

THE
AMERICAN LAW REGISTER.

APRIL 1879.

TITLE BY ADVERSE POSSESSION.

TITLE to land by adverse possession is based upon the Statute of Limitations. While the statute does not profess to take an estate from one man and give it to another, yet, it bars the claim of the former owner, and quiets the title of him who has actually occupied the premises for the period prescribed by the statute. The effect of the statute is to transfer the title to the adverse occupant. In *Graffius v. Tottenham*, 1 W. & S. 488, GIBSON, J., says: "The title of the original owner is unaffected and untrammelled till the last moment, and is vested in the adverse occupant by the completion of the statutory bar." The Statute of Limitations is said by an eminent jurist (Story's Confl. of Laws, sect. 576) to be one "of repose to quiet titles, to suppress frauds, and to supply the deficiency of proofs arising from the ambiguity and obscurity or antiquity of transactions." The *prescription* of the civil law was not as broad in its application as the Statute of Limitations. It being provided that "things movable may be prescribed to after the expiration of three years, and that a possession during a long tract of time, will also found a prescription to things immovable; that is to say, ten years if the parties are present, and twenty years if either of them be absent. Property may thus be acquired * * * if the property was honestly obtained at first:" Sanders's Justinian, Lib. 2, title 6.

By the ancient common law, a person might have prescribed for a right which had been enjoyed by his ancestors or predecessors at

any distance of time, even though his or their enjoyment of it had been suspended for an indefinite series of years. But by the Statute of Limitations of 32 Henry 8, c. 2, it was enacted, that no person shall make any prescription by the seisin or possession of his ancestor or predecessor, unless such seisin or possession hath been within three-score years next before such prescription made: 2 Blackstone Com. 264. By the statute 21 James 1, c. 16, the period within which an action must be brought to recover possession of real estate was reduced to twenty years.

There can be but one actual seisin of an estate. Two persons cannot be actually seised of the same land at the same time, claiming it by title *adverse* to each other: 3 Wash. Real Property 125. At common law seisin was the completion of the feudal investiture, by which the tenant was admitted into the feud, and performed the rites of homage and fealty: Stearns's Real Actions 2. Seisin in deed is said to be actual possession of the freehold, and seisin in law is a legal right to such possession. A constructive seisin in deed is said to be equivalent to an actual seisin: *Green v. Liler*, 8 Cranch 244.

Where two persons are in possession at the same time, under different claims of right, he has the seisin in whom is the true title: 3 Wash. R. P. 128, and cases cited. To constitute an actual disseisin there must not only be an unlawful entry upon lands, but it must be made with the intention to dispossess the owner: 4 Kent Com. 488; *Smith v. Bartes*, 6 Johns. 218; *Bradstreet v. Huntington*, 5 Peters 439; *Ewing v. Barnett*, 11 Id. 41. The *quo animo* in which the possession was taken, is a test of its adverse character, and possession to be adverse must be intended to be in hostility to the true owner; but the question of intention ordinarily, is one of fact, to be submitted to the jury: *Magee v. Magee*, 37 Miss. 149. In the case of *Yetzer v. Thoman*, 17 Ohio St. 133, it was held that under the Statute of Limitations of Ohio, if a party, established in himself, or in connection with those under whom he claims, an actual, notorious, continuous and exclusive possession of land for a period of twenty-one years, he thereby, except as to persons under disabilities, acquires a title to the land, irrespective of any questions of *motive* or *mistake*. Where a party claims by disseisin, which has ripened into a valid title by lapse of time, he must show an *actual, open, exclusive* adverse possession for the length of time required by the statute: *Hawk v. Senseman*, 6 S. & R. 21; *Cal-*

houn v. Cook, 9 Penna. St. 226; *Melvin v. Prop'rs of Locks et al.*, 5 Me. 15; *Cahill v. Palmer*, 45 N. Y. 484; *Robinson v. Luke*, 14 Iowa 424; *Booth v. Small*, 23 Id. 177; *Horbach v. Miller*, 4 Neb. 47. Actual residence upon or enclosure of the land is not necessarily requisite to constitute such possession; acts of notoriety, such as entering upon the land and making improvements thereon, raising crops, felling trees growing on the land, and taxation of the land for a series of years to the person claiming it, and the payment of taxes by him, are competent evidence tending to show adverse possession: *Ellicott v. Deal*, 10 Pet. 412; *Ewing v. Barnett*, 11 Id. 41; *Allen v. Gilmore*, 13 Me. 178; *Little v. Libbey*, 2 Greenleaf 242; *Miller v. Shaw*, 7 S. & R. 136; *Farrer v. Fessenden*, 39 N. H. 277; *Horbach v. Miller*, 4 Neb. 47. The extent of the possession must be determined by the character of the entry. If a party enters under *color of title* by deed or other written instrument and occupies and improves a portion of the land, he acquires actual possession of all the land embraced in his deed or instrument in writing, and this too although the title conveyed by the deed or other written instrument may have no validity: *Prescott v. Nevers*, 4 Mason 330; *Jackson v. Porter*, Paine 457; *Bynum v. Thompson*, 3 Ired. 578; *Webb v. Sturtevant*, 1 Scam. 187; *Kyle v. Tubbs*, 23 Cal. 431; *Welborn v. Anderson*, 37 Miss. 155. The Supreme Court of Alabama say: the whole doctrine of adverse possession rests upon the presumed acquiescence of the owner. Acquiescence cannot be presumed unless the owner has or may be presumed to have notice of the possession: *Benje v. Creagh*, 21 Ala. 151; *Brown v. Cockerell*, 33 Id. 47. But actual notice to the owner of the land is not necessary; notice will be presumed from actual occupation of the land.

Merely taking a deed to land is not sufficient to constitute an adverse possession; it must be followed by an actual entry, and it is only from the time of such entry that the Statute of Limitations begins to run: *Robinson v. Luke*, 14 Iowa 424. If a person is in possession under color of title, and occupying a portion of the premises, it has been held that another person cannot acquire constructive possession by occupying a portion, with color of title to the whole; his possession will be restricted to the part which he actually occupies: *Jackson v. Vermilyea*, 6 Cowen 677. It is held that where possession is claimed of lands held under a color of title, by cultivation of a part, such constructive possession cannot be ex-

tended beyond a single lot of land, or single farm: *Jackson v. Woodruff*, 1 Cowen 286. The rule would be different, however, in case of actual occupancy of a portion of each lot or farm described in the deed. As to what constitutes color of title, the authorities seem to hold that if the title under which the party claims, and under which he entered, shows the character and extent of his claim, it is sufficient to constitute adverse possession: *Bell v. Longworth*, 6 Ind. 273; *Doe v. Hearich*, 14 Id. 243; *Jackson v. Todd*, 2 Caines 183; *Jackson v. Sharp*, 9 Johns. 162; 12 Id. 365; 16 Id. 293; 18 Id. 40, 365.

But it is not enough that a claimant enters under a void deed regularly recorded, and causes a survey to be made of the lands according to the deed, and pays the taxes on the lands for a number of years, they being wild and uncultivated: *Little v. Megquia*, 2 Me. 176; *Bates v. Norcross*, 14 Pick. 224. Where a party enters upon land without color of title, his right can never extend beyond the limits actually occupied by him; *Barr v. Gatz*, 4 Wheat. 213. To constitute such adverse possession as will bar the right of the owner of the estate, it is essential that the possession should be continued for the period prescribed by the statutes. If the continuity of possession is broken before the expiration of the time fixed by the statute, an entry within the time will render the prior possession unavailing: *Pederick v. Searle*, 2 S. & R. 240; *Wickliffe v. Ensor*, 9 B. Mon. 253; *Holdfast v. Shepard*, 6 Ired. 361; *Taylor v. Burnsidess*, 1 Gratt. 165; *Doe v. Eslava*, 11 Ala. 102. But when one enters upon land claiming title to the same, and continues to reside thereon, he may convey his interest by deed, and if the possession of such person and those claiming under him added together amounts to the time fixed by the Statute of Limitations, such possession is a bar to a recovery: *Overfield v. Christie*, 7 S. & R. 177; *McCoy v. Dickenson College*, 5 Id. 254; *Fanning v. Wilcox*, 3 Day 269; *McNeeley v. Langan*, 22 Ohio St. 37. No possession can be held to be adverse to one who has no right of entry during its continuance; therefore the Statute of Limitations does not run against a reversioner till the death of the tenant for life, even if the latter has conveyed the estate in fee: *Gernet v. Lynn*, 31 Penn. St. 94; *Melvin v. Locks et al.*, 16 Pick. 137; s. c. 17 Id. 255; *Raymond v. Holder*, 2 Cush. 269. And the reversioner may enter at any time within the period prescribed by the statute after the termination of the particular estate,

notwithstanding there may have been a disseisin of the tenant and an adverse possession for more than the statutory period, because the title of the reversioner did not accrue until the determination of the estate of the tenant. The reason is plain, the doctrine of adverse possession being predicated on presumed acquiescence of the owner of the land, and the owner having parted with the possession to the tenant, was not in a position to enforce his rights. But in cases of rights of way and of common, it has been held that when the tenant suffers a direct and palpable injury to his own possession, that if the landlord had actual knowledge of the injury and submits, he will be bound: *Daniel v. Nott*, 11 East 371. And it has been held that when a disputed boundary line has been adjusted by the agreement of the tenant for life, that such agreement is presumptive evidence to bind the remainder-man: *Saunders v. Annesley*, 2 Sch. & Lef. 101.

The authorities uniformly hold that a tenant cannot set up his possession as adverse to his landlord so long as the relation of landlord and tenant continues to exist. But he may show that his landlord's title has terminated, after which he may disclaim the tenancy and make his possession adverse: *Nellis v. Lathrop*, 22 Wend. 121; *Mattis v. Robinson*, 1 Neb. 5. If the tenant purchases a better title than that of his landlord, he must surrender possession to his lessor before he can avail himself of his new title: *Mattis v. Robinson, supra*. As between trustee and *cestui que trust*, so long as the trust is a continuing one, and is acknowledged and acted on by the parties, the statute does not begin to run; but when it is disavowed by the party in possession, whether it be the trustee or *cestui que trust*, and he distinctly with the knowledge of the other, disclaims to acknowledge the trust and to hold under it, then the possession from that time becomes adverse: *Newmarket v. Smart*, 4 Am. Law Reg. 400, and cases cited. But until the trust is disavowed, it continues to subsist, and mere lapse of time, however great, is no bar: *Paschall v. Hinderer*, 28 Ohio St. 568. Questions have arisen where the Statute of Limitations has been changed from twenty-one to ten years during the time a party was holding adversely, as to the limitation applicable to the case. It being competent for the legislature to change statutes prescribing limitations to actions, the one in force at the time suit is brought is the one applicable to the cause of action: *Bigelow v. Beman*, 2 Allen 497; *Horbach v. Miller*, 4 Neb. 457. The legislature cannot