A PROBLEM IN "TACKING"

EDWARD H. WARREN

The particular problem stated in the following paragraph was selected as a frame within which to put a picture of the fundamental questions in the law of adverse possession. The solution requires: (1) the consideration of the proper construction of the usual Statute of Limitations relating to land, and the effect of that construction upon all problems in tacking; (2) an examination of the extent to which the statute, although by its terms it only bars remedies, nevertheless operates as a statute for the acquisition of titles to land; and (3) a clarification of the differences between the medieval doctrine of disseisin and the modern doctrine of adverse possession. "Disseisor" and "adverse possessor" are often used as though they were interchangeable terms, but they should not be so used. "Adverse possessor" is a much more comprehensive term than is "disseisor", as is explained below, and this is vital in problems of tacking. The use of the two terms as though they were interchangeable is the product of confusion, and a prolific breeder of confusion. The law of tacking will, it is submitted, never be placed upon a sound basis until there is an end to such confusion.

In 1915 A was the owner of Blackacre but in that year, no one being in actual possession, B took possession and continued in open possession, claiming to be the owner, until 1930 when he died. B
had gone through a ceremony of marriage with X, but she was already married. B and X had a son C. B believed that C would be his heir and for that reason made no will. On the death of B, D, his brother, was his heir. C had been residing on Blackacre with B and has continued in open possession at all times since B’s death. In 1932, in the course of some litigation begun by X, D became convinced that X was not the widow of B, and, realizing that he was B’s heir, delivered to C a deed transferring and releasing to him all his rights in Blackacre. C, from B’s death to D’s deed, claimed to be the owner of Blackacre as the heir of B, believing that he was his heir. After the delivery of D’s deed, he claimed as the grantee of D. At all times he has claimed as the successor, immediate or mediate, of B. In 1939 A brought ejectment against C to recover the possession of Blackacre. He has not been under any disability. He contends that C cannot tack his adverse possession to that of B because from B’s death to D’s deed, C had no privity of estate with B. Should A win?

By statute it was provided: “No person shall commence an action for the recovery of lands, nor make an entry thereon, unless within twenty years after the right to bring such action or to make such entry first accrued, or within twenty years after he, or those from, by, or under whom he claims have been seised or possessed of the premises” (with an exception applicable to persons under a disability).

The first question to consider is whether, if B’s marriage had been valid and C had been his heir, A could have maintained ejectment against C within twenty years from the time C entered or only within twenty years from the time B entered.

The statute is in two parts. The first part speaks of twenty years after the right to bring an action for the recovery of land or to make an entry thereon first accrued. The second part speaks of twenty years after the time when the plaintiff (or those under whom he claims) have been possessed. If B had not died and had continued in possession for another five years, A would have been barred at the same time, whether we follow the first part or the second part. Both parts lead to the same result.

It is submitted that the legislature probably thought of these two parts as alternative methods of expressing its will. And no discord between the two parts will arise if A, within the twenty years after he has been ousted by B, cannot acquire a new right to bring an action for the recovery of that land or to make an entry thereon which will cause a new statutory period to begin to run, unless within such twenty years A shall be restored to the possession and thereafter
ousted a second time. The statute is therefore to be construed as showing the legislative intent to be that once \(A\) has been ousted and therefore the statutory period had begun to run against him, he cannot acquire a new right to bring an action for the recovery of the land or to make an entry thereon which will cause a new statutory period to begin to run, unless he shall be restored to the possession, and thereafter ousted a second time.

It is conceded, and urged, that all good thinking upon problems in tacking must be built upon the foundation of a sound construction of the statute. When \(B\) ousts \(A\), \(A\) has a right to recover the land, this right being exercisable against \(B\) by action or entry. When \(B\) ceases to be in possession and \(C\) comes forthwith into the possession, \(A\)'s right to recover the land is now exercisable against \(C\) by action or entry. There is a new possessor and this lays some basis for a contention that there is a new right to bring an action, which will start the running of a new statutory period. But the vital question is whether the legislature intended this, and if one will carefully consider the statute, uninfluenced by any desire except the desire to ascertain what was probably the intent of the legislature, and will give due heed to the second part of the statute as well as the first, it would seem to become quite plain that the legislature did not intend that there should be a second period of twenty years, except where there was a second loss of possession by \(A\). Such a construction has been repeatedly acted upon by the courts. In a particular problem, courts may reach different results, but they all start from this construction. In the particular problem which we are now considering, to wit,—where \(C\) is the heir of \(B\), they all not only start from this construction but they all also reach the same result. \(A\) has only twenty years from \(B\)'s entry.

It is important to note that ouster, although a robust-sounding word, does not necessarily connote the use of force. Whenever \(A\) has the actual, or constructive, possession of land and \(B\) takes possession without \(A\)'s consent, \(B\) ousts \(A\).

The second question to consider is whether, when \(B\) ousts \(A\) and later \(C\) ousts \(B\), \(A\) has twenty years from the time of \(C\)'s entry to bring an action of ejectment against \(C\).\(^1\) Here \(C\) has not come in under \(B\) but against him. There have been two ousters,—the first of \(A\) by \(B\), the second of \(B\) by \(C\). \(C\) has hauled down \(B\)'s flag and run up his own flag. There is no privity of estate between \(B\) and \(C\). Moreover—and this is the more fundamental difficulty—there is no privity of

---

\(^1\) For the sake of simplicity, this article will speak of the right to bring an action of ejectment, instead of speaking of the right (a) to bring an action of ejectment or some other action for the recovery of land, or (b) to make an entry thereon.
claim between C and B. Most (not all) courts hold that in such case A may recover the possession from C at any time within twenty years from C's entry.

It is A's land. In 1915, B ousts A. In 1930, C ousts B. In 1939, A brings ejectment against C, and, although he has in fact been out of possession for more than twenty years, A wins. How can a court properly permit this? The courts which permit it use a fiction. The fiction is that when C ousted B he also ousted A. The act by which C ousted B is divided into three parts. At the beginning of the act, the human eye sees B in possession; at the end of the act, the human eye sees C in possession; in the middle of the act, the legal eye sees A in possession.

There has, in legal contemplation, been a momentary revival of A's possession. Now where the actual possession of land is vacant, ownership draws to it a constructive possession. Thus, if B possessed A's land for ten years, and then abandoned it, and after an interval C took possession, A would have been in constructive possession during the interval and, consequently, C's entry would be a new ouster, and A would have a new period of twenty years within which to recover the possession. The fiction of a momentary revival of possession in A when C ousted B produces precisely the same result as is produced when B abandons the land and after an interval C takes possession.

In the first case put above 2 A has only twenty years from B's entry; in this second case, A has twenty years from C's entry. A is not in fact ousted in the second case any more than he was ousted in the first case. C's relation to A in the second case is in no way different from C's relation to A in the first case. True, the relations between B and C differ. But B in no wise represents A,—he is holding adversely to A. Why, then, should the relations between B and C affect A?

It is a highly artificial fiction. What is the end which caused courts to use such a means?

To lay an adequate basis for an answer to this question we divert to inquire what is today, under the doctrine of adverse possession, the connection of such a statute as quoted above 3 with the acquisition of titles to land.

Such a statute should be contrasted with a statute which provides, say, that where a person has been in possession of land for a defined period, claiming the fee in good faith and under color of title and paying taxes, he shall at the end of the period become the owner (sav-

2. See p. 897 supra.
3. See p. 897 supra.
ing the right of any person who has during the period brought an action to recover the land to prosecute such action). This is a statute for the acquisition of titles to land. If the possessor becomes owner, he does so because the statute so provides.

But in the statute quoted above, the legislature does not provide that the possessor for twenty years shall become the owner. And there are many situations in each of which, according to the law in all, or some, of the states the possessor for twenty years does not become owner. Eight such situations may be stated:

1. At the time $B$ entered, $A$, the owner, was under a disability. More than twenty years may be necessary to bar him (or his successors).

2. At the time $B$ entered, $A$ had an estate for life or years, and $X$ had the reversion or remainder in fee. It is the law in most states that the statutory period does not begin to run against $X$ until the termination of $A$'s estate.

3. $B$ has an estate for life or years, and $A$ has the reversion or remainder in fee. $B$ openly claims the fee. In many states the statutory period does not begin to run until the time when $B$'s estate would have terminated if he had made no such claim.

4. $A$ enters upon government land. $B$ ousts $A$. After twenty years, $B$ may have a defense against $A$, but he does not become the owner of the land.

5. In a few states, if $A$ has registered his title under a so-called Torrens Act, $B$, a possessor for twenty years, does not become the owner.

6. $B$ has been in possession for twenty years pursuant to some right less than the fee, and he has not claimed any greater right than he had. He does not become owner because his possession was not "adverse".

7. $B$ has been in possession for twenty years without any right, but he has not claimed the fee, or to be precise, "the ownership" in states where land is allodial. He does not become owner because his possession was not "adverse".

8. $B$'s possession for twenty years was not "open".

In the first case, the statute in express terms makes special provision for a person under a disability. The statute applies, but the statutory period may be more than twenty years. In the second and third cases, the statute applies, but the statutory period may not begin to run until a time later than the time of $B$'s wrong. But in the last five cases the statute does not apply. In the fourth and fifth cases it does not apply against a privileged owner. In the last three cases it does
not apply for the possessor since his possession lacks some quality which the court thinks it must have in order to make the statute apply.

Assume a simple case outside these eight situations. \( A \) is not under a disability and he has a present estate in fee. He is not a privileged owner. \( B \)'s possession is "adverse" and "open". Then the statute applies, and the statutory period begins to run at once. At the end of twenty years \( A \) by force of the statute has lost his right to recover the land either by action or by entry. \( B \) is in possession and there is no one who has a right to disturb that possession either at present or in the future. He has an indefinitely undisturbable possession.\(^4\)

Now, it is the common law that he who has an indefinitely undisturbable possession of land or a chattel is the owner of that land or chattel. Strictly speaking, the only effect of the statute is to change \( B \)'s disturbable possession into an indefinitely undisturbable possession. \( B \) becomes the owner, not by any provision in the statute, but by the common law that he who has an indefinitely undisturbable possession is owner. The common law admits \( B \) into ownership, but it is the statute which qualifies \( B \) for admission. In this very important way, the statute contributes to the acquisition of titles to land.

With this basis laid for an answer, the next question arises: why, in the case where \( B \) ousts \( A \) and later \( C \) ousts \( B \), did courts use the fiction of a momentary revival of \( A \)'s possession? What is the end which caused courts to use such a means?

Pondering over the seventh of the eight situations stated above supplies the answer. \( B \)'s possession for twenty years was tortious, but \( B \) did not claim the fee. He does not become the owner because his possession was not "adverse". The sixth situation where \( B \)'s possession was under a limited right and this seventh situation are commonly lumped together. But there is an obvious distinction. In the sixth situation, \( A \) had no cause of action against \( B \) and, of course, the statute was not applicable. In the seventh situation, however, upon \( B \)'s entry, \( A \) at once had a cause of action against him, and, according to the words of the statute, \( B \) has a defense after twenty years.

Why does not the statute apply? The statute quoted above was modeled on the statute 21 Jac. I, C. 16, passed in 1623. At that time the common-law doctrine of disseisin was in full vigor. Under that doctrine, if \( A \) had the fee of Blackacre and \( B \) took possession without \( A \)'s consent claiming the fee, \( B \) was a disseisor and forthwith acquired

\(^4\) Compare the possession of a tenant which for the present is undisturbable, but which the landlord may lawfully disturb at some future time.
A PROBLEM IN “TACKING” 903

an estate in fee in Blackacre. A, the disseisee, lost his estate in fee and had only “a right of entry” enforceable by action (court-help) or entry (self-help). If he so enforced it, B’s fee was defeated, and A was revested with an estate in fee. Upon the disseisin, therefore, B had an estate, a defeasible fee, and A had no estate, but only a right to defeat B’s estate.

Courts and legislatures were at that time favorable to disseisors to an extent which it is difficult to understand today. For example: the law denounced as champertous the idea of an assignment by A of his “right of entry” to C, a third person, and A had no legal capacity to make an assignment to C. But the law allowed a release by A of his “right of entry” to B. If A did not want to undertake the burden of litigation with B, he had no market for his “right of entry” except with B. Thus, the law helped B towards acquiring A’s right at a low price.

In this atmosphere, the Statute of Limitations relating to land was interpreted as though it had been passed for the protection of disseisors. By lapse of time A’s right to defeat B’s estate by action or entry was to be lost, and thus B’s defeasible fee was to be changed into an indefeasible fee. B’s estate was to be quieted. The point is that the courts interpreted the statute as being exclusively for the benefit of disseisors. Tortious possessors were classified. Only those tortious possessors who had risen to the eminence of disseisors were entitled to invoke the protection of the statute.

A modern court may feel reluctant to continue the doctrine of disseisin, and may adopt the milder doctrine of adverse possession,—that B is not a disseisor but an adverse possessor, and that he acquires, forthwith upon his entry, not a defeasible fee but only an inchoate right which may ripen into title.

It is desirable to pause to consider the similarities and dissimilarities of the two doctrines. Where B has ousted A, both doctrines are applicable and they usually, but not always, produce the same result. If the statutory period has run, under the disseisin doctrine B’s defeasible estate becomes indefeasible. Under the adverse possession doctrine, B’s disturbable possession becomes an indefinitely undisturbable possession. In either case, B gets a good title. It is only with respect to acts which occur during the running of the statutory period that there may be a difference in result. Two examples may be given:

1. B took possession of A’s land, claiming to be the owner. A granted to C, and C recorded the deed. A later granted to B, who took the deed with knowledge that a deed had previously been given to C. In an action of ejectment against B, brought in the name of
A for C's benefit, B successfully defended. The court did not speak of disseisin and, indeed, it spoke of A as having "title". But if A was the owner, his second deed to B could not prevail over his first deed to C. The result is, it is submitted, understandable only if B is regarded as a disseisor, a person who has by his entry and claim acquired a defeasible fee. Then A would have only a right of entry, and a disseisee's right of entry was not assignable to a third person, but was releasable to the disseisor.5

2. A Statute of Frauds may require a writing in the case of a transfer of "estates or interests" in land. If B is a disseisor, he has an estate—a defeasible estate but still an estate. He should not be permitted to blow hot and cold and say he has no estate. Possibly the inchoate right of an adverse possessor comes within the scope of the word "interests", but this word was probably used to cover future interests which are not technically estates, and it is unlikely that the legislature intended to cover present possessory rights which certainly can be created without a writing and are commonly called "inchoate rights". Therefore, on a sound construction, the statute applies to the transfer by a disseisor of his defeasible estate but does not apply to the transfer by an adverse possessor of his inchoate right. Such inchoate right may be transferred by a transfer of the possession.

But the great difference between the two doctrines is in their scope. There is no disseisin without an ouster. Littleton said: "And note that disseisin is properly where a man entereth into any lands or tenements where his entry is not lawful, and ousteth him that hath the freehold"; 6 and Coke said: "Disseisina is a putting out of a man out of seisin, and ever implyeth a wrong." 7 But ouster is not a requisite to adverse possession. Adverse possession is a much broader term than disseisin. It covers every case where the possessor is claiming the fee but does not have the fee. Within the wider circle of the adverse possessors, there is an inner circle of the disseisors,—the ousterors; a modern court may treat a person within the inner circle as a disseisor or an adverse possessor as it deems proper. Take cases where A tries to convey his land to B, but the conveyance does not comply with all statutory requirements. The statute will require a writing; it will probably require a seal; it may require an acknowledgment, or one witness, or two witnesses, or the affixing of a government stamp. In such cases, as a matter of strict law, the land is still A's land, and he has a right to recover it from B, although in some cases there would be an equitable defense. But the statutory period will be

6. TENURES § 279.
7. Co. LITT. *153b.
running whether there is an equitable defense or not. Time will cure the defect. \( B \) is not a disseisor, but he is an adverse possessor, and such cases form an important part of the cases where the law of adverse possession is applicable. Another example. \( B \) ousts \( A \), and \( C \), \( B \)'s heir, succeeds \( B \) in the possession. \( B \) is in the inner circle,—he may be treated as a disseisor or an adverse possessor as the court may deem proper. But \( C \) is not within the inner circle. He is a second adverse possessor, but he is not a second disseisor of \( A \), for there has been no second ouster of \( A \). This difference is vital in the law of tacking.\(^8\)

But there is one requirement common to disseisin and adverse possession. There must be a claim in fee by the possessor. The statute was construed to apply only in favor of disseisors, and similarly it has been construed to apply only in favor of adverse possessors. Such a restrictive construction of the statute, restricting its scope as defined by the words of the statute, is a heritage from the days of disseisin.

This restrictive construction of the statute has been accepted by all our courts and has been acquiesced in by all our legislatures. Moreover, there is a very sensible reason for continuing it today. We have seen above that the Statute of Limitations makes a very important contribution to the acquisition of titles to land. Indirectly, it operates as a statute for the acquisition of titles. Now, the law does not usually give rights to persons regardless of their will to have such rights, and to give title through the operation of the statute to a person who never claimed the title would be anomalous.

But it should be pointed out that this restrictive construction of the statute burdens the courts with the examination of stale claims. No lapse of time will ripen into title a possession uncoupled with a claim in fee. \( A \) may have been out of possession for forty years (or for a hundred and forty years) and it may still be possible for him or his successors to win in ejectment on the ground that there has not been a claim in fee made throughout any twenty years. What is a claim in fee is a question for the jury (or other trier of the fact). Evidence of things said may be admissible. Evidence of the discharge of the duties of ownership, as by the payment of taxes, is admissible, and the jury may be entitled to infer a claim in fee from the exercise of such rights, even where there has been no payment of taxes. But there may be the exercise of some, and indeed many, rights of ownership, and yet a verdict that there was no claim in fee may be sustain-

---

\(^8\) See Sawyer v. Kendall, 10 Cush. 241 (Mass. 1852). For a discussion of this case, see p. 907 infra.
able. It is frequently a difficult question to answer, and the farther into the past that the jury is called upon to go, the more difficult it becomes.

It is seen, then, that the older courts so construed the statute that only those tortious possessors who had risen to the eminence of dis-seisors were entitled to invoke the protection of the statute. This was the beginning of the idea that $B$, the man in possession, must not rely on $A$'s sloth. He must show that he, $B$, is a person qualified to invoke the protection of the statute.

This produces a second requirement, relating to the claim in fee. There must be a claim in fee. The statute has a twenty years period. It has seemed natural to many courts to conclude from these two facts that the possessor must show that the claim in fee which he is asserting has been asserted for twenty years. The particular claim he is asserting must have been ripening for twenty years before it is fit for confirmation through the operation of the statute. Therefore, when $B$ ousts $A$ and later $C$ ousts $B$, these courts do not allow the possessor to invoke the protection of the statute until $C$'s claim has been asserted for twenty years.

This gives $A$ the right to sue $C$ more than twenty years after he was ousted by $B$. The statute, according to the construction stated above,\(^9\) prohibits this. $A$, once ousted, cannot acquire a new right to bring an action for the recovery of the land which will cause a new statutory period to begin to run unless he shall be restored to the possession, and thereafter shall be ousted a second time. The courts met this difficulty by restoring $A$ to the possession by the fiction of a momentary revival of his possession.

If $B$ ousts $A$ and is in possession for fifteen years and then $C$ ousts $B$, most courts allow $A$ to eject $C$ at any time within thirty-five years of $B$'s entry. This doctrine makes, in substance, a second restriction of the scope of the statute as defined by the language used by the legislature, and claims which are in fact stale have to be investigated.

A proper foundation has now been laid for discussion of the case put at the opening. $B$ had a son, $C$, by $X$ whom he believed to be, but who was not, his wife. He refrained from making a will because he believed that $C$ would be his heir. He was in possession from 1915 to 1930 when he died, and $C$ continued in possession claiming as $B$'s heir and believing that he was $B$'s heir, and has at all times since been in possession, claiming under $B$. In 1932, $D$, $B$'s brother and

---

\(^9\) See p. 897 supra.
heir, released to C all his interest in the land. There was a privity of claim at all times between C and B, but from 1930 to 1932 there was no privity of estate. Does this lack of privity of estate under such circumstances give A a right to eject C, although the action is not brought until twenty-four years after B entered?

In *Sawyer v. Kendall*, A and B had in a partition proceeding been awarded adjoining parcels of land, Blackacre to A and Greenacre to B. B was married, and her husband occupied Greenacre in the right of his wife for twelve years, and in connection with this occupation, he also occupied Blackacre during the same period. Upon his death, his wife continued the occupation of both Greenacre and Blackacre for eighteen years more. The court refused to disturb a verdict for the successor of A, although the action was brought thirty years after the person under whom the plaintiff claimed had been in possession. It said that the husband “occupied it during his life, not by right of his wife, but by virtue of his own act of disseisin. His wife could commit no act of disseisin, till her coverture ceased by his death.”

It further said that there was no privity of estate between the husband and the wife, and that this was fatal to tacking. To the argument that the right of the wife to dower, in land of which her husband had died seised, would create sufficient privity of estate, the court answered that the right of dower confers no title to any part of the husband’s land after his death until assignment is made. “It is a mere right, which does not ripen into a title until some specific portion is set out and assigned as dower. If, therefore, such assignment would create a privity of estate with the husband, in the land so assigned, it is very clear that none exists before assignment made. In the present case, it is not pretended that the demanded premises have ever been assigned as dower to the tenant.”

It will be noted that the court was not called upon to decide whether, if a widow asks for an assignment of dower, and such is made, such assignment when made does or does not have a retroactive effect, relating back to the death of the husband. The difficulty here was more fundamental than a lack of privity of estate. There was no privity of claim. When her husband died, B no doubt thought she came back into her own. She had thought of her husband as having a right under her, and it probably never occurred to her that, when he died, she had a right under him. She never applied for an assignment of dower; she was claiming in her own right. Her claim was independent, not derivative.

10. 10 Cush. 241 (Mass. 1852).
11. Id. at 245.
12. Id. at 246.
Today, this decision would have little or no practical importance. Under like circumstances, the occupation of a husband would, ordinarily at least, be as agent of his wife and would enure to her benefit. But in the course of the opinion, the court said:

"The general rules of law respecting successive disseisins, are well settled. To make a disseisin effectual to give title under it to a second disseisor, it must appear that the latter holds the estate under the first disseisor, so that the disseisin of one may be connected with that of the other. Separate successive disseisins do not aid one another, where several persons successively enter on land as disseisors, without any conveyance from one to another, or any privity of estate between them, other than that derived from the mere possession of the estate; their several consecutive possessions cannot be tacked, so as to make a continuity of disseisin, of sufficient length of time to bar the true owners of their right of entry. To sustain separate successive disseisins as constituting a continuous possession, and conferring a title upon the last disseisor, there must have been a privity of estate between the several successive disseisors. To create such privity, there must have existed, as between the different disseisors, in regard to the estate of which a title by disseisin is claimed, some such relation as that of ancestor and heir, grantor and grantee, or devisor and devisee. In such cases, the title acquired by disseisin passes by descent, deed, or devise. But if there is no such privity, upon the determination of the possession of each disseisor, the seisin of the true owner revives and is revested, and a new distinct disseisin is made by each successive disseisor."

This exposition of the law has had considerable influence. But it is submitted, with great respect to the court, that it is not satisfactory. It seems to be based upon an unfortunate use of the term "second disseisor". According to this exposition, in all cases where C succeeds B in the possession, and there is a claim in fee, C is a second disseisor. But it has already been seen that an unlawful taking of possession, an ouster, is essential to a disseisin, quoting the definitions of Littleton and Coke. When C comes in making the same claim as B made, there is no new ouster of A. C is a second adverse possessor since any possessor is an adverse possessor who claims the fee but does not have the fee. But C is not a second disseisor of A, for there has been no second ouster of A.

Of those who come in continuing B's claim are really second disseisin, there is a second ouster, and that under the statute ought to disseisors, there never ought to be any tacking. The whole subject of

13. Id. at 245.
14. See p. 904 supra.
tacking ought to disappear from our law. For if there is a second start the running of a new period. The truth is that there is, in all the cases about tacking, no instance where there is a second disseisin, except where $B$ ousts $A$ and later $C$ ousts $B$. In such case, $C$ is a disseisor of $B$, but even there he cannot be made into a second disseisor of $A$ (the only relevant point) except by the use of the highly artificial fiction of a momentary revival of $A$'s possession. Where $C$ comes in continuing $B$'s claim, $C$ disseises nobody—not even $B$.

Now the court in Sawyer v. Kendall called even the heir of $B$ a second disseisor. This is remarkable, in view of the reverence that that court had for the Littleton and Coke tradition. It is submitted that it will tend to clearness of thought if a court does not use the term disseisin, unless it is prepared to use it in the clear-cut meaning given to it by the definitions of Littleton and Coke.

The truth of the matter is that no $C$ who comes in continuing $B$'s claim is a second disseisor of $A$, whether there is a privity of estate between $B$ and $C$ or not. Is the court to respect the fact, or to ignore it? The court in Sawyer v. Kendall seems to us to have been acting upon the conception that, in favor of that kind of a $C$ who had privity of estate—an heir or devisee or grantee—it would indulgently ignore the fact—that it would, so to speak, use a blind legal eye; but that no such indulgence would be exercised in favor of that kind of a $C$ who had no privity of estate. Is not this approach wrong? $C$ can be made into a second disseisor of $A$ only by ignoring the fact—only by using a fiction that between $B$'s possession and $C$'s possession there was a momentary revival of $A$'s possession, that in a twinkle of the legal eye $A$ was restored to the possession and ousted again. The courts are not indulgent to an heir or devisee or grantee by ignoring a fact. They simply respect the fact. And it is not urged that the court should be indulgent toward a $C$ who comes in without privity of estate; it is urged only that the court should use a normal legal eye, should see things as they are in fact, and not evade the fact by a fiction, unless there is some end to be obtained which justifies the use of such a means. Is it justifiable in such a case as was stated at the opening of this Article.

The statute according to its terms bars stale claims by persons out of possession. After reading the statute, one would expect that if a person out of possession attempted to assert a claim which he (not being under any disability) had failed to assert during twenty years, he was sure to lose. But no. Under doctrines restricting the scope of the statute he may win. The courts will inquire of the possessor by what warrant he invokes the protection of the statute. The possessor must meet certain requirements.
A claim in fee is the first requirement. The same claim in fee throughout the twenty years is the second requirement. Is there a third requirement relating to the claim to the effect that even where the same claim has been made there must be a privity of estate between successive possessors?

The natural construction of the statute is to protect persons in possession against slothful persons out of possession. That certainly was the legislature's general idea. The courts already have gone a long way from that idea. There ought to be some limit to doctrines, whether of construction or fiction, which favor, not the persons in possession, but slothful persons out of possession.

Every doctrine by force of which the court refuses the protection of the statute to a possessor unless he satisfies certain requirements not found in the statute but laid down by the court causes the statute to shrink. And every time that the statute shrinks, stale claims emerge. It is submitted that one of the purposes which the legislature probably had in mind in passing the statute was to relieve the courts from the necessity of passing upon stale claims. It is desirable to keep down the bulk of litigation, and it is very desirable that juries, and other triers of the fact, should not be required to delve far into the past. This consideration, as an aid in determining what result in a given case would probably be consistent with the will of the legislature, has not been given the weight to which it is entitled. There ought to be some limit to doctrines (whether of construction or fiction) which cause the statute to shrink and stale claims to emerge.

What justification has a court for requiring privity of estate between successive possessors? It has no mandate for this under the statute. On the contrary, it produces a result contrary to the result to which the words of the statute lead. Its justification must be that it is reaching a sensible result and one with which the legislature would probably have been content.

But it is submitted that the result is not sensible. A has, in fact, been out of the possession for over twenty years. He has in fact been slothful. C, if called upon to state by what warrant he invokes the protection of the statute, has a strong case. A claim in fee has been made throughout the twenty years. The same claim in fee has been consistently made throughout the twenty years. His taking possession was according to the intent of B. He was not an officious intruder; he believed in good faith that he was B's heir.

Why should the slothful A be allowed to take advantage of the mistake? What has A to say in excuse for his sloth? Nothing. What has C to say to justify him in invoking the protection of the
A great deal that merits consideration. And if the court abides by the language of the statute, what happens? A loses.

There is no danger of hurting D, the heir of B. Suppose he had chosen not to release to C, but to assert his superior right. To allow C to tack his possession (from B's death to D's deed) to B's possession will, in such event, help D, for C will have been serving as a stopgap. If C's possession cannot be tacked, D could gain no title until twenty years after he, D, entered.

A rule that privity of estate is required may perhaps work well as a general rule for the sake of blocking officious intruders, but it is submitted that there is no sufficient justification for requiring it in all cases.

It is not desired to minimize the fact that Sawyer v. Kendall has had considerable influence, and that courts have laid down a requirement of privity of estate as a general rule. But this article is an attempt to persuade the reader that, if he will climb a mental height so as to get a view of the whole subject, he will see that there are some circumstances where a possessor who can show a privity of claim, although not a privity of estate, is warranted in invoking the protection of the statute.

There are two cases important to note.

In Atwell v. Shook, B had been in adverse possession of Blackacre, A's land, for fifteen years, when he died. He apparently died intestate (although this is not specifically stated). C, his widow, continued in possession and applied for a homestead in his land, and Blackacre was allotted to her as a part of her homestead. She continued in possession for twenty-one years, and then granted the premises to the defendant. The statutory period was twenty years and the defendant had been in possession less than twenty years. The plaintiff had succeeded to the rights of the heirs of B, and sought to recover the land from the defendant. The defendant sought to show a possessory title in himself. To do this, it was necessary for him to show that the possession of C, the widow, was adverse to the heirs (at least for a period before her deed to him long enough to complete the statutory period if such adverse possession by the widow and his own adverse possession were tacked). The court ruled against him on this.

But he had a second defense. He was in possession and his possession was good against anyone not having a superior right. The plaintiff could not rely upon any disturbance by the defendant of a prior possession of himself or of those under whom he claimed.

15. See p. 907 supra.
16. 133 N. C. 387, 45 S. E. 777 (1903).
Therefore, it was necessary for the plaintiff to show that the heirs of B had acquired a possessory title, and the court held that they had. Its reasoning involved two propositions. First, it held that the possession of the widow not only was not adverse to the heirs but, on the contrary, enured to their benefit. While a claim in fee by a possessor is necessary, a claim that the possessor, C, has a life estate, with reversion or remainder in fee to D is sufficient. It has been held that if B, the adverse possessor, devised to C for life, and D in fee, C's possession under the devise enures to the benefit of D.17 By similarity of reasoning, the possession of C claiming a life estate as the widow of B was by necessary implication a claim that the fee was in the heirs of B.

Now, the widow had been in possession for twenty-one years before her deed to the defendant (the statutory period was twenty years) and on this reasoning, the heirs would have acquired a possessory title. But she had assumed to be the owner by making her deed to the defendant. This would raise a problem like that in the third of the eight situations stated above.18 But there seems to have been no contention that she claimed the fee in the first five years, and the heirs of B would therefore clearly have gained a possessory title if her possession during those five years could be tacked to B's possession. And the court held that it could. This is the point of the case that is relevant to our problem.

The court assumed that "the allotment of the homestead was invalid and conferred no right upon the widow," but it said:

"Yet if she remained in possession under and by virtue thereof, she was not a new disseizor, but . . . such possession was a continuation of that of her husband and enured to the benefit of the heirs. . . . It is the taking and holding the possession under and by virtue of the original entry which constitutes the continuity and privity which the law requires."19

If a lower court had no statutory authority to allot a homestead to the widow except out of land owned by the husband, and the adverse possession doctrine is adopted, it had no authority to allot a homestead out of Blackacre; and the court said that the allotment was invalid, and conferred no right upon the widow. It may be urged (1) that the court was thinking in terms of disseisin rather than of adverse possession and, when it said the allotment was invalid, it only meant that it was defeasible by A; and (2) that it thought that

18. See p. 901 supra.
the allotment when made had a retroactive effect and related back to the death of \( B \). But this is a strained construction of the opinion. When the court said the allotment was invalid, it meant what it said, and it was permitting tacking because \( C \)'s claim, invalid though it was, was not an independent claim but a derivative claim. The court plainly thought that the lack of privity of estate was not fatal to tacking. It was enough that \( C \) had continued the possession and claimed that the land had belonged to \( B \) and, therefore, that she, as his widow, was entitled to the possession. She had kept \( B \)'s flag flying and had sought protection under that flag. The court was familiar with Sawyer v. Kendall, but it reached a result contrary to the result which it would have reached if it had believed the law to be as expounded in that case. A privity of claim, without a privity of estate, was enough.

The second authority is Lantry v. Wolff.\(^{20}\) \( B \) took possession of \( A \)'s land without \( A \)'s consent, claiming the fee, and was in possession from 1874 to 1879 when he died intestate. At the time of his death, \( C \), his stepdaughter, was residing with him on the land. On his deathbed \( B \) said to \( C \) that she should have what he had when he died, after his debts were paid. \( C \) said that she would pay the debts. \( C \) remained in possession until 1881 claiming to be the owner by virtue of this conversation. She then granted the premises to \( D \), and \( D \) and \( D \)'s grantees (immediate or mediate) continued in possession until more than ten years after 1874 (ten years was the statutory period). The defendant, relying upon a possessory title, had secured in the trial court a verdict and judgment, and the upper court affirmed this judgment. Whether \( C \) had paid \( B \)'s debts or not does not appear from the report.

The court ruled that tacking of \( C \)'s possession to \( B \)'s possession should be permitted. It said it was quite immaterial whether the statement by \( B \) to \( C \) amounted to a devise or gift of the land, that the important facts were that \( C \) believed that \( B \) had given her the land, that she took possession thereof by virtue of such statements and claimed title to the same against the world.

"In the case at bar the possession of \([C]\) to this land should be tacked to that of \([B]\), since she came in claiming under \([B]\), and her possession of the property was connected with, and was a continuation of, the possession of \([B]\)." \(^{21}\)

In this case, it is submitted that there was no privity of estate between \( C \) and \( B \). The stepdaughter could not have been the heir.

\(^{20}\) 49 Neb. 374, 68 N. W. 494 (1896).
She was not the devisee under a valid will. There was no valid transfer *inter vivos*. There was no gift *mortis causa*, as the subject matter was land. Possibly a court could be persuaded to hold that C's promise to pay B's debts was a consideration which, if fulfilled, gave C some standing in equity despite the lack of a writing; but this is very doubtful and it is certainly not the conception upon which the court proceeded. The court proceeded on the conception that under some circumstances a privity of claim, even where there is no privity of estate, is sufficient to warrant tacking.

21. *Id.* at 377, 68 N. W. at 496.