trusts under the deed of 1846 continued beyond the cesser of the trustees' fee simple and attached to the fee simple by adverse possession that they acquired. That part of his judgment in which he deals with this seems, with great respect, to be rather self-contradictory. He says,[184]

> "It seems to me that the vicar and churchwardens remained in occupation of the property...because they were trustees under the deed of 1846 and for no other reason. They were the trustees of that deed and they carried on as trustees. It is true that their paper title came to an end, owing to the operation of the School Sites Act, when the school was closed, but they then held the land under a pure right of possession. Their right, none the less, was good against everybody in the world except persons who could claim successfully through the Lords of the Manor. They simply carried on in the same capacity as trustees on the trusts of the deed, which required them to use it for the purposes of the school..."

But, if their right was "good against everybody in the world except persons who could claim successfully through the Lords of the Manor," why was it not good against the charity (represented by the Attorney-General)? One cannot but help sympathize with the arguments of Counsel for the vicar and churchwardens who regarded themselves as beneficial owners of the land, able therefore in 1952 to sell it in

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183. (1889), 42 Ch.D. 312 - see pp.196-8 supra.
184. [1956] 1 Ch. 585, at 591. (Author's italics).

that capacity and declare what trusts they liked of the purchase money. Counsel said,

> "Under the School Sites Act the vicar and churchwardens were a corporation aggregate for the purpose of holding land, and when the property reverted to the estate of the grantors by the closure of the school that statutory corporation became dissolved and the trusts of deed of 1846 were therefore wholly spent. The grantors could do what they liked with the land and so could anyone else who had possession adversely to them. The trusts of the deed having come to an end after the discontinuance of the school, the vicar and churchwardens did not remain in possession under the School Sites Act; the slate was clean and anyone who possessed the land could hold it for his own use and benefit."[185]

Danckwerts, J. purported to follow two earlier decisions where the Court had settled cy-près schemes for the application of former school sites, A. G. v. Edalji[186] and A. G. v. Price,[187] but, as in neither of those cases had the limitation period of twelve years run between closing of the school and application to the Court, they do not seem to establish that the trusts under a void deed of grant are enforceable against an estate by adverse possession acquired by the so-called 'trustees'. Moreover, in commenting on Churcher v. Martin,[188] Danckwerts, J. seems to have been under a misapprehension as to Kekewich, J's judgment in that case for Danckwerts, J. says of the 'trustees' in

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185. [1956] 1 Ch. 585, at 588.
186. (1907), 97 L.T. 292.
187. [1912] 1 Ch. 667.
188. (1889), 42 Ch.D. 313 - discussed pp. 196-8 supra.

Churcher v. Martin,[189]

> "The trustees remained in possession for the statutory period, and it was held that they had acquired a possessory title, but that it was held by them on the trusts for which they had been made trustees by the transaction in question."[190]

But, we have seen[191] that the italicised sentence is precisely what Kekewich, J. refrained from holding. It does seem as if there has crept into Re Ingleton Charity[192] that estoppel fallacy that was rejected, rightly, by Malins, V. C. in Paine v. Jones.[193]

We have now, as part of the discussion of trusts engrafted or not on title by adverse possession, considered the general principle, accepted by the cases so far discussed, that possession taken under a mistake as to the validity of a void transaction, is nevertheless adverse. It now remains to consider the particular application of this general principle to (A) Transactions inter vivos, (B) Succession on death.

(A) Transactions inter vivos.

If the transaction is oral, when it ought to have been or evidenced in writing, e.g. a contract for the sale or disposition of land under Section 40 of the Law of Property Act, 1925, or a lease that ought, by Section 52 of the same Act, to be made by deed, possession taken

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189. [1956] 1 Ch. 585, at 590. (Author's italics).
190. (1889), 42 Ch.D. 313, discussed pp. 196-8 supra.
191. p. 198 supra.
192. [1956] 1 Ch. 585, see explicitly at p. 592.
193. (1874), L.R. 18 Eq. 320, pp. 187-9 supra.

under it ought on general principle to be adverse to the grantor, unless the oral transaction constitutes a specifically enforceable contract for a grant in proper form, e.g. when, in addition to the elements of a valid contract being present, the taking of possession amounts to part performance under Section 40 of the 1925 Act. Then the doctrine of Walsh v. Lonsdale,[194] by which the specifically enforceable contract is as good in equity as the grant, may prevent, at first at least, the possession being adverse.[195]

It is interesting to note that in America some difficulty has arisen with regard to possession taken under an oral gift or exchange, which requires written evidence to be enforceable. Powell asks the question,

> "Does this fact bar [the possessor] from the benefits of the open, notorious, visible and continuous possession taken under circumstances which cause him to believe himself entitled to such possession?"[196]

but finds in answer that,

> "The distinct weight of authority answers this question in the negative, finding the requisite 'adverseness' or 'hostility' or 'claim of right' on these circumstances. A minority of jurisdictions see a 'permissive' ingredient in such circumstances, preventing adverse possession. This latter position is more legalistic than realistic and minimizes the real utility of adverse possession as a means for attaining reasonable justice."[197]

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194. (1882), 21 Ch.D. 9.
195. Drummond v. Sant (1871), L.R. 6 Q.B. 763 (equitable lease); Warren v. Murray [1894] 2 Q.B. 648 (equitable lease) but cf., Bridges v. Mees [1957] Ch. 475 and see Chapter 2, pp. 28-9 supra.
196. Powell: Real Property (1965), Vol. 6, pp. 725-6.
197. Ibid.

It is to be hoped that any English court, faced with a similar problem, will find wisdom in Professor Powell's concluding sentence.

With regard to possession taken under written instruments or deeds that are void ab initio, we have already found established the general principle that it is adverse to the grantor. By comparison, one finds that in some American jurisdictions, not only is possession thus taken adverse but it is accorded a specially favourable status in that, being possession by "color of title," a specially short period of limitation is prescribed and the possession will extend constructively to the whole area of land described in the invalid deed that constitutes the color of title.

What, then, may be possible future particular applications of this general principle in English law? Clearly possession taken under a deed that is void for want of due execution or void for being tainted with illegality[198] should be adverse to the grantor. Again, possession taken under a grant from a third party mistakenly thought to have a title to the land, or continued under a licence that ceases to be operative because the licensor parts with the land, ought to be adverse to the true owner of the land.[199]

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198. Cf., Fisher v. Bridges (1854), 3 E. & B. 642.
199. See Ballantyne (1918), 28 Yale Law Journal 219 at 223-4.

In Re Woking Urban Council (Basingstoke Canal) Act, 1911,[200] the Court of Appeal held (inter alia) that the purchaser of the entire undertaking of a canal company under an ultra vires conveyance by that Company took possession adversely, albeit under a mistake as to the validity of the conveyance, and in due course barred the title of the company and of those entitled on its dissolution.[201] This decision is unlikely to be much prayed in aid in view of Kekewich, J's decision in Re Kingsbury Collieries Ltd. and Moore's Contract[202] that a corporation normally has implied power to sell its land[203] but may prove useful, e.g. in those cases where the rigid restrictions of Ss. 127-129 of the Lands Clauses Consolidation Act, 1845, on sales of compulsorily acquired land still apply.[204]

An allied field where the rule in Re Woking Urban District Council (Basingstoke Canal) Act, 1911[205] may be useful is where a charity has sold and conveyed its endow-

200. [1914] 1 Ch. 300 (C.A.); cf., Mayor etc. of Brighton v. Guardians etc. of Brighton (1880), 5 C.P.D. 368 (Prohibition in Local Act against sales; purchaser acquired title by adverse possession).
201. Now the Crown, see Companies Act, 1948, s. 354; Re Wells [1933] Ch. 29, at 54; Re Strathblaine Estates Ltd. [1948] Ch. 228.
202. [1907] 2 Ch. 259.
203. But where a winding-up is proposed, see Bisgood v. Henderson's Transvaal Estates Ltd. [1908] 1 Ch. 743.
204. Requiring the land to be superfluous and in certain circumstances to be offered to the original owner from whom they were compulsorily acquired, but many compulsory acquirers are, by their statutes, exempt from these restrictions, e.g. the British Railways and British Waterways Boards - Transport Act, 1962, s. 14.
205. See note 200 supra.

ment land without the consent of the Court, or the Charity Commissioners (the Minister of Education in educational charity cases), as required by the imperative words of Section 29 of the Charities Act, 1960, which appear to render such a conveyance void ab initio and not merely voidable.[206]

A conveyance by a local authority without the required consent of the Minister of Housing will no longer need adverse possession to fortify it[207] since Section 19 of the Town and Country Planning Act, 1959,[207a] provides that the title of any person claiming under the authority shall not be impugned on the ground that consent was not required. In the case, e.g. of conveyances by a local authority prior to the 1959 Act but without the Minister's consent, the purchaser will get no title via the conveyance[208] and will have to rely on adverse possession.

Another case of a void conveyance may cause some difficulty so far as alleged adverse possession by the grantee is concerned. That is the situation under Section 18(1) of the Settled Land Act, 1925, which provides,

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206. Cf., Milner v. Staffs. Congregational Union [1956] Ch. 275 and Re Ingleton Charity [1956] Ch. 585, at 593. If the land is non-endowed, but has been occupied by the charity, consent is still required, but the title of a person acquiring the land in good faith and for money or money's worth cannot be defeated because of failure to obtain consent - s. 29(2).
207. Cf., Rhyl U.D.C. v. Rhyl Amusements [1959] 1 All E.R. 257. 207a - Cf. S.26 of 1959 Act and Local Authorities (Land) Act, 1963, S.8.
208. Ibid.

> "18. - (1) Where land is the subject of a vesting instrument and the trustees of the settlement have not been discharged under this Act then -
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> (a) any disposition by the tenant for life or statutory owner, other than a disposition authorised by this Act or any other statute... shall be void, except for the purpose of conveying or creating such equitable interests as he has power, in right of his equitable interests and powers under the trust instrument, to convey or create..."

It is to be observed that there is no saving in this section for a bona fide purchaser,[209] but will the possession of such a purchaser held for the requisite time[210] be adverse to the beneficiaries under the settlement? On general principle it ought to be so, being mistakenly taken under a void conveyance, but the difficulty is that the Court might refer it to the rightful title - namely the assignment of the tenant-for-life's equitable interest created by the proviso to Section 18(1)(a) of the 1925 Act,[211] in which case the proviso would have worked a cruel kindness to the purchaser. Perhaps, in accordance with the presumption of hostility advocated in this thesis, the Court

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209. See Weston v. Henshaw [1950] Ch. 510 - contrast S. 13 of the 1925 Act (disposition void before vesting instrument executed), where there is a saving for a bona fide purchaser, and in any event the void disposition operates as a contract for value to execute the disposition after the vesting instrument is executed - hence it is unlikely that initially adverse possession will arise - but see cases cited at p. 204, note 195 supra.
210. Which, in the case of a settlement with future interests, may be much longer than twelve years - S. 7, Limitation Act, 1939.
211. Cf., Doe d. Milner v. Brightwen (1809), 10 East 583.

would require strong proof that the purchaser was relying solely on his limited equitable title before holding that his possession was not adverse.

Where there is a bona fide purchase from a person believed to be beneficial owner, but who in fact holds upon trust for sale, the fact that the purchase-money is not paid to at least two trustees or a trust corporation as required by Section 27(2) of the Law of Property Act, 1925, would not it seems invalidate the conveyance if the purchaser was unaware of the trust for sale, and even if the purchaser is aware of the trust for sale but pays the purchase-money otherwise than in accordance with Section 27 (2), he gets the legal estate but subject to the equitable interests of the beneficiaries (Section 27(1) and (2)), so that whether he is aware or unaware of the trust for sale, no question of adverse possession by the purchaser would seem to arise.

A case of a sale in purported exercise of a trust for sale where the question of adverse possession might arise, however, is where the instrument creating the trust for sale requires a consent or consents to the exercise of the trust. This may happen, for example, where a testator devises the matrimonial home on trust for sale, but provides that it is not to be sold in his widow's lifetime without her consent and that she shall be permitted to occupy it,

thus avoiding the cumbersome machinery of a strict settlement. What, then, if the trustees sell the house without the widow's consent? Does the purchaser get any title at all under the conveyance, for, if not, and he takes possession, mistakenly believing the conveyance to be valid, he will presumably be an adverse possessor? Section 26 of the Law of Property Act specified two cases where a consent "shall not, in favour of a purchaser, be deemed to be requisite to the execution of the trust,"[212] namely,

(i) If the consent of more than two persons is required, the purchaser need see only that two consents have been obtained;

(ii) The purchaser need not ensure that the consent of any person under a disability or not sui juris has been obtained.

The inference from this, though it is not explicitly stated in the Section, is that a conveyance without the consent of up to two sui juris, non-disabled, persons (when their consents are made requisite by the trust instrument) is completely void because there has in effect been a complete non-execution of the trust. It does not seem, unlike the situation just discussed of failure to pay the purchase-money to at least two trustees or a trust corporation, that the conveyance would convey the legal estate subject to the

212. Law of Property Act, 1925, s. 26(2), but the language is equally applicable to s. 26(1).

equitable interests of the beneficiaries. If the deduction that the conveyance is void is correct, then a purchaser taking possession would be an adverse possessor. It may be however that the Court would, by analogy, with other situations in which there has been a conveyance in breach of trust, e.g. a purchase by a trustee personally of trust land, treat the conveyance as merely voidable at the instance of the beneficiaries, in which case the question of whether the purchaser became an adverse possessor would depend on further considerations as to possession taken under voidable instruments, discussed below.[213]

(B) Succession on death.

It is now proposed to discuss the effect of possession taken under a mistake as to testate or intestate succession.

Cases[214] prior to the Land Transfer Act, 1897 which for the first time vested the realty of a deceased initially in his person representative(s) show clearly that possession taken under a mistake as to the effect of testate or intestate succession was adverse to the devisee or heir-at-law rightfully entitled. Moreover, this was so even if the possession was taken by a personal representative - he was not an "express trustee" within the meaning of Section 25 of the Real Property Limitation Act, 1833, so as to prevent

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213. Infra, p. 218.
214. See pp.183-92 supra; e.g. Williams v. Pott (1871), L.R. 12 Eq. 149; Paine v. Jones (1874), L.R. 18 Eq. 320.

time running in his favour, even with regard to leaseholds which devolved on him gua personal representative.[215]

The Land Transfer Act, 1897, however, provided that a deceased's land vested in the first instance in the personal representatives "as trustees for the persons by law beneficially entitled thereto"[216] and on this provision it was held that a widow-administratrix under a 1913 intestacy who took and held possession of the land as if she were beneficially entitled did not bar the heir-at-law since the 1897 Act had made her an "express trustee."[217] A similar result must have followed from the imposition by Sections 33 and 46 of the Administration of Estates Act, 1925, of the "statutory trusts" on an intestate's realty in the hands of his administrator, but, oddly enough, Section 1 of the 1925 Act, replacing the 1897 Act, while providing that a testator's realty shall vest in his personal representative(s) in the first instance, makes no reference to a trust but merely states that the realty shall,

> "devolve from time to time on the personal representative of the deceased, in like manner as before the commencement of this Act chattels real devolved on the personal representative from time to time of a deceased person."

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215. Re Lacy [1899] 2 Ch. 149 - contra if the will constituted the adverse possessor exécutor and trustee - Patrick v. Simpson (1889), 24 Q.B.D. 128; Re Allsop [1914] 1 Ch. 1.
216. Land Transfer Act, 1897, ss. 1 and 2.
217. Toates v. Toates [1926] 2 K.B. 30 (D.C.).

But the manner in which chattels real devolved prior to the 1925 Act had been adjudged in Re Lacy[218] not to constitute the personal representative an "express trustee" - could this mean that an executor after 1925 could have possessed adversely on his own behalf or on behalf of the wrong beneficiary?[219] The question is now largely academic since S. 31(1) of the Limitation Act, 1939, made the important change of defining a trustee by reference to S. 68(17) of the Trustee Act, 1925, which provides that,

> "...the expressions 'trust' and 'trustee' extend to implied and constructive trusts...and to the duties incident to the office of a personal representative, and 'trustee' where the context admits, includes a personal representative."

The result is that by a combination of this definition with Section 19(1) of the 1939 Act, providing that,

> "No period of limitation prescribed by this Act shall apply to an action by a beneficiary under a trust, being an action...to recover from the trustee trust property or the proceeds thereof in the possession of the trustee,"

a personal representative cannot now take possession adversely to his beneficiaries, either on his own behalf or as agent for another.[220]

If, however, possession is taken of a deceased's land by someone who is not a personal representative and does not

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218. See note 215 supra.
219. Not so a true trustee - see Lister v. Pickford (1865), 34 Beav. 576.
220. Cf., Re Lacy [1899] 2 Ch. 149.

make himself a constructive trustee within the meaning of Section 68(17) by knowingly participating in breaches of trust, then there is no reason why he should not be an adverse possessor, even though he takes possession under a mistake as to his entitlement under the law of testate or intestate succession.[221] This might be so, for example, where the widow of a deceased intestate remained in possession of her deceased husband's house (which he owned in fee simple) without taking out a grant of letters of administration. Twelve years after her husband's death, her possession would have extinguished the fee simple vested in the Probate Judge by Section 9 of the Administration of Estates Act, 1925, and she would have acquired a fee simple by adverse possession.[222]

Since 1925, however, it is more likely, because of the requirement of Section 36 of the Administration of Estates Act, 1925, of a written Assent by a personal representative, that such a possessor will be holding under such an Assent, albeit executed in favour of the wrong person. This will nevertheless be effective to transfer the intestate's title out of the personal representative and into the possessor who will not therefore be an adverse possessor, his posses-

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221. Williams v. Pott (1871), L.R. 12 Eq. 149; Paine v. Jones (1874), L.R. 18 Eq. 320.

222. Unless, there were interests of beneficiaries still enforceable e.g. those of infants against whom time would not run until they were 21 - Limitation Act, 1939, s. 22.

sion being referable to the title vested in him by the Assent. However, Section 36(9) of the 1925 Act expressly provides that,

> "An assent or conveyance given or made by a personal representative shall not, except in favour of a purchaser of a legal estate, prejudice the right of the personal representative or any other person to recover the estate or interest to which the assent or conveyance relates."

Such a recovery would presumably be by an action for rescission and delivery-up of the Assent, to which in theory no limitation period is applicable, but doubtless in considering whether there had been laches, the court would apply the usual periods of limitation of actions for recovery of land by analogy.[223] Moreover, if an order for possession was sought, the usual limitation periods would presumably directly apply.

Another interesting question in relation to Assents is the well-known problem of failure by a personal representative to execute a written Assent in his own favour when he is entitled beneficially or as a trustee. In Re King's Will Trusts,[224] Pennycuick, J. held that a written Assent was under Section 36(4) of the Administration of Estates Act, 1925, essential to evidence the change in capacity. The decision has been criticized in that it may render necessary a grant de bonis non to the estate of the original

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223. Cf., Re Maddever (1884), 27 Ch.D. 523.
224. [1964] 1 Ch. 542.

deceased when the personal representative, beneficially entitled, himself dies without having executed a written Assent in his own favour,[225] and may also invalidate an appointment by an executor-cum-trustee of a new trustee to act with him, as in Re King's Will Trusts[226] itself. However, it is difficult to see how the possession of the land without a written Assent by the personal representative-cum-beneficiary or executor-cum-trustee could be adverse to himself. Mr. J. T. Farrand, writing on the problem, has said,

> "The only relief from this cumbersome consequence which the writer can suggest...is to proceed where possible by means of adverse possession. Briefly Re Hodge[227] ...supplies direct authority for an implied assent in respect of the equitable interest, so separating it from the legal estate and creating trust-like circumstances; then it has fairly recently been held that, since 1939, time can run against a trustee in favour of the cestui que trust (Bridges v. Mees)[228] and it is also well established that 'the vendor may force upon the purchaser a title with any number of interruptions filled up by possessory titles' (per Buckley L. J. giving his reasons for dissenting in Re Atkinson and Horsell's Contract)[229] Therefore, twelve years after the alleged implied assent, the title will be good again."[230]

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225. Unless there is a chain of executorship under S. 7 of the Administration of Estates Act, 1925.
226. [1964] 1 Ch. 542.
227. [1940] Ch. 260.
228. [1957] Ch. 475 - see Chapter 2 , pp. 28-9 supra.
229. [1912] 2 Ch. 1 at p. 16.
230. (1964), 108 Sol.Jo. at p. 701.

Is it true, though, as Mr. Farrand seems to suggest that if A holds the legal estate in trust for himself as beneficiary, his possession as beneficiary can extinguish the legal estate in himself as trustee? How can a man possess adversely to himself? Could he sue himself for recovery of the land? It would seem not. In Williams v. Pott,[231] A who was entitled to land in his own right treated his possession of it by mistake as possession as agent of B whom he regarded as the true owner, and he accounted to her for the rents and profits of the land. After the limitation period had expired, B was held to have extinguished A's title but in the action the same question was asked, "How could A have possessed adversely to himself?" The answer given was that he was not himself in possession at all but merely as agent for B. He could in fact have sued B for a declaration of his personal entitlement to the land or, indeed for recovery of possession for himself. No side element of agency enters, however, into the case of a sole personal representative entitled beneficially or as trustee. If though, there were several personal representatives and one of them took exclusive possession by virtue of an implied assent, then the doctrine of adverse possession might divest the other personal representatives of their title and take the place of a written Assent. The difficulties created by the decision

231. (1871), L.R. 12 Eq. 149; for facts see pp.145-6 supra.

of the Court of Appeal in Re Landi[232] as to adverse possession between co-owners should not be overlooked, since personal representatives are, as we have seen above[233] by definition trustees for the purposes of Section 19(1) of the Limitation Act, 1939, and cannot normally therefore claim to have acquired title by adverse possession to trust property.

It now remains in this chapter to consider the problem left open by the House of Lords in Magdalen Hospital v. Knotts,[234] namely is possession of land taken under a voidable transaction capable of being adverse.

(2) Possession taken under a voidable transaction.

The problem of possession taken under a transaction mistakenly believed to be valid, when in fact it is voidable could crop up in a number of different situations. A transaction entered into by an infant, an insane person or drunkard, by a person forced thereto by duress or undue influence or induced to enter into it by misrepresentation all present occasions when at law or in equity the transaction may be voidable. Similarly a lease, conveyance, etc. in breach of trust, e.g. a purchase by a trustee of trust land, may cause the transaction to be voidable at the instance of the beneficiaries. Again Sections 172 and 173 of the Law of

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232. [1939] Ch. 828: Discussed in full, Chapter 3, pp. 50-65 supra.
233. Supra, p. 213.
234. (1879), 4 App.Cas. 324.

Property Act, 1925 expressly render "voidable" conveyances with intent to defraud creditors and with intent to defraud subsequent purchasers respectively.

Is then possession taken under such transaction adverse to the grantor or to those entitled to avoid the transaction? In the House of Lords in Magdalen Hospital v. Knotts,[235] only the Lord Chancellor, Earl Cairns adverted to the point, his remarks being obiter, since their Lordships held the lease in that case to be void, and not merely voidable. The Lord Chancellor said no more than that he did not feel the need to say how far he would concur in the Court of Appeal's decision below[236]

The Court of Appeal had no doubt, however. Thesiger, L. J., in delivering the judgment of the Court said,

> "But although the lease may be voidable only, is there any reason why section 2 of the statute[237] should not be held to apply, so as to make the period of limitation run from the time of granting the lease where, as here, an action of ejectment might have been commenced the very day it was granted? It has been argued on the part of the Plaintiffs that the right to re-enter, and consequently to bring an action, does not arise in a case like the present until the mind of the lessor determines to avoid the lease, and that the issuing of the writ, though not the election

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235. (1879), 4 App.Cas. 324 at 332; see pp.146-8 supra.
236. (1878), 8 Ch.D. 709.
237. Section 2 of the Real Property Limitation Act, 1833, prescribing a period of twenty-years (subsequently reduced to 12 years by the Real Property Limitation Act, 1874) for actions for the recovery of land or for making an entry or distress; cf., Limitation Act, 1939, ss. 4 and 31(5).

> itself, is an overt act evincing the election to avoid, and making the right of action accrue only upon the election so evinced, i.e. upon the commencement of the action; but this argument appears to us to be a mere speculative refinement, not consistent with fact or reason. As a matter of fact it is admitted that no election need be proved to have existed, still less to have been communicated to the lessee[238] and that the supposed election has no real existence at all apart from the writ. Why, then, is an election to be presumed other than the election which is constituted by the action itself? And if the action requires no precedent act to support it, how can it be said that the right to bring such action does not accrue as soon as the lease is made?"[239]

With all of this, one must agree, if it means that a right of action to avoid the lease accrued at the moment the lease was made, with the result that after expiry of the statutory period, now normally twelve years, the right to avoid the lease is lost and the lease will endure for the whole of its natural length.

An action for avoidance of a conveyance, lease, etc., may be "an action to recover land" within the meaning of Sections 4 and 10 of the Limitation Act, 1939, and thus barred by those Sections after the expiry of the appropriate period.[240] That this may be so is seen by setting out as

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238. But cf. in the field of voidable contracts, Car Finance Ltd. v. Caldwell [1965] 1 Q.B. 525 (C.A.).
239. (1878), 8 Ch.D. 709 at 726.
240. No doubt if the claim is to purely equitable relief, e.g. rescission for undue influence, the claim may be barred by laches earlier than the statutory period. For the view that the action is not for the recovery of land, see p. 227 infra.

follows the relevant provisions of the 1939 Act,

> S. 4(1), (2) and (3): "No action shall be brought ...to recover any land after the expiration of - years[241] from the date on which the right of action accrued."
>
> S. 31(1): " 'Action' includes any proceeding in a court of law..."

i,e. includes an action claiming the equitable remedy of rescission or the remedy at law of avoidance for breach of some statutory provision.

> S. 31(5): "References in this Act to a right of action to recover land shall include references to a right to enter into possession of the land..."

i.e. where the transaction is voidable, the right of re-entry accrues on the very effecting of the transaction and time runs from then. Moreover, it does not matter that the primary object of a rescission action may be to secure cancellation and delivery up of the lease or conveyance and a declaration of the plaintiff's title. The action is nevertheless an action for the recovery of land for,

> "The expression 'to recover any land'...means 'obtain any land by judgment of the Court' yet it is not limited to the meaning 'obtain possession of any land by judgment of the Court'."[242]

However, both Jessel, M. R. at first instance in

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241. The periods vary according to whether the claim is by the Crown, a spiritual or eleemosynary corporation sole, or any other person.

242. Williams v. Thomas [1909] Ch. 713 at 730 (per Buckley, L. J.); cf., Vandeleur v. Sloane [1919] 1 I.R. 116. (action for declaration is for "recovery of land").

Magdalen Hospital v. Knotts[243] and the Court of Appeal in the same case seem to have deduced from this that when the lessor's right of action to avoid the lease was barred, his fee simple reversion was extinguished by adverse possession. To avoid this conclusion, which it will be submitted is erroneous, Jessel, M. R. held that time did not run at all until the issue of the writ in the rescission action, thus piling error upon error, if one may say so with great respect to that very learned Judge.

His actual words clearly show that Jessel, M. R. thought that if he admitted that the right of action to avoid a lease accrued at its commencement, he would be ipso facto describing the lessee's possession as adverse; he said,

> "Could it be tolerated that a charity, or a bishop, or a rector, should grant a lease, say, for twenty-two years, when a twenty-one years' lease only was authorised, and, because no rent was received for twenty-two years, the lease being granted at a peppercorn rent, the tenant should hold the land in fee simple against the church or charity? The mere statement of such a proposition shocks one's intellectual conceptions. The notion that a man could, by contract, take possession of the land of a church or a charity for a term, having paid some consideration for it, and say at the end of the term, 'Oh! that lease was void', you know it was void and so did I; I will keep the land in fee simple, because the Statute of Limitations transfers the title as soon as the statutory period has run, is absurd. Of course that was perfectly impossible, and any such notion would have been, I have no doubt, scouted in former days, and could not have been seriously arguable in the present day. How then was that absurdity got rid of? Simply by holding that the lease was voidable."

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243. (1877), 5 Ch.D. 175.

The Court of Appeal seem to have adopted Jessel, M. R's error because, having reversed his decision that time did not run at all until the issue of the writ and substituted correctly a decision that it ran from the granting of the lease, they then were at pains to hold that the lessee's possession was adverse ab initio and that, presumably, he had extinguished the landlord's fee simple. The relevant passage from the Court of Appeal's judgment is as follows,

> "Where a lease is made in breach of trust, the avoidance of such lease takes effect ab initio, and may render the lessee liable to account for back profits, while the lessee under a voidable lease has a lawful possession until the lease is actually avoided, and is not liable in an action for mesne profits for anything prior to the avoidance. It may be said, therefore, that in the former case the possession is adverse throughout, while in the latter it only becomes adverse when the determination to put an end to it is communicated either by service of writ or otherwise. But the distinction referred to, although existing in point of fact, does not necessarily carry with it different legal consequences so far as the Statute of Limitations is concerned. That Statute has got rid of the doctrine of adverse possession of the person against whom the claim to land...is made. The question under it...is whether twenty years have elapsed since the claimant's right of action or entry accrued;"[244]

The distinction being made by Jessel, M. R. is between two kinds of voidable lease, one "a case of avoidance" for breach of a statute which he distinguished from the other, "a right to impeach the lease upon equitable grounds immediately after it was granted...an original defect in granting

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244. (1878), 8 Ch.D. 709 at 729.

the lease."[245]

We agree with the Court of Appeal that the lessor's right of action or re-entry on avoidance of the lease accrues at the beginning of either kind of lease and that the distinction has no relevance to the law of limitation, but we cannot agree that the possession of the lessee, while the lease is on foot and not avoided, is adverse to the lessor. The Court appears to have overlooked the well-known rule, enunciated after the Real Property Limitation Act, 1833, that,

> "possession is never adverse if it can be referred to a lawful title."[246]

It is axiomatic that a voidable transaction is valid until avoided.[247] How then can possession under a valid lease be adverse, just because the lease may or may not be avoided in the future? To hold that the possession is adverse would be to hold that, e.g. if a 21-year voidable lease had not been avoided by the end of its twelfth year, the lessee would have extinguished the lessor's fee simple reversion! The truth would seem to be that, in the case of any voidable transaction, possession taken by unequivocal

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245. (1877), 5 Ch.D. 175 at 182. The distinction was made in order to avoid certain earlier authorities which are discussed, infra, p. 229 et seq.
246. Thomas v. Thomas (1855), 2 K. & J. 79 at p. 83 (per Page-Wood, V. C.),
247. Cf., the similar rule in the general law of contract and in particular under Sale of Goods Act, 1893, s. 23.

reference to it cannot be adverse. The grantee will therefore stand or fall with the instrument effecting it and he will never be able to acquire title by adverse possession, but when the grantor's right to rescind is barred, normally after twelve years, (this being an action for the recovery of land),[248] the grantee will be safe with whatever title the instrument gives him. If it is an out-and-out conveyance of the fee simple, he will have an indefeasible fee simple. If it is a lease, he will hold the lease for the remainder of its natural term.

In this context, the references in S. 4 of the 1939 Act to a "right of action to recover any land" and in S. 10 of the 1939 Act to the right of action accruing when "adverse possession" is taken by "some person in whose favour the period of limitation can run" must be construed by reference to the definition in S. 31(1) of the 1939 Act of "land" as including "any legal or equitable estate or interest therein," e.g. the lessee under a voidable lease bars the right of the lessor to recover that legal estate that is the remainder of the term and so mutatis mutandis with an out-and-out, voidable, conveyance.[249]

Support for this view is found in the analogous provision of Section 8 of the Limitation Act, 1939, which provides,

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248. See p. 221 supra.
249. But see discussion, infra, p. 226 et seq.

> "A right of action to recover land by virtue of forfeiture or breach of condition shall be deemed to have accrued on the date on which the forfeiture was incurred or the condition broken.
>
> Provided that, if such a right has accrued to a person entitled to an estate or interest in reversion or remainder and the land was not recovered by virtue thereof, the right of action to recover the land shall not be deemed to have accrued to that person until his estate or interest fell into possession, as if no such forfeiture or breach of condition had occurred." (author's italics).

In other words, if, for example, a lease becomes voidable for breach of a lessee's covenant and the lessor has a choice whether to forfeit and re-enter or not, he may lose his right to forfeit if he waits for more than twelve years, so that the lessee can hold possession for the remainder of the natural term of the lease, but the lessor does not thereby lose his freehold reversion.[250]

The case, under Section 8, of failure to avoid a lease for breach of covenant, seems an exact parallel to failure to avoid a lease for a defect in its inception, and it is impossible to see why the lessor in the second case should be in any worse position than the lessor in the first.

It may, perhaps, be felt that, just and logical though this may be, it does some violence to the language of

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250. In Magdalen Hospital v. Knotts (1878), 8 Ch.D. 709 at pp. 726-7, the Court of Appeal followed the analogy of the unitalicized part of the Section (then Section 3 of the Real Property Limitation Act, 1833) but failed to take note of the important qualification in the italicised part (then Section 4 of the 1833 Act).

Sections 4 and 10 of the Limitation Act, 1939 by introducing a somewhat artificial concept of adverse possession of a term of years, but not of the freehold reversion. Even if this is so, however, it is possible to arrive at the just and logical conclusion by another route, namely by arguing that a right to avoid a voidable transaction concerning land, is not technically, an action to recover land, and is not therefore directly governed by Sections 4 and 10 of the 1939 Act but is governed by the doctrine of laches. This is the approach traditionally taken to the problem in the many reported cases on rescission on equitable grounds, e.g. undue influence or purchase by a trustee of trust property. The effect of these cases on the doctrine of laches is well-known by which laches is a concept, in which length of time is but one factor, the culpability in delaying of the would-be plaintiff being an equally important one. Even where it is sought at law to avoid a transaction, e.g. for breach of a statute, the Courts have not treated the claim as technically an action for recovery of land. In Re Maddever,[251] the Court of Appeal was concerned with an application by a creditor to set aside a conveyance in fraud of creditors,[252] the application being made some ten years after the conveyance was executed. The Court of Appeal held that the delay,

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251. (1884), 27 Ch.D. 523 (C.A.).

252. Then rendered voidable by 13 Eliz., c. 5,* now replaced by Law of Property Act, 1925, s. 172.

* (Fraudulent Conveyances Act, 1571)

though not satisfactorily explained was no bar because, though the case was in a sense to be governed by the doctrine of laches, the Statute of Limitations was to be applied by analogy and twelve years had not expired. This decision, then, lends some support to the view, that an action to avoid a transaction relating to land is not technically "an action to recover any land," within the meaning of Sections 4 and 10 of the Limitation Act, 1939.

To sum up so far, it is submitted that the grantee's possession taken under a voidable transaction cannot be adverse to the grantor until such time as the transaction is avoided,[253] whereupon adverse possession will commence. However, the right to avoid the transaction will be lost after a certain period, which may either be one of the fixed periods of limitation specified by Section 4 of the Limitation Act, 1939 for an action for the recovery of land or may (if the view that Section 4 applies directly is incorrect) be governed by the doctrine of laches. Expiry of the period does not bar any estate in reversion or remainder that the grantor may have but merely makes unimpeachable the erstwhile voidable grant.

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253. The fact of which would seem to need communication where practicable to the grantee before the avoidance takes effect - Car Finance Ltd., v. Caldwell [1965] 1 Q.B. 525 (C.A.), but see Denning, M. R. at first instance [1965] 1 Q.B. 525 at 532 and cf., C.A. in Magdalen Hospital v. Knotts (1878), 8 Ch.D. 709 at 726 (cited supra, pp.219-20).

It remains only to examine three mid-nineteenth century decisions, which were cited before the various Courts in Magdalen Hospital v. Knotts[254] in support of the allegation that possession taken under a voidable lease is adverse to the lessor. The cases are Magdalen College v. A. G.[255] A. G. v. Davey[256] and A. G. v. Payne[257] and the Court of Appeal in the later case of Magdalen Hospital v. Knotts[258] undoubtedly treated them as establishing that possession taken under leases by charities, voidable for being alienations in breach of trust was nevertheless adverse to the charities. Jessel, M. R. in Magdalen Hospital v. Knotts[259] had distinguished these cases, as we have seen, on the ground that they were voidable in their inception. In the House of Lords[260] Counsel for the lessors alleged that the lease in Magdalen College v. A. G. the principal of the three cases, was void, not voidable,[261] but no comment was made upon this by their Lordships.

It is, however, submitted that an examination of these three cases will show that they do not conflict with the submissions just made about the non-adversity of possession

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254. (1879), 4 App.Cas. 324, (H.L.); (1878), 8 Ch.D. 709 (C.A.); (1877), 5 Ch.D. 175.
255. (1857), 6 H.L.C. 189.
256. (1859), 4 De G. and J. 136.
257. (1859), 27 Beav. 168.
258. See note 254 supra.
259. Ibid.
260. Ibid.
261. (1879), 4 App. Cas. 324 at 329.

under a voidable transaction.[262]

The principal case of the three is Magdalen College v. A. G.[263] in which the House of Lords considered an application by the Attorney-General on behalf of the objects of a charitable parish trust for the cancellation of a lease for ever granted (by means of a fine and a deed of enfeoffment) at a rent of £15 per annum (this was really, therefore, the same as a grant of the fee simple subject to an annual rent charge). The lessees had been in possession under the lease for more than sixty years when the action was brought and the House of Lords held that the Attorney-General's claim was barred by Section 2 of the Real Property Limitation Act, 1833, the predecessor of the action for the recovery of land provisions of Sections 4 and 10 of the Limitation Act, 1939. Nowhere, however, was it said by their Lordships, that the lessees had acquired a fee simple by adverse possession[264]; indeed the Lord Chancellor, Lord Cranworth, expressly said,

> "I do not deem it material to consider whether the legal title of the Defendants is to be attributed to the conveyance made to them by the Parish Officers of the two parishes, or to the fine and non-claim. The Defendants certainly acquired the legal estate, and they were certainly purchasers from the trustees for a valuable consideration."[265].

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262. Supra, p. 224.
263. (1857), 6 H.L.C. 189.
264. The case principally turned on whether the Attorney-General was bound by the Real Property Limitation Act, 1833.
265. (1857), 6 H.L.C. 189 at 211.

One can deduce from this statement two propositions being laid down by Lord Cranworth,

(i) the transaction was voidable as being in breach of charitable trust;[266]

(ii) the grantees obtained their title from the lease, not by adverse possession.

It must follow that Section 2 of the 1833 Act was being used merely to bar the right to rescind the transaction and not to create adverse possession in the sense of extinguishing any fee simple reversion in the grantors. How could it in this case where the grantors in effect had no such reversion?

In A. G. v. Davey,[267] the Court of Appeal heard an appeal from a setting-aside by the Master of the Rolls of a lease in breach of trust by a charity for 500 years at a rent of £6 per annum. The Master of the Rolls held that the Real Property Limitation Act, 1833, did not bind the Attorney-General, suing on behalf of charitable objects, but the Court of Appeal reversed this decision following the House of Lords' decision to the same effect in the case just discussed, Magdalen College v. A. G.[268] The only issue was

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266. The prohibition is now statutory - see Charities Act, 1960, s. 29, which, it is submitted at p. 207 supra renders the conveyance void, where consent is not obtained.

267. (1859), 4 De F. & J. 136.

268. (1857), 6 H.L.C. 189 (supra, p. 230).

whether there was any distinction between a lease for ever and a lease for 500 years. The lessees pleaded,

> "that they...had been in possession of the premises since the date of the lease, and submitted that there was no title to relief in equity. They claimed the same benefit as if they had pleaded the Real Property Limitation Act, 1833."[269]

This was clearly not a claim to adverse possession extinguishing the lessor's fee simple reversion but merely a claim to retain the 500 year lease as a valid one. Indeed this was recognised by Counsel for the Attorney-General who said,

> "Here the Defendants do not claim to be entitled in fee. They make no claim except under a lease, and if that lease is void, they have no title."[270]

Unfortunately, Counsel said this when invited by the Court to distinguish the present case from Magdalen College v. A. G.[271] and must have wrongly regarded that case as deciding that the lessees for ever acquired a fee simple adverse possession, whereas, as we have seen, the case decided no such thing.[272] This error was communicated to the Court, the Lord Chancellor, Lord Chelmsford saying,

> "Is there then any distinction between the present case and that of Magdalen College? [Counsel for the Attorney-General] says that the lease was void, but that by the acceptance of rent, a tenancy from year to year had been created.

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269. (1859), 4 De G. & J. 136 at 138. (Writer's italics).
270. Ibid., at p. 139.
271. (1857), 6 H.L.C. 189 (supra, pp230-1).
272. See supra, p. 230.

> He was pressed to give an authority for this proposition, that possession taken under a lease of this kind had ever been dealt with in equity as a lease from year to year, and he has been unable to produce any such authority. I think that there has been adverse possession, and that the statute would run according to the decision in the House of Lords, by which we are bound."[273]

However, Lord Chelmsford's remark, "I think that there has been adverse possession" shows, with respect, a misunderstanding of the nature of this action which was a claim to rescind a lease (voidable, not void, as he described it), defended on the ground that the claim to rescind was barred "as if" by the 1833 Act, i.e. by analogy. The decision of the Court of Appeal in this case was simply to allow the appeal, i.e. to refuse to set aside the lease, not to declare the lessee entitled to the fee simple reversion.

It is, incidentally, a little difficult to appreciate Lord Chelmsford's point about a yearly tenancy arising from the payment of an annual rent. Such a tenancy would undoubtedly be recognised at common law, at least where the lease was void as distinct from voidable, as witness Lord Selborne in the later case of Magdalen Hospital v. Knotts[274]

> "The other observation which I wish to make is, that the present case is one for which there was, probably, never any precedent, and which is never likely to be followed by another similar to it - a long term having been attempted to be granted by a charitable corporation at a peppercorn rent. If

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273. (1859), 4 De G. & J. 136 at 140.
274. (1879), 4 App.Cas. 324 at 335. See pp. 146-8 supra.

> any rent had been reserved and received, however small, the legal relation of a tenancy from year to year would have been created, and the Statute of Limitations could not have run."

In fact, the position would seem to be that where an annual rent has been paid under a void lease, a common-law yearly tenancy would arise and would have been governed by Section 8 of the Real Property Limitation Act, 1833, now re-enacted in Section 9(2) of the Limitation Act, 1939, as follows,

> "A tenancy from year to year or other period, without a lease in writing, shall for the purpose of this Act, be deemed to be determined at the expiration of the first year or other period, and accordingly the right of action of the person entitled to the land subject to the tenancy shall be deemed to have accrued at the date of such determination:
>
> Provided that, where any rent has subsequently been received in respect of the tenancy, the right of action shall be deemed to have accrued on the date of the last receipt of rent."

It would seem, therefore, that even if a money rent had been paid by the lessees in Magdalen Hospital v. Knotts, the lessees' possession would still have been adverse after the first year of the common-law yearly tenancy, since a void deed of lease could not be a "lease in writing" under the Section, which has been held, to require for this purpose,

> "not merely an instrument which would be evidence of the conditions of holding, but one passing an interest,"[275]

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275. Per Coleridge, J. in Doe d. Lansdell v. Gower (1851), 17 Q.B. 581 at 599. (Lease of parish property void as not made with proper authority).

Where a periodic rent is paid under a voidable lease, it would seem on principle that a common-law periodic tenancy ought not to arise, since to imply it would be inconsistent with the express lease, which is valid until avoided.

The last of the three cases said to establish that possession taken under a voidable lease is adverse to the lessor is A. G. v. Payne[276] before Romilly, M. R. The facts were similar to those of A. G. v. Davey[277] and the case was heard shortly afterwards. Leases for lives by a charity were impugned by the Attorney-General on the ground that they were improvident and in breach of trust. Counsel for the Attorney-General sought to distinguish A. G. Davey[278] and Magdalen College v. A. G.[279] on various grounds which do not concern our present enquiry but Romilly, M. R. rejected the distinctions, speaking the following significant words,

> "I cannot distinguish this case from A. G. v. Magdalen College,[280] and I think that as soon as the lease was granted the lessee held adversely to the rights of the charity, to the extent of the alienation contained in the lease."[281]

These words appear strongly to support the conclusion reached in this chapter[282] that the long-possession of a

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276. (1859), 27 Beav. 168.
277. (1859), 4 De G. & J. 136; see p.231-5 supra.
278. Ibid.
279. (1857), 6 H.L.C. 189. Discussed, supra pp. 230-1.
280. Ibid.
281. (1859), 27 Beav. 168 at 174; (writer's italics).
282. Set out in detail at p.228 supra.

grantee under a voidable grant, and in particular a lessee under a voidable lease, does no more than confirm him in his grant, "to the extent of the alienation"[283] to use Romilly, M. R's own words. When the learned Master of the Rolls said,

> "the lessee held adversely to the rights of the charity"

he was not, indeed could not, be describing adverse possession in its true sense, but was merely saying that the lessee was, by possession long continued, barring the right of the charity to avoid the lease.

In conclusion, therefore, we may claim to have demonstrated that of the three cases, Magdalen College v. A. G.[284] A. G. v. Davey,[285] and A. G. v. Payne,[286] said to have decided that possession taken under a voidable lease is adverse to the lessor, capable of extinguishing his fee simple reversion, the first Magdalen College v. A. G.[287] merely held that time could run against the Attorney-General and prevent him bringing an action to rescind a voidable lease, thus confirming the lease; the second A. G. v. Davey[288] held no more, despite certain incautious dicta of Lord Chelmsford; and in the third, Romilly, M. R. clearly held that only the lease was "gained" by long possession, the reversion remaining in the lessor.

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283. (1859), 27 Beav. 168.
284. Ibid.
285. (1859), 4 De G. & J. 136.
286. (1859), 27 Beav. 168.
287. Ibid.
288. (1859), 4 De G. & J. 136.