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ON THE INTERVERSION OF POSSESSION;

OR,

WHETHER A PARTY MAY CHANGE THE CAUSE OF HIS POSSESSION.

It was a rule of the Roman law, that a man who was in possession under a title emanating from another, might not make interversion, and commence to hold independently of the title to which his holding was subordinate, *cum nemo causam sibi possessionis mutare possit.*[1] No man might change the cause of his possession, and hold adversely to the right under which he entered, unless the character of his possession was changed by some cause without. There could be no interversion, *nulla extrinsecus accedente causa.*

Savigny[2] is of opinion that the rule in question had not been properly understood by most writers, especially before the discovery of the Institutes of Gaius. He says that it seems to have been supposed that the rule rendered it absolutely impossible, even with the co-operation of a third party, to change the cause of possession, though such is not the meaning of the rule; for if the possessor in bad faith of a thing, purchase it of the proprietor, or of him whom he supposed to be such, the cause of the possession is completely

[1] L. 5, Code de Acq. Poss. [2] Tr. de la Poss., p. 69, Edition of 1842, Paris.

and effectually changed; and, on the other hand, if the tenant expels the lessor, he has effectually changed the cause of possession from the *causa conductionis* to the *causa dejectionis*, and will thus arrive at true possession. The rule opposes no obstacle to such a change, and there was no necessity for a positive prohibition, for the lessor is sufficiently protected by the interdict *de vi*, and the expulsion or ouster could never, by the Roman law, be a step to *usucapion*. The rule, therefore, he considers applicable to those few cases where an unjust and arbitrary cause might be changed to one which was valid and efficacious, but where *usucapion* was prevented by the application of a rule altogether positive in its nature, as in the following cases. Before the heir has taken possession of the things belonging to the succession, any one might take possession of those things and acquire title by *usucapion* as heir, (*pro herede.*) For usucapion in such a case, by the Roman law, neither good faith nor a just title being required, one year only was necessary to its accomplishment, even for immovable property. This, therefore, was a cause of possession to which the positive rule of prohibition was applicable, for it was founded upon a dishonest intent of the party taking possession, and was nevertheless a just cause of usucapion, *justa usucapionis causa*, which distinguished it entirely from the case of a lessor expelled by his tenant. The reasons for the recognition of a possession so unjust, and of the usucapion founded therefrom, were special, and the law itself was changed by Adrian.

The ancient rule, *nemo sibi causam possessionis mutare potest*, applied in the following manner. If one was in possession as a purchaser, (*pro emptore,*) and was in the course of acquiring title by usucapion in that character, or if he had natural possession of a thing as depositary or bailee, on the death of the true proprietor, *usucapio pro herede*, usucapion in the character of heir, might be of great advantage to each of these possessions. The purchaser of immovable property acquired title in one year, instead of two, which were necessary in his character of purchaser, and the depositary or bailee, to whom in that character usucapion was impossible, was thus enabled to acquire a right by usucapion. The rule *nemo*, &c.,

that no one may change the cause of his possession, might be opposed to such possessions. Those who had once commenced to possess in a certain manner, were not permitted, with a consciousness of its unlawfulness, to change that possession to a *possessio pro herede*. Such, according to Savigny, was the design of the rule in question, though he admits that it has entirely lost its true signification since the time of Justinian. The rule by which possession at the common law is affected, and which is far from being understood as an arbitrary or positive rule, is the same which was applicable, under the law of Justinian, to prescription *longissimi temporis*, or cases of possession for thirty years, and the principle of the rule still applies to possession which commences lawfully and in subordination to title.

The meaning of the rule is, that a man shall not change, by his own act, the character of his possession, so as to give effect to usucapion or prescription. That a tenant, who entered under a rightful title and acknowledged the authority of his lessor, might acquire possession by the simple act of expelling his lessor, although he could not, by the old law, render possession thus acquired available to usucapion, is sufficiently apparent from the texts of the Digest.[1] Possession, says Cujas, does not require good faith, though usucapion demands good faith.[2] Possession is not always available to usucapion.[3] Although violence prevents alike usucapion and prescription *longi temporis*, it does not obstruct prescription *longissimi temporis*, where there has been a possession of thirty years after the act of violence has ceased.

The lessee, therefore, who had, under certain circumstances, acquired the possession of land leased to him by violence, that is, by holding out the lessor and denying his title, acquired an absolute right by the law of Justinian, after a possession of thirty years.

The rule in question has application to all cases at the civil law, or the common law, in which prescription may be effectual, though not founded upon a title commencing in good faith.

The principle of the rule is independent of any positive regula-

[1] D. 43, 12, 16, and 18.

[2] Cujacius, vol. 6, p. 663.

[3] Cujacius, vol. 3, p. 285, ch. 12.

tion; it is that a person who has acquired a possession subordinate to another's right, shall not, by the act of his own mind, change the character of that possession, and at his own election hold independently and adversely.

"The sense of the rule," says D'Argentrée,[1] "is that no man shall mentally, alone, and by a silent thought, change the cause of his possession—that is, elect to hold for a different cause from that for which he had previously held." "So no man, by his intention alone, can change the nature of possession which he has received to hold in another name; for example, if a tenant should resolve to make no further payment to the owner of whom he held, no interversion of possession is effected by the operations of his own mind. Some act is necessary."

Interversion is effected by a conveyance from the owner of land to his tenant, who thereafter will hold in virtue of the extrinsic cause contemplated by the rule, and also when the land comes to the tenant by descent.

The cause of possession may also be changed by a conveyance from a third person claiming to be the owner of the land. If the tenant is aware that the person from whom he thus derives title, is not the true owner, he will be a possessor in bad faith, but he may prescribe after thirty years by the civil law.[2]

The question has been considered by French writers, whether after such a conveyance from a third person to the tenant, some refusal or act equivalent to an expulsion was necessary, in reference to the owner, to mark a change in the character of the possession. Dunod[3] says, that if the tenant refuses, after a title thus derived, to yield any part of the profits to the owner, if he declares to him that he will no longer hold the land under him, but that he will enjoy the land as his own, this will be a change in the character of the possession by an extrinsic fact, unjust indeed, but which, nevertheless, is the commencement of a possession, the cause of which is changed for him, but not by himself.

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[1] D'Argentrée, art. 265, ch. 4, p. 863.

[2] D'Argentrée, art. 265, ch. 4, Nos. 29 and 30.

[3] Dunod, Tr. des Prescriptions, p. 36.

S'il refuse après cela de faire part des fruits à son maître; s'il lui déclare qu'il ne veut plus tenir de lui ces heritages, mais qu'il en veut jouir comme des siens propres, ce sera un changement de possession par un fait extérieur, injuste à la vérité, mais qui ne laissera pas de donner commencement à la possession, quia non sibi mutare sua ipsi mutari dicetur causa possessionis.

The acquisition of a new title, it would seem, was not considered by this writer as sufficient to effect an interversion, unless with a refusal on the part of the tenant to account for the profits. A denial of the right of the owner, as well as a new title, was supposed necessary to change the cause of possession. Troplong controverts this notion,[1] and is of opinion that a denial of the right and a refusal to account is important only as giving publicity to the newly acquired title, and as excluding the vice of clandestinity. The title, he says, is only effectual when it is sustained by a possession which is neither equivocal nor clandestine. It is necessary, in order to effect a change in the character of the possession, that the owner should have notice of the new title. If the tenant permits the party, in subordination to whose right he had possession, to remain in ignorance of the conveyance, the cause of the possession will not be changed, but if he communicates that fact, or if the publicity attending his title and claim are such as to make them known to him, no express refusal to account, or denial of the right of the owner is necessary, because the title itself is supposed to be the cause of interversion, and this, when publicly asserted, is in itself a denial of the right under which the possession had commenced. In support of this view, Troplong cites the provisions of the French Code, by which a conveyance, emanating from a third person, and contradiction or a denial of right are made distinct and independent causes of interversion. Whereas, if contradiction in express terms had been necessary, that would have been declared to be the single cause of interversion.

Contradiction, or a refusal to account and a denial of the right of the person of whom possession had been held, is in itself a mode

[1] Troplong, Tr. de la Prescription, No. 507.

in which the cause of possession may be changed. Such an interversion is not inconsistent with the rule above stated. The act is an extrinsic one, though emanating from the tenant, and by changing the relations of the parties creates a new and independent possession.

A possession thus commencing, though unjust and fraudulent, is recognised at the French law as the foundation of prescription *longissimi temporis*, or thirty years.

The appropriation of the entire profits of the land by the tenant, and the omission to pay or account, is not regarded as sufficient to work a change of the possession, and the words of D'Argentrée on this subject, are noticeable as in striking conformity with the doctrine, as stated by Lord Mansfield, as the rule in regard to ouster of one tenant in common by another.

"A simple refusal," he says, "does not constitute a ground for the commencement of prescription, but only when on the demand by the lessor, the tenant refuses to pay and asserts his right to possession, with acquiescence on the part of the owner. That is, without his commencing an action for thirty years."

The act of the tenant in asserting his right is regarded as constituting a change of possession. A mere cessation of payment produces no such effect as a refusal to pay, and a denial of right, because the cessation of payment may be ascribed rather to the forgetfulness of the owner, than to the act of the tenant in assertion of right.

The denial of the right of the owner, as well as the omission to pay, is necessary to a change of possession. A tenant, says Dunod, to do this, must, on the request of the owner, not merely omit to perform the duties required, he must say at the same time that he is not subject to them.[1]

In regard to the manner in which contradiction or the denial of the right of the owner may be made, the question has arisen, whether mere words were sufficient, unless in writing, and whether a claim in writing is in all cases necessary. Troplong states a

[1] Dunod, p. 37.

case where the acts of the tenant in possession are in themselves sufficient to constitute a claim of right, and a denial of the title of the owner, as follows:

If a person to whom permission has been accorded to feed his cattle by the owner, *à titre de precaire*, or as tenant at will, on uncultivated land, is at length informed by him that the permission is withdrawn, and notwithstanding the tenant afterwards persists in his occupation, and throws down the enclosures which the owner had erected for his exclusion; these are, in themselves, acts of possession, which, whilst they manifest a claim of right, involve a denial of the right of the owner. No such effect could be given to a merely oral communication, though these may be important as giving a character to acts which would otherwise be equivocal, such as a neglect or refusal to pay rent, or to account for the profits of land.

There is nothing in the rule in question which prevents a tenant, who is in possession under an executed contract, from acquiring a new possession by a conveyance from a third person, or from transferring the land to another, who may thereafter commence to hold adversely on a distinct possession.

The only principle which prevents a tenant from changing his possession and acquiring a right to land by prescription, is the effect of the contract which may exist between him and the party from whom he derives possession; and the only contract which can have that effect, is one which imposes a duty upon the tenant to be performed at a future time. Such a contract is inconsistent with a new and independent possession, and its effect is to prevent the tenant from acquiring title by prescription, or from commencing to prescribe while the contract is executory. The possession of a tenant for years, is always held under an executory contract. The contract on his part is to occupy the land as lessee during the continuance of the term, and at its end to deliver up the land to the owner. A tenant for years may acquire title from a third person to land of which he is in possession under a lease, and he may hold the land against his lessor by a title thus derived. But he will hold by title, and not by prescription, on a possession

commencing under his independent title. If he cannot sustain his claim of right by his new title, he cannot avail himself of an adverse possession, commencing at the time of the supposed conveyance. The contract controls his possession and renders it the possession of the owner.

Though the possession of a tenant for years cannot be changed, except by a paramount title derived from a third party, there is no principle which, on the conveyance by such a tenant of the land held by him for a term of years, prevents the purchaser from acquiring a new possession that will in time ripen into title.

The effect of the law in question was not to prevent the alienee of a tenant for years even from transferring such a possession as might be the foundation of prescription. Cujacius says, that if a tenant sells the farm which he holds as his own, though the sale is unlawful, by reason of the principle that a man may not change the cause of his possession, there is no doubt that a *bona fide* purchaser may prescribe for it, though he bought it of a vendor who was in bad faith, but the true owner may recover the land, if the purchaser has not acquired a right by prescription.[1]

The sale by a tenant for years, to be effectual, as changing the cause of possession, must be a transfer of property, and such as leaves no privity between the vendor and purchaser, otherwise it will operate only as an assignment of the tenant's interest, and the possession of the assignee will be that of the owner. Such is the doctrine of the French law,[2] and in this respect it is in perfect accordance with the common law, notwithstanding the peculiar effect which a feoffment has been supposed to have by the latter. A feoffment by a tenant for years, as by any other party in possession, operates to create a new possession in the feoffee, and as against third parties, this is its only effect. Such a possession may be adverse at the common law, and give effect to the Statute of Limitations, just as it would be a foundation for the prescription of thirty years by the civil law.

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[1] Cujacius Recit. Solemn, Sur le Code de acq. poss.

[2] Troplong, Tr. de la Prescr., No. 516.

As against the feoffor, a feoffment transferred the freehold; but as against the true owner, says Bracton,[1] there will be no freehold, except by long and peaceable seisin, and if immediately after the feoffment, the true owner can acquire seisin, he may hold all others out of possession. *Sed quod verum dominum, nunquam erit liberum tenementum, nisi ex longa et pacifica seisina et unde si incontinenti post tale feoffamentum posset verus dominus ponere se in seisina, omnes quoscunque tenere posset exclusas a possessioni.* And, although it was held by Lord Mansfield, that on a feoffment by a tenant for years, the lessor might elect to consider himself as not disseised, "and still distrain for the rent, or charge the person to whom it is paid as a receiver;"[2] some action by the lessor is necessary to manifest his election, for if the lessor permits the feoffee to remain in possession, he will, on the foundation of that possession, acquire a freehold. This is clear from what fell from his lordship, on the effect of fines with proclamations. By a fine with proclamations, the right of the true owner is extinguished, as he says, "for the sake of the bar." Fines are a species of statutes of limitation. It is sufficient for the operation of a fine that the feoffee of a tenant for years has a freehold as against the feoffor. Such a possession the feoffee has, under the Statute of Limitations.

The doctrine which was urged in that case, that the feoffee might be a good tenant to the precipe in a common recovery, was, that substantially the feoffee had an indefeasible right of property which was capable of being passed by a common recovery.

A tenant for term of years, who is bound by his contract to hold for the owner during the term, and at its end to deliver up possession, may as effectually change his cause of possession by a conveyance to a third person, as a tenant, who holds *ex precario*, and whose liability results from his tenure alone. If the tenant for a term of years refuses to pay rent, and claims title, and expels the owner on his entry to claim performance of covenants, he is guilty of a forfeiture which may render him liable to an

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[1] Bracton, Lib. 2, ch. 14.

[2] Taylor *vs.* Horde, 1 Burr., 60.

action of ejectment, but he acquires no possession, because the lessor may waive the forfeiture and demand performance of the covenants by the lessee. Having this election to waive the forfeiture and insist upon performance, some act on his part is necessary to show his election to take advantage of the forfeiture, and the mere wrongful act of the tenant will not initiate a new possession in himself. Such is the necessary effect of the contract on the parties, and in this respect there is a distinction between the tenant and his feoffee, who is a disseisor, but only at the election of the lessor. In the one case the possession is controlled by a contract; in the other merely by tenure. The feoffee of a tenant for years is in privity of estate, and not in privity of contract.

Though, on an act of forfeiture by a tenant for years, the lessor has his election, and on his waiver of the forfeiture, the possession of the tenant will continue to be the possession of the lessor, it is quite otherwise with a tenant at will, and any act of forfeiture by such a tenant immediately puts an end to the tenancy of the latter.

Where a tenant for a term of years under a lease, delivered up possession of the premises and the lease, in fraud of his landlord, to a person who claimed under a hostile title, with a view to enable him to set up his hostile title; this was held to be a forfeiture, of which the landlord might take advantage.[1]

In another case,[2] where a tenant for a definite term of years, on a demand of rent, orally refused to pay it, and asserted that the fee was in himself, the Court of King's Bench distinguished the case from the preceding one, on the ground that, in that case, the tenant had betrayed his landlord's interest by an act that might place him in a worse condition. They were of opinion that a lease, for a term of years, could not be forfeited by an oral disclaimer, although a tenancy from year to year might be thus determined. Lord Denman said, "When a landlord brings an action to recover the possession from a defendant who has been his tenant from year to year, that evidence of a disclaimer of the landlord's title by the tenant, is evidence of the determination of the will of both parties,

1 Ellenbrock *vs.* Flynn, 1 Cr. Mees. & Ros., 137.

2 Doe ex d. Graves *vs.* Walls, 10 Ad. & El. 427.

by which the duration of the tenancy, from its particular nature, was limited." His lordship thought the word "forfeiture" was improperly applied to such a case, as the supposed forfeiture absolutely put an end to the tenancy in such a case. Several cases were referred to on the argument, to show that the effect of a disclaimer was to create a forfeiture of the estate for a term of years; but they were all distinguished by the Court from the case in question; as of estates from year to year, and as such determinable at the will of the parties. Thus, it was held, that if a tenant hold from year to year, the landlord cannot maintain an ejectment without giving six months' previous notice, unless the tenant have attorned to some other person, or done some other act disclaiming to hold as tenant to the landlord; and in that case no notice was necessary.[1]

In another case, Lord Kenyon said, that if the tenant put his landlord at defiance, he might consider him either as a tenant or trespasser, and eject him without any notice to quit.[2]

When the tenant holds from year to year, the court said in a case where the claim of the tenant was not considered as necessarily inconsistent with the tenancy, "it does not appear to be necessary that any act should be done, as distinguished from a verbal disclaimer; a disavowal by the tenant of the holding under the particular landlord, by words only, is sufficient." In such a case, the disavowal determines the estate.[3]

So it was held,[4] that a tenancy, from year to year, was determined by the tenant having written a letter to the reversioner's attorney, stating that his connection as a tenant had ceased for several years.

If a tenant at will disclaims that relation to his landlord, this is a renunciation by the party (of his interest and) of his character of tenant, either by setting up a title in another or by claiming a title

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1 Throgmorton *vs.* Whelpdale, Bul. N. P., 96.

2 Doe *vs.* Pasquali, Peake's N. P., 196.

3 Doe d. Gray *vs.* Stanion, 1 M. & W., 695.

4 Doe d. Grubb *vs.* Grubb, 10 B. & C., 816. See also Williams *vs.* Cooper, 1 Man. & Gran. R., 139.

in himself. By such an act the tenant does not change the cause of his possession, in the sense that he might otherwise presumptively hold under the agreement by which the tenancy was created, but he puts an end to his tenancy. He no longer holds permissively, but as a wrongdoer, and, if the owner permits him, thus claiming adversely, to continue in possession during the period of limitation, he is barred of his right.

In a case[1] where the widow of a testator, to whom he had devised the estate in question, and the younger of two sons joined in a deed of bargain and sale, conveying the estate in fee to H., without the privity of the eldest son and heir at law of the testator, and H. continued in undisturbed possession of the estate for twenty-two years, and died possessed, bequeathing it to his children; it was held that the possession of H. was not a disseisin to the eldest son and heir. "I think," said Abbott, C. J., "there is no ground for saying that the adverse possession of H. has operated as a disseisin (of the heir). H. did not take possession wrongfully; he only wrongfully continued possession. He came in under right and title, which remained good during the life-estate of the widow, but ceased at her death, and from that period he continued in possession wrongfully. But what is the effect of that? No more than that he is tenant by sufferance (to the heir), who permitted him for a period to remain in possession." "I know of no authority," he proceeds, "which says that a mere wrongful possession divests the estate of the party against whom the possession is adversely held. If the argument is to be carried to that extent, a mere adverse possession might be made equivalent to a fine and feoffment." But there was really in this case no adverse possession. The party entered rightfully under the conveyance from the tenant for life. Although he entered under a conveyance which purported to pass an estate in fee, his estate and his possession were, by operation of law, reduced to such as he might rightfully claim. His possession, after the death of the tenant for life, being qualified by construction of law, notwithstanding the claim under which he entered, continued subordinate to the right of the true owner, and therefore was not, properly

[1] Doe d. Souter *vs.* Hall, 2 Dowl. & Ry., 38.

speaking, adverse. There was no act of disclaimer by the tenant at sufferance after he became such, and, though he died in possession and bequeathed the land to his children, this was not such an act as might change the cause of his possession. This was the very case to which the rule of the civil law applied. There was no extrinsic act to change the cause of his possession, and his intention to hold adversely could not have effect consistently with the principle of law, which made him merely a tenant at sufferance. If there had been any act putting an end to his rightful possession, after the death of the tenant for life, this might have been sufficient to render him a disseisor.

The following case is an instance, where, as in a tenancy for a term of years, there could be no interversion, because the party in possession was prevented from changing the cause of his possession by the effect of a covenant which bound him in equity, and prevented him from setting up an adverse possession, and which would have prevented him from changing the cause of his possession by the operation of any extrinsic act.

In a case where certain devisees under a will, covenanted to carry the supposed intention of the testator into effect in favor of the heir, to what became a lapsed devise, by the death of a person to whom a certain share had been devised. Although they had the legal estate, and continued in possession more than twenty years, their possession was not adverse, and the Court were of opinion that they would have been guilty of a breach of trust if they had prevented the rents from being received for the party entitled.[1]

In this case, the possession was prevented from becoming adverse by the covenant which controlled its character, and even if the parties had claimed to hold discharged of the covenant, they would have been held liable in a court of equity, subject only to the rules of that court on a long-continued possession.

The doctrine of Lord Redesdale,[2] that the attornment of a tenant for a term of years to a stranger, by which the possession is betrayed, gives the stranger adverse possession against the lessor, is

[1] Coclough *vs.* Halse, 3 B. & C. 757.

[2] Hovenden *vs.* Lord Annesley, 2 Sch. & Lefr. 624.

not inconsistent with the rule which prevents the tenant from changing the qualities of his own possession. The attornment of the tenant is to be regarded, in such a case, as having the same effect as a wrongful conveyance by the tenant. The tenant does not, by such an act, change the cause of his own possession; but the design of his act is to make his own possession that of the stranger to whom he attorns.

Lord Redesdale observed, that the attornment of a tenant "will not affect the title of his lessor, so long as he has a right to consider the person holding the possession as his tenant. But as he has a right to punish the act of the tenant in disavowing the tenure, by proceeding to eject him, notwithstanding his lease, if he will not proceed for the forfeiture, he has no right to affect the rights of third persons, on the ground that the possession was betrayed; and there must be a limitation to that, as to every other demand." "The intention of the statute of limitations," said his lordship, "being to quiet the title of lands, it would be curious if a tenant for ninety-nine years, attorning to a person, insisting he was entitled, and disavowing tenure to the knowledge of his former landlord, should protect the title of his original lessor for the term of ninety-nine years. That would, I think, be too strong to hold, on the ground of the possession being in the lessee after the tenure has been disavowed to the knowledge of the lessor. If the tenure has not been disavowed to the knowledge of the lessor," he said, "it was different," and referred to a case "where there had been a lease for sixty years, and no rent paid for many years, and at the expiration of the lease it was insisted, that as no rent had been paid the tenant could not be evicted by the person entitled to the reversion; but it was held, that as the tenant entered originally under the lease, and his possession was lawful as against his lessor, who was entitled to all his remedies for the rent, there was no disavowal of the tenure. But that if he had attorned, with the knowledge of his lessor, to another, so that there was a disavowal of tenure for that time, he was of opinion that the same doctrine could not be sustained. If in the case referred to by his lordship, there had been a disavowal of tenure during the whole time of the lease,

this would not have affected the right of the reversioner to enter at the end of the term for years, for if such a disavowal is to be regarded as a forfeiture, it might be waived without impairing the right as between the parties.

Lord Redesdale, in this case, contemplated the attornment of the tenant as an act designed to transfer the possession to a stranger, and as such depending for its efficacy upon knowledge of the attornment being brought home to the lessor.

There was nothing in the terms of the contract between the lessor and the lessee, which could prevent the attornment of the tenant from giving the stranger possession by the ministry of the lessee. The attornment was to be regarded as having the same effect as if the tenant had abandoned possession to a hostile claimant. It thereupon became necessary for the lessor to enter upon his tenant for a forfeiture, for the same reason that his entry upon a stranger in actual possession would be necessary. No act of the tenant could have any effect upon the possession, so as to change the relations of the parties, as between themselves, because that was controlled by an agreement which had not only a present but a prospective operation upon his possession. The only question in the case decided by Lord Redesdale, related to the effect of the attornment. If that was sufficient to constitute the party, to whom it was made, in possession, that possession being hostile, was capable, by length of time, of ripening into title.

The question was considered and discussed in a leading case on this subject, by the Supreme Court of the United States.[1] In that case, the tenant, by agreement with the owner of the land, entered upon the premises as an agent, and with authority to sue trespassers, and protect the possession of the owner. He thus became a tenant at will. Afterwards, the tenant claimed to hold the land by an adverse title, and the owner had notice of the adverse claim. The tenant, and those claiming under him, continued in possession more than thirty years. The Court held, that the disclaimer determined the tenancy as to the owner, and that from the time it was

[1] Williston *vs.* Watkins, 3 Peters R. 43.

made, he had a right to eject him as a trespasser. This decision was in perfect conformity with the principle above stated; but the learned judge who delivered the opinion of the Court, considered the case the same as if the tenancy had been for a term of years, and seemed to suppose that the disclaimer of such a tenant would necessarily work a forfeiture which must put an end to his estate, and make his subsequent possession adverse.

After considering the facts which constitute a disclaimer with the knowledge of the owner, and its effect, Baldwin, J., said: "Having thus a right to consider the lessee as a wrongdoer holding adversely, we think that, under the circumstances of the case, the lessor was bound so to do. It would be an anomalous possession which, as to the rights of one party, was adverse, and as to the other, fiduciary. If after a disclaimer with the knowledge of the landlord, and attornment to a third person, or setting up a title in himself, the tenant forfeits his possession and all the benefits of the lease, he ought to be entitled to such a result from his known adverse possession. No injury can be done to the landlord unless by his own laches. If he sues within the period of the act of limitations he must recover; if he suffers the time to pass without suit, it is but the common case of any other party who loses his right by negligence and lapse of time. As to the assertion of his claim, the possession is as adverse and as open to his action as one acquired originally by wrong; and we cannot assent to the proposition, that the possession shall assume such a character as one party alone may choose to give it. The act is conclusive on the tenant. He cannot make his disclaimer and adverse claim, so as to protect himself during the unexpired term of the lease. He is a trespasser on him who has the legal title. The relation of landlord and tenant is dissolved, and each party is to stand upon his right."

Now, if it were true that an oral disclaimer would be sufficient to work a forfeiture of a definite term for years, it is plain that the lessor might treat the disclaimer as a forfeiture or not, at his election; and for the obvious reason, that the relation between the parties is created by a contract executed only in part, and by which