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RIGHTS OF AN ADVERSE POSSESSOR

BY W. E. BURBY*

In 1740 Willes, Lord Chief Justice, in rendering his decision in the case of *Lambert v. Stroother*¹ made the following observation: "Upon this head a great many cases were cited, on which my brother Draper said appeared to him at first to be so very intricate and inconsistent that he was a great while before he could find out the meaning of them, or reconcile them one with another, but that at last with great difficulty he had found out a distinction which reconciled them all. And I must own that I do not understand them yet, and am not able to reconcile them and, therefore I shall lay most of them aside, because I think I can determine this point with the assistance of but very of them." Without the ability of Serjt. Draper to reconcile all the cases, and without the assurance of the Lord Chief Justice of being able to determine this question with the assistance of very few of them, the writer undertakes this discussion of the rights of an adverse possessor.

For the purposes of this article an adverse possessor will be defined as one in the possession of real property claiming title thereto, the possession and claim of right being of such nature that if continued for the required length of time will be a bar to the assertion of title by the real owner. The scope of the article will be limited to a discussion of the rights of an adverse possessor as against third persons, strangers to the title.

The disseisor of history is the adverse possessor of today.² He was at one time regarded as the owner in fee and had all the rights pertaining to ownership.³ The dispossessed owner would seem to have lost all property rights until re-entry.⁴ This man of history does not lack

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¹ *Lambert v. Stroother*, Willes 219 at 221, 125 E. R. 1140 (1740).

² See *Property in Chattels*, 29 HARV. L. REV. at p. 378.

³ James Barr Ames, *The Disseisin of Chattels*, 8 HARV. L. REV. 23 (1889); AMES LECTURES ON LEGAL HISTORY, at p. 229; Jos. Bingham, *Legal Possession*, 13 MICH. L. REV. at p. 561 (1915).

⁴ *Liford's Case*, 11 Co. Rep. 516, 77 E. R. 1216 (1615); *Pacific Live Stock Co. v. Isaacs*, 52 Ore. 54, 96 Pac. 460 (1908).

for modern defenders who, it would seem, out of respect for his old age, still attribute to him the rights of ownership.⁵ The modern tendency, however, is to connect seisin with title and to give to the person disseised larger powers to assert his title.⁶ It is generally stated that the rights of the adverse possessor as against third persons have remained unchanged.⁷ What, then, are the rights of the adverse possessor against third persons?

The adverse possessor, like any other possessor of property, has certain rights against third persons which are based upon possession alone. It is believed that the recognition of these possessory rights gave birth to the confusing and inaccurate expression that one in the possession of property has title good against the whole world except the true owner.⁸ It may be that there was a time in legal history when the two words, seisin and possession, were equivalent.⁹ In early English property law, possession was always of controlling importance. Title, as distinguished from possession, was of little consequence. It is generally recognized to-day, however, that title is of prime importance, and that there is a fundamental distinction between possession, adverse possession, and title.¹⁰ It was determined as early as 1646 that a mere occupant of property could maintain trespass *quare clausum fregit* against a stranger to the title.¹¹ In the early cases the courts, while apparently satisfied with the rule of damages that in actions for injuries to real property the measure of damages should be determined by the extent of the plaintiff's interest, took the view that trespass *quare clausum fregit* was a personal action, and since the title was not necessarily involved, if the plaintiff was in possession and claimed title, his claim could not be disputed by the defendant unless he was claiming under a superior right. As stated by

⁵ See Legal Possession, *supra*; H. W. Ballantine, Title by Adverse Possession, 32 HARV. L. REV. 141 (1918).

⁶ HOLDSWORTH'S HISTORY OF ENGLISH LAW, Vol. 7, p. 31.

⁷ HOLDSWORTH, *supra*, p. 28, 46; 20 HARV. L. REV. 563; 23 LAW QUAR. REV. 130; 27 HARV. L. REV. 496.

⁸ See H. W. Ballantine, Title by Adverse Possession, 32 HARV. L. REV. at 144 (1918). "There is an important limitation on the rule that bare possession is title good against all the world except the true owner." It is difficult to see how there can be a "limitation" on a rule that does not exist.

⁹ F. W. Maitland, The Mystery of Seisin, 2 LAW QUAR. REV. 481 (1886).

¹⁰ See P. Bordwell, Disseisin and Adverse Possession, 33 YALE L. J. at 300 (1924).

¹¹ Johnson v. Barrett, Aley 10, 82 E. R. 887 (1646); Graham v. Peat, 1 East 244 (1801); See, Harper v. Charlesworth, 4 B. & C. 575 (1825); Cutts v. Spring, 15 Mass. 135 (1818); Oklahoma City v. Hill, 6 Okla. 114, 50 Pac. 242 (1897). As to sufficiency of possession see, Catteris v. Cowper, 4 Taunt. 547 (1812).

Willes, Lord Chief Justice, in *Lambert v. Stroother*,¹² "Whereas trespass is a possessory action, founded merely on the possession, and it is not at all necessary that the right should come in question." The same thought is expressed by Mr. Joseph Beale,¹³ "Trespass is not now and never was * * * * an action for injury to a right. * * * * Trespass is and always has been an action for injury to the thing, and whoever had the thing could recover for the whole injury, although he might be answerable over." In *Johnson v. Barret*¹⁴ a mere occupant was allowed full recovery for injuries permanent in their nature. In *Harper v. Charlesworth*¹⁵ a mere possessor was allowed full recovery for permanent injuries to the property. A modern statement of the rule is: "If therefore the occupant of the land claims title, this claim cannot be disputed by a trespasser, who must therefore pay to the occupant the entire damages where no one has disputed his claim or interfered with his possession."¹⁶ There can be little justification for a rule of damages which permits a party to enhance the amount of his recovery by setting up a claim that may or may not be true and which it is not in the power of the defendant to dispute. It has, however, the merit of being consistent with the principle that gave it birth; *i.e.*, when one brings an action of trespass *quare clausum fregit* he does so on the basis of possession, and not on the theory of ownership. In *North v. Cates*,¹⁷ full recovery was allowed for permanent injuries. It did not appear that the plaintiff was more than a mere occupant of the property. The court stated: "From these authorities it seems evident that in actions of trespass, it is not necessary for the plaintiff in his declara-

¹² *Supra*, n. 1.

¹³ *Cyc.*, Trespass, 1184n. See *DICKEY ON PARTIES TO ACTIONS* (Truman's Notes). Rule 79, Sub. Rule 1 (835), " * * * * for it is an established maxim that 'trespass is a possessory action, founded merely on the possession, and it is not necessary that the right should come in question'."

¹⁴ *Aleyn* 10 (1646).

¹⁵ 4 B. & C. 575 (1825). In many of the early cases where recovery is allowed the nature of the injury is not discussed. See *Brest v. Lever*, 7 M. & W. 593 (1841); *Cary v. Holt*, 2 Strange 1237 (1746).

¹⁶ *SEDGWICK ON DAMAGES* (9th ed.) Vol. 1 §69 (1913). See also, 4 *SUTHERLAND ON DAMAGES* (3rd ed.) §1012 (1903). The author would seem to limit the operation of the rule to an adverse possessor, for it is stated that the defendant should not be permitted to dispute the *prima facie* case for full recovery if the plaintiff was in possession under color of title. A similar statement of the rule is found in *DICKEY ON PARTIES TO ACTIONS* (Truman's Notes) (1882), Rule 79, Sub. Rule 1. The rule as there stated, however, denies the right of the defendant to set up the rights of a third person in order to rebut the mere possessory right of the plaintiff. See *ESTER'S PLEADING* (4th ed.) Vol. 2, p. 58, §2206 (1898); *Pacific Ry. Co. v. Walker*, 12 Kan. 460 (1874).

¹⁷ 2 Bibb 591 (Ky. 1812); accord, *Owings v. Gibson*, 2 A. K. Marsh 515 (Ky. 1820); *Hall v. Deaton*, 68 S. W. 672 (Ky. 1902).

tion to allege title, nor in such cases would it be sufficient for the defendant to traverse the title of the plaintiff, but he should show either a title in himself, or some other under whose authority he entered." In the case of *Todd v. Jackson*,¹⁸ another action for permanent injuries, the plaintiff failed in his attempt to prove title. The court stated: "There is nothing in the idea that the plaintiffs are prejudiced by the fact of having attempted to prove their title and failed. If the title is immaterial, their failure to prove it is immaterial." In the much cited case of *Illinois Coal Co. v. Cobb*,¹⁹ the right to recover for permanent injuries based upon prior possession was recognized by the court. In *Beaumont Lumber Co. v. Ballard*, it was expressly found that the plaintiff did not occupy the premises under the proper claim of title to be considered as an adverse possessor, yet full recovery for permanent injuries was allowed. The same might be said of *Woods v. Banks*,²¹ where it was found that the plaintiff was an adverse possessor only at the election of the owner. It is not surprising that these cases are generally found in the list as authorities supporting the statement that one in the possession of property is the owner as against strangers to the title. Such a statement ignores the fact that recovery is allowed, not on the theory of ownership, but on the theory of possession. These and other cases allowing full recovery to the one in possession, especially if he is not an adverse possessor, would seem to be contrary to the generally recognized rule of damages that in an action for injuries to real property the amount of recovery should be measured by the

¹⁸ 2 Dutch 525 (N. J. 1857).

¹⁹ 94 Ill. 55 (1879); *contra*, *Sweeney v. Connaughton*, 100 Ill. App. 79 (1901); *La Salle Coal Co. v. Sanitary District*, 260 Ill. 423 (1913); holding that even an adverse possessor should not be permitted full recovery for permanent injuries to the freehold.

²⁰ 23 S. W. 920 (Tex. Civ. App. 1893).

²¹ 14 N. H. 101 (1843). In the following cases it may be assumed that the plaintiff was in adverse possession, yet full recovery was allowed on the theory that prior possession alone was sufficient. *Cutts v. Spring*, 15 Mass. 135 (1813); *Reed v. Price*, 30 Mo. 442 (1860). "The question of title was not necessarily in issue; for possession was sufficient to maintain the action." *Nickerson v. Thacher*, 146 Mass. 609 (1888); *Pacific Ry. Co. v. Walker*, 12 Kan. 460 (1874); *Paraffine Oil Co. v. Berry*, 93 S. W. 1098 (Tex. 1906); *Carter v. Maryland & P. R. Co.*, 77 Atl. 301 (Md. 1910); *Truitt v. Osler*, 4 Boyce 555, 90 Atl. 467 (Del. 1914).

extent of the plaintiff's interest.²² It is true that by showing prior possession the plaintiff makes out a *prima facie* case for full recovery. Possession is presumptive evidence of ownership.²³ After showing such possession, the secondary burden of going forward with the evidence would be on the defendant, but the primary burden of showing title should still be on the plaintiff. In *Burlington & Missouri River Ry. Co. v. Beebe*,²⁴ Cobb, J. stated that after showing possession, the burden was on the defendant "to prove title out of the plaintiff." Cases so holding have the merit of disputing the old theory that trespass *quare clausum fregit* is a purely possessory action and that in no case is the question of title involved if the fact of possession is established, unless the defendant is claiming under a superior title; yet they seem contrary to the rules of evidence concerning the burden of proof. Such cases in effect recognize that if one seeks to recover for permanent injuries, he should have more than a possessory interest, but place the burden on the defendant of showing the limitations of the plaintiff's interest.

That the adverse possessor occupies a different position than a mere possessor seems to have been recognized in *Owings v. Gibson*²⁵ where full recovery was allowed to the *adverse possessor* on the ground that *he was the owner as against the whole world except the real owner*. Such a distinction was also made in *Nelson v. Mather*.²⁶ It seems

²² SEDGWICK ON DAMAGES (9th ed.) Vol. 1 §69 (1913); SUTHERLAND ON DAMAGES, (3rd ed.) Vol. 4, §1097 (1908); It is not within the scope of this article to discuss the merits or demerits of this rule of damages. That it differs from the rule as applied in the case of personal property, where full recovery is allowed by the possessor, is generally recognized. The Winkfield, 18 T. L. R. 178 (Eng. C. A.). See an interesting discussion of this rule as applied to personal property in Title to Chattels by Possession, 7 LAW QUAR. REV. 224 (1891). In *Glenwood Lumber Co. v. Phillips*, 1904 A. C. 405, 410, full recovery for timber cut on the land was allowed to the one in possession as lessee apparently on the theory that, after being cut the timber became personal property and was lawfully in the possession of the plaintiff. On the theory of the Winkfield case *supra*, therefore, a full recovery by the plaintiff as bailee of personal property was proper.

See *Richbourg v. Rose*, 53 Fla. 173, 44 So. 69 (1907) in which an action of replevin was brought for property severed from the freehold. In order to maintain the action it was held that the plaintiff would have to be in actual or constructive possession of the land at the time the property was severed. As the title to real property cannot be directly tried in an action of replevin if the defendant was in adverse possession replevin cannot be maintained.

²³ ESTEE'S PLEADING (4th ed.) Vol. 2 p. 57, §2204 (1898); WIGMORE ON EVIDENCE Vol. 5 (2nd ed.) §2515; DICEY ON PARTIES TO ACTIONS (Truman's Notes) Rule 79, Sub. Rule 1 (1882); See *International Railway Co. v. Ragsdale*, 67 Tex. 24, 28, 2 S. W. 515 (1886).

²⁴ 14 Neb. 463 (1883); See also *Reed v. Price*, 30 Mo. 442 (1860); *Lehigh & H. R. Ry. Co. v. Antalics*, 81 N. J. L. 685, 80 Atl. 469 (1911); *Danielson v. Kullonen*, 111 Minn. 471, 126 N. W. 404 (1910).

²⁵ 2 A. K. Marsh 515 (Ky. 1820).

²⁶ 5 Kan. 89 (1869).

that the weight of authority in the United States is against allowing either a possessor or an adverse possessor full recovery for injuries to the freehold. For such recovery the plaintiff must show either a satisfactory paper title or title acquired by adverse possession.²⁷ Such decisions, if not inconsistent with the theory that an adverse possessor has good title against the whole world except one who can show a better title, present a very strong argument against it.²⁸ If to be regarded as an owner, it is difficult to see why the adverse possessor should be deprived of one of the principal incidents of ownership; *i.e.*, the right to protect his property as against strangers to the title. That the wrong-doer might not be discharged from liability as to the original owner seems at most but a weak argument for denying relief.

What has been said regarding trespass *quare clausum fregit* would seem to be equally true of ejectionment. Generally, for the purpose of ejectionment, no distinction is made between the mere possessor and the adverse possessor. Both are allowed to recover in ejectionment against a stranger to the title, not on the theory that they are the owners of the property, but on the theory that ejectionment is a possessory action and a prior peaceable possession is sufficient to support it. Ejectionment was not a real action at common law.²⁹ In its origin the remedy was only to recover possession according to some temporary right, and it was only by the use of fictions that the title was at length brought into controversy.³⁰ It is true that in ejectionment the plaintiff must recover on the strength of his own "title" and not on the weakness of the defendant's title; but, as stated by Mr. Justice Curtis in *Christy v. Scott et al.*,³¹ "* * * if the plaintiff had actual prior possession of the land, this is

²⁷ *Winchester v. City of Stevens Point*, 58 Wis. 350, 17 N. W. 3 and 547 (1883); *Anderson v. Thunder Bay River Boom Co.*, 59 Mich. 216, 23 N. W. 776 (1885); *International Ry. Co. v. Ragsdale*, 67 Tex. 24, 28, 2 S. W. 515 (1886); *Waltmeyer v. The Wisconsin, Iowa & Neb. Ry. Co.*, 71 Iowa 626 (1887); *Kelly v. N. Y. Ry. Co.*, 81 N. Y. 233 (1880); *Frisbee v. Marshall*, 122 N. C. 760, 765, 30 S. E. 21 (1898); *La Salle County Coal Co. v. Sanitary District*, 260 Ill. 423, 103 N. E. 175 (1913).

²⁸ See, Jos. Gingham, *Legal Possession*, 13 MICH. L. REV. 561 n. (1915). Where it is stated that cases refusing full recovery to the adverse possessor are not inconsistent with the theory that he is the owner as against the whole world except the one having a better title, because the granting of relief might result in double liability to the trespasser in that the recovery by the adverse possessor might not bar an action brought by the owner after reentry.

²⁹ See *Allen v. Rivington*, 2 Saund. 111 (1846); *Kortright v. Cady*, 21 N. Y. 343, 362, (1860); 3 BLACKSTONE 199, 200.

³⁰ *Southmayd v. Henley*, 45 Cal. 101 (1872), sustained ejectionment on prior possession alone.

strong enough to enable him to recover it from a mere trespasser, who entered without any right."

That there is a fundamental distinction between possession and adverse possession is made apparent from an examination of the cases involving eminent domain proceedings. In order to recover for more than injuries to his possessory interest, the plaintiff must prove his title. That one in the *adverse possession* of property is entitled to full compensation as against all persons except the real owner seems to have been the conclusion reached by the court in the leading case of *Perry v. Clissold*.³² In that case, before the rights of the owner were barred by the statute, land was taken from the adverse possessor under eminent domain proceedings. The English Privy Council directed a valuation of the land to be made apparently with the view of awarding to the executors of the adverse possessor damages for the full value of the land as of the time of the resumption of the land by the crown. Apparently, at the time of the order, the rights of the original owner were barred. The decision of the court was based on the theory that the adverse possessor is the owner as against all strangers to the title. The decision can hardly be said to represent the weight of authority in the United States.³³ Statements are found to the effect that denial of full recovery to the adverse possessor in eminent domain proceedings is not inconsistent with the theory that he is the owner as against third persons for "the eminent domain appropriator desires and is justified in demanding not merely the vested rights, etc., of use, but also good title and legal power to retain them against all the world in return for full value paid"³⁴ It would seem that in proceedings of this kind the amount of compensation should be determined not so much on what the eminent domain

If, however, a plaintiff in ejectment is permitted to recover for injuries to the freehold and is not limited to the rents and profits merely, then as for the right to recover for permanent injuries the same principles should govern as are applied in the case of trespass *quare clausum fregit*.

³¹ 55 U. S. at 292 (1852).

³² 1907 A. C. 73; See 20 HARV. L. REV. 563; *contra ex parte*, Hollingsworth, 24 L. T. 347, 19 W. R. 580 (1871), held that by the resumption the adverse possessor's inchoate title to the land was interrupted by the parliamentary rights of the company.

³³ *Robbins v. Milwaukee & Horicon R. R. Co.*, 6 Wis. 610 (1858); *Costello v. Burke*, 63 Iowa 361 (1884); *Waltemeyer v. Wisconsin, Iowa, and Neb. Ry. Co.*, 71 Iowa 626, 33 N. W. 140 (1887); See *Campbell v. City of New Haven*, 101 Conn. 173, 125 Atl. 650, 23 MICH. L. REV. 180 (1924); *Chandler v. Jamaica Pond and Aqueduct Co.*, 125 Mass. 544 (1878), holder of base, qualified or determinable fee held to have sufficient interest for full recovery.

³⁴ *Jos. Bingham, Legal Possession*, 13 MICH. L. REV. 561 n. (1915).

appropriator *desires*, but rather on what he *actually takes* from the possessor. When deprived of his possession by eminent domain proceedings, the adverse possessor is deprived not only of his possession, but also of a right which he has as against third persons of remaining in possession and if possible acquiring title. If he is in a position to show, as he was in *Perry v. Clissold*, that *he would have acquired title if the property had not been taken from his possession*, he should receive compensation for any interference with this right. In the above assumed case the measure of damages would be the full value of the property. It should be awarded to him, not on the theory that he is the *owner* of the property as against third persons, but on the theory that he has a right to remain in possession and, if possible, acquire title. If that right is interfered with by third persons, and he is in a position to show that as a result of this act he has been deprived of acquiring title, he should receive compensation. The situation is similar to that presented where a claimant of government land is deprived of his possibility of acquiring title. He should be compensated according to the probability of his acquiring title.³⁵ In *La Salle Coal Co. v. Sanitary District*³⁶ the court did not recognize any such right in the adverse possessor. Action was brought for permanent injuries to the freehold. At the time of the injury the plaintiff was in possession under such claim of right that if continued for the required length of time he would acquire title. After the statutory period had elapsed, action was brought for the injury. Relief was denied on the ground that at the time of the injury the plaintiff was not the owner of the property and, as such, was not entitled to recover for permanent injuries to the freehold. Upon a proper showing of the plaintiff that but for the interference of the defendant title to the property as it was at the time of the injury would have been acquired, he should have received full compensation. Although there is no common law action for an injury to such a right, still, being in a position to maintain trespass, the court should award all damages suffered by the plaintiff as a result of that trespass.

³⁵ See *Ellisworth, etc., Ry. Co. v. Gates*, 41 Kan. 574, 21 Pac. 632 (1889). But see *Spokane, etc., Ry. Co. v. Zeigler*, 167 U. S. 65 (1897).

³⁶ 260 Ill. 428, 103 N. E. 175 (1918).

The theory contended for here that an adverse possessor is not the owner of property until he has acquired such title by force of the statute of limitations would seem to be contrary to the prevalent theory that the statute of limitations does not operate to transfer title to the adverse possessor but merely quiets the title which he already has.³⁷ The idea that the statute of limitations does operate as in effect making a transfer of title was a theory entertained by some very eminent authorities in the past.³⁸ This interpretation would seem to be more in accord with modern decisions. A great deal of confusion results from attributing to the adverse possessor an "*inchoate title*" or a "*growing title*". However we consider the statute of limitations as operating, the conclusion seems clear that modern decisions do not attribute to the adverse possessor the rights of ownership.

³⁷ H. W. Ballantine, *Title by Adverse Possession*, 32 HARV. L. REV. at 141 (1918); Henry Bordwell, *Disseisin and Adverse Possession*, 33 YALE L. J. 800 (1923).

³⁸ See *Doe v. Sumner*, 15 M. & W. 39 (1845); a paradox of Sugden's, 34 LAW QUAR. REV. 253 (1918).