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REAL PROPERTY-ADVERSE POSSESSION-ADVERSENESS OF POSSESSION WHEN POSSESSOR HAS NOT CLAIMED A FEE

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REAL PROPERTY—ADVERSE POSSESSION—ADVERSENESS OF POSSESSION WHEN POSSESSOR HAS NOT CLAIMED A FEE—From 1924 until 1948 plaintiff and her family were in apparent, open and continuous possession of a portion of defendant's lot, without permission, and with the intent to exclude the defendant and all others from possession. Although plaintiff and her family constructed a lawn, gardens, steps, and parking space on the premises, the court found that such use was "an incident to her occupancy of the house" on the adjoining lot, and was without any separate claim of title. In 1948, defendant entered and began excavating for the foundation of a house. Plaintiff sought an injunction and damages, resting her claim on title acquired through adverse possession. The evidence disclosed that from 1937 until 1941 plaintiff and her family occupied the adjoining lot as tenant of a bank rather than as owner of the fee, but the bank made no claim to the disputed premises. From a final decree dismissing the bill, *held*, affirmed. Possession will not ripen into fee simple title where the possessor has not claimed a fee throughout the period of the statute of limitations. *Holmes v. Johnson*, (Mass. 1949) 86 N.E. (2d) 924.

In 1822, Justice Story, by way of dictum, said, "If the party claim only a limited estate, and not a fee, the law will not, contrary to his intentions, enlarge it to a fee."¹ His conclusion has received both applause and criticism from courts and text writers, but the weight of authority and reason supports the critics.² Limitation statutes seek to bar stale claims in the interest of security of titles. Penalty to the record title-holder or reward to the adverse possessor is incidental to the underlying purpose and is not controlling.³ While the statutes

¹ *Ricard v. Williams*, 7 Wheat. (20 U.S.) 59 at 108 (1822). For a thorough discussion of the decision see Walsh, "Title By Adverse Possession," Series 1, No. 19, N. Y. UNIV. CONTEM. LAW PAMPHLETS (1939). It has been asserted that such a requirement in effect limits the application of the statute of limitations to one who subjectively believes himself to be the owner, since one who knows that he is without title will be unlikely to assert title until he is questioned. 4 TIFFANY, REAL PROPERTY, 3d ed., §1147 (1939).

² 4 TIFFANY, REAL PROPERTY, 3d ed., § 1151 (1939); *Holtzman v. Douglas*, 168 U.S. 278, 18 S.Ct. 65 (1897); *Carpenter v. Coles*, 75 Minn. 9, 77 N.W. 424 (1898). In the latter case, at page 11, the court said, "The misapprehension on the subject arises from the somewhat misleading, if not inaccurate, terms frequently used in the books to express this adverse intent, such as 'claim of right,' 'claim of title,' and 'claim of ownership.' These terms . . . mean nothing more than the intention of the disseisor to appropriate and use the land as his own to the exclusion of all others."

³ Ballantine, "Title by Adverse Possession," 32 HARV. L. REV. 135 (1918).

seek only to deal with the remedy,⁴ additional requirements as to the character of the possession have been imposed by judicial decision to protect the true owner, on the theory that he should have some notice of the necessity of asserting his claim.⁵ But where the true owner has had adequate notice and still fails to assert his claim within the period prescribed by the statute, the extinguishment of his title should not depend upon whether the possessor claimed a fee or only a limited estate in the land. In the principal case, defendant or his predecessors clearly had a right of action in 1924 and continuously thereafter. Nothing in the record suggests that they were lulled into a false sense of security. That plaintiff was in possession without permission of the true owner is undisputed. Possession is substantially the same as ownership when other persons cannot assert a better right. Once the defendant's right was extinguished by the passage of time, the title of the plaintiff became complete, for the possessor is owner "against all the world" but one with a superior title.⁶ The decision of the Massachusetts court is not without support in the decided cases.⁷ It is submitted, however, that these decisions, with their undue emphasis on the character of the possession, are inconsistent with the policy underlying statutes of limitations.

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⁴ For the Massachusetts provision see Mass. Gen. Laws (1932) c. 260, §21. Special features of the limitation acts in the various states are described by Professor Taylor in "Titles To Land By Adverse Possession," 20 IOWA L. REV. 551 (1935). He reports that only eleven states impose additional requirements such as good faith, color of title, and payment of taxes.

⁵ *City of Rock Springs v. Sturm*, 39 Wyo. 494, 273 P. 908 (1928) and cases therein cited.

⁶ *Sharon v. Tucker*, 144 U.S. 533, 12 S.Ct. 720 (1892). This is in accord with the English authority. See *Perry v. Clissold*, App. Cas. 73 (1907).

⁷ *Bond v. O'Gara*, 177 Mass. 139, 58 N.E. 275 (1900); *Leavitt v. Elkin*, 314 Mass. 396, 49 N.E. (2d) 1020 (1943); *Bedell v. Shaw*, 59 N.Y. 46 (1874). In the principal case, the court largely relied on *Bond v. O'Gara* and the dictum in *Ricard v. Williams*, supra, note 1. To the effect that the decision in *Bond v. O'Gara* should have been decided on the ground that the occupant was a tenant at will of the owner and the possession, therefore, not adverse, see note in 14 HARV. L. REV. 374 (1901). While "squatters" are not generally held to be adverse possessors, the underlying reason, in most cases, is the dubious character of their possession, which, coupled with their lack of claim, may lull the owner into a false sense of security. The reason is not the lack of claim standing alone.