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Abstract

The foundations of the doctrine of possessory rights are centuries old, yet, as Mr. Bucknall establishes, Ontario courts frequently have difficulty in applying both the common law tests and the statutory changes enacted in the Limitations Act. A critical examination of several cases reveals startling judicial inconsistency and demonstrates the need for a clearer analytical framework within which to determine questions of possessory title. Mr. Bucknall sets out this framework in a series of principles designed to restate and clarify the interaction of the common law maxims and the statutory enactments.

TWO ROADS DIVERGED: RECENT DECISIONS ON POSSESSORY TITLE

BY BRIAN BUCKNALL*

The foundations of the doctrine of possessory rights are centuries old, yet, as Mr. Bucknall establishes, Ontario courts frequently have difficulty in applying both the common law tests and the statutory changes enacted in the Limitations Act. A critical examination of several cases reveals startling judicial inconsistency and demonstrates the need for a clearer analytical framework within which to determine questions of possessory title. Mr. Bucknall sets out this framework in a series of principles designed to restate and clarify the interaction of the common law maxims and the statutory enactments.

I. INTRODUCTION

Let *Piper v. Stevenson*¹ serve as a starting point. In 1901, Miss Piper purchased six lots from Mr. Whaley with the intention of setting up a farm. For some reason, Miss Piper fenced in eight rather than six lots and began to farm them. She lived on another farm during this period and went on the property only for the purposes of cultivating and harvesting. In 1905 and 1906 she had buildings constructed and moved to her new farm. In 1911, the holder of paper title to the two erroneously enclosed lots sold them to Mr. Stevenson. Mr. Stevenson knocked down Miss Piper's fences and himself fenced off the lands which Miss Piper thought she owned and Miss Piper sued successfully for a declaration that she had acquired a possessory title.

Compare that result to the decision over sixty years later in *Masidon Investments Ltd. v. Ham*.² In 1958, Mr. Ham, a lawyer in Oakville, rented a 100 acre parcel of land with the intention of using it as his residence. The landlord apparently considered that the land was a long-term speculation in real estate and had little concern for the actual use made by Mr. Ham. Mr. Ham was a flying enthusiast and laid out a grassy airstrip suitable for use by light planes. It was a fair weather field, with no electric light, radar or radio assistance. The field did, however, become popular with other flyers and from time to time as many as twelve planes would be parked there. Around 1967, Mr.

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¹ (1913), 28 O.L.R. 379, 12 D.L.R. 820.

² (1982), 39 O.R. (2d) 534 (Trial Division); (1984), 45 O.R. (2d) 563 (Court of Appeal).

Ham's landlord defaulted on his mortgage on the property and an order of foreclosure was registered against the entire 100 acres. After some shuffling of papers, Mr. Ham's landlord re-acquired title to a fifty acre parcel at the west end of the farm, which was the parcel on which Mr. Ham lived, while Masidon Investments Ltd. held title to the fifty acre parcel at the east end of the farm, which was the parcel on which Mr. Ham had established his airstrip. From 1968 on, Mr. Ham continued to occupy the entire 100 acres despite the fact that his landlord could only give him title to fifty acres. He continued to fly planes from the east half of the parcel, to use the buildings on that side of the parcel, to have the land cultivated by neighbouring farmers, to maintain fences and to make minor improvements to his airstrip. In 1979, the owners of the east half of the parcel realized what had been going on and brought action against Mr. Ham for a declaration that they owned the lands and sued for punitive damages for his trespasses. Masidon was successful in its suit for declaratory relief and it was held that Mr. Ham had not acquired possessory title.

The two cases provide some striking similarities. In both, vacant land was in question and the holders of paper title appeared to be indifferent to the steps taken by the persons in possession. The legislation governing the claims brought in each case, the *Limitations Act*,³ remained substantially the same over the entire period separating the two decisions. On the bare facts, none of the "distinctions" so beloved of lawyers will explain the contrast in results. One can only conclude that: *Piper v. Stevenson* was wrongly decided, or *Masidon v. Ham* was wrongly decided, or the law has changed.

The hallmark of the decision in *Masidon* is the reliance which Mr. Justice Carruthers, at the trial level, and Mr. Justice Blair on appeal, place on the doctrine of adversity. He concluded that whatever action Mr. Ham took could not be inconsistent with Masidon's intention to sell the land at a future date for development. Insofar as Ham did not and, indeed, could not, do anything inconsistent with Masidon's intentions — because Masidon had no intention — Masidon's rights were inviolable. This analysis, which on the face of it would appear to have been equally available in *Piper v. Stevenson*, was not even mentioned in the earlier case.

Before one can conclude that the law has changed in the decades following *Piper v. Stevenson*, one further decision should be considered. *Beaudoin v. Aubin*⁴ concerned a dispute over a strip of land along the

³ *Limitations Act*, R.S.O. 1980, c. 246.

⁴ (1981), 21 R.P.R. 79.

edge of a residential lot. Mr. Beaudoin and his wife rented the home adjacent to the disputed strip of property in 1951. In 1966, they purchased the home. From 1951 on, however, they had occupied the subsequently disputed strip on the assumption that it was their own. They learned at the time of their purchase that the strip had actually been registered in the name of the adjoining property owners but continued thereafter to use the lands as they had used them before. In 1979, the adjoining owners, by this time the Aubin family, became aware of paper title and disputed Mr. Beaudoin's rights. The parties brought the matter to court for declaratory relief. Mr. Justice Anderson specifically reviewed the Aubins' contention that, since the occupation of the land had arisen as the result of a mistake as to the boundary line between the parcels, no rights whatever could accrue. That is to say, in the absence of knowledge of the true state of title to the property, there could be no adversity and no intention to possess adversely. Mr. Justice Anderson rejected the intention test entirely and considered at length the question of whether the intention and adversity tests were, in fact, appropriate elements of the law in Ontario. He concluded that they were not and granted a declaration as to title to Mr. Beaudoin.

The decision in *Beaudoin v. Aubin* preceded the decision in *Masidon v. Ham* by over a year. Curiously enough, *Beaudoin* was not even discussed by Mr. Justice Carruthers in *Masidon* even though it had been relied upon by counsel for Mr. Ham. The divergence in approach is almost as striking as the divergence in result between *Piper v. Stevenson* and *Masidon v. Ham*. Nor are the two recent decisions uncharacteristic of the law in this area. Contrary to what might be professional expectations, the number of cases dealing with questions of possessory title does not seem to diminish year by year, nor does the jurisprudence used in those cases become more stable and consistent. It seems that the time has come for a reconsideration of some of the underlying doctrines.

II. *MASIDON INVESTMENTS LTD. V. HAM*: NEW APPLICATIONS OF THE ADVERSITY TEST

Mr. Justice Carruthers: The Trial Decision

The judgment in *Masidon v. Ham* is disturbing for a number of reasons. Mr. Justice Carruthers at one point casually referred to the issue of whether "a prescriptive right has been acquired" as if prescriptive rights and possessory titles were the same thing.⁵ The text writers

⁵ *Supra* note 2, at 544 (T.D.). Gushue J.A. made a similar error recently in *Re Lundrigans Ltd. and Prosper* (1982), 132 D.L.R. (3d) 727 at 730. (Prescription is the concept applicable to non-possessory rights such as easements or rights of way.)

generally recognize these as being two conceptually independent (though sometimes factually similar) bodies of law.⁶ More importantly, there are suggestions throughout the decision that some of the basic doctrines with regard to possessory titles have been misunderstood. Mr. Justice Carruthers concluded, at one point, that Mr. Ham had, by perhaps improper means, "fashioned a design to acquire possessory title to the lands in dispute."⁷ Later, while considering the onus which a person claiming possessory title must bear, he pointed out that "the relevant provisions of the *Limitations Act* did not come into being in order to promote the obtaining of possessory title."⁸ In the traditional analysis, the *Limitations Act* had no relationship whatever to the "acquisition" or "obtaining" of possessory title. Possession was, in its nature, a species of title assertable against the entire world other than the true owner. A stranger to Masidon as well as to Mr. Ham could not have asserted any rights to the lands while Mr. Ham was in possession on the basis that Masidon, in fact, had a better title than Mr. Ham. From the beginning of the common law period, Mr. Ham's possession in those circumstances would have been defended and the raising of the *jus tertii* would have been rejected.⁹ By this analysis Mr. Ham, Miss Piper and Mr. Beaudoin had obtained possessory title to the lands which they claimed at the time that they respectively went into possession. The *Limitations Act* did not create that title. The Act simply established situations in which such title became indefeasible through the lapse of time. Section 15 of the Act reflects the situation precisely. When a limitations period had elapsed against a person who has established a possessory title, the former title is *extinguished*. Nothing is said about the creation of a new title or a transfer of title from the former owner to the new owner.

This misinterpretation of the principles underlying possessory doctrines is reflected in a plethora of findings of fact and statements of law which may or may not bear on the issues at hand. Mr. Justice Carruthers found, for example, that the holder of an interest in the disputed lands had not been put on notice that Mr. Ham was making use of them, even though in 1974 they received a property appraisal which made reference to the "private airstrip for small aircraft."¹⁰ The impli-

⁶ See, for example, Megarry and Wade, *The Law of Real Property* (3d. ed., 1966) at 996.

⁷ *Supra* note 2, at 547 (T.D.).

⁸ *Id.* at 553.

⁹ *Cheshire's Modern Law of Real Property* (9th ed., 1962) at 799-800.

¹⁰ *Supra* note 2, at 541 (T.D.).

cation is clearly that the degree of knowledge which the holder of paper title has with regard to the use of the disputed lands is important. The absence of such knowledge somehow improves the position of the holder of paper title. The point is not explored, nor is acknowledgement given to the fact that the *Limitations Act* specifically makes reference to knowledge of use by another party in only one instance: where the lands are in a "state of nature."¹¹ The fact that, by statute, knowledge becomes a question in that instance would suggest that it is not an issue in other instances and, indeed, the cases have so held.¹²

Similarly, Mr. Justice Carruthers noted that "there is no evidence that Ham ever attempted to exclude the plaintiffs or anyone representing them or their interests from any portions of the lands in dispute,"¹³ while at the same time finding that "the plaintiffs have never been on, at or over the lands in dispute."¹⁴ How Mr. Ham might have successfully excluded people who did not wish to enter is a conundrum. It was held against Mr. Ham that when an Ontario Municipal Board hearing took place, concerning the zoning of the lands, he knew of it but did not appear. It stands to the favour of Masidon that its representatives did appear. The relevance to the issues at hand of Mr. Ham's failure to attend is not made clear, though it is suggested that this is evidence that Mr. Ham did not really believe that he owned the lands in question. Masidon's actions, on the other hand, appear to have suggested to Mr. Justice Carruthers that Masidon had continued to be in "possession" of the lands in question. These facts, together with the fact that Masidon continued to pay taxes on the lands and to consider offers for purchase, suggested that Masidon's possession had not been discontinued. Again, the specific wording of the legislation, which provides that "no action shall be brought" and further that a "mere entry" from time to time will not disrupt the running of a limitations period, was not addressed.

As mentioned previously, the heart of the matter appears to have been that the use which Mr. Ham made of the property was not appropriate for the running of a limitations period. In this respect Mr. Justice Carruthers relied heavily on the decisions of Madame Justice Wilson, then of the Ontario Court of Appeal, in *Keefer v. Arillotta*¹⁵ and

¹¹ *Supra* note 3, s. 5(4).

¹² *McGugan v. Turner*, [1948] O.R. 216. See generally *Beaudoin v. Aubin*, *supra* note 4. See also, *contra*, *Lutz v. Kawa* (1981), 112 D.L.R. (3d) 271, which is not followed in *Beaudoin v. Aubin*.

¹³ *Supra* note 2, at 550 (T.D.).

¹⁴ *Id.* at 539.

¹⁵ (1976), 13 O.R. (2d) 680, 72 D.L.R. (3d) 182.

in *Fletcher v. Storoschuk*.¹⁶ One extract which Mr. Justice Carruthers took from the *Keefe* decision conveys the essence of the argument:

The use an owner wants to make of his property may be a limited use and an intermittent or sporadic use. A possessory title cannot, however, be acquired against him by depriving him of uses of his property that he never intended or desired to make of it. The *animus possidendi* which a person claiming a possessory title must have is an intention to exclude the owner from such uses as the owner wants to make of his property.¹⁷

Both Madame Justice Wilson and Mr. Justice Carruthers relied on the old English case of *Leigh v. Jack*¹⁸ for this proposition.

Madame Justice Wilson's words create the implication that possessory title is "acquired" by some ongoing process. Implicitly, the old doctrine that an estate in possession will either exist or not exist at any given instant in time, and will become indefeasible through the provisions of the statute, is ignored. Secondly, the quotation identifies not one but two tests of intention where a possessory interest is to be claimed. There is, first, the intention of the person in possession, which must be to "exclude the owner from such uses as the owner wants to make," and second, the intention of the owner, which may be to make some use, or no use, of the lands. To phrase the principle positively, a person in possession of lands which he does not own can "acquire" title only if he knows that he does not own the lands, knows who does own the lands, knows the intentions which the true owner has with regard to the use of the lands, and acts in a manner inconsistent with those intentions.

The phrasing of the principle in a positive form does, of course, display its weaknesses. Proof of any intention is difficult, especially over a ten year period. Certainly there would be few owners who would confess to having any immediate and consistent intention to use lands which they have not tried to occupy for over a decade. Mr. Justice Carruthers himself confessed that his approach to the doctrine may well mean that possessory title cannot be obtained against "development land which is in the holding stage."¹⁹ Further, the formulation is almost impossible to apply in what is the most common instance, situations where both the paper title holder and the possessor are simply mistaken about the nature and extent of their respective rights and cannot therefore establish an intention consistent with the proposed le-

¹⁶ (1981), 35 O.R. (2d) 722, 18 D.L.R. (3d) 59.

¹⁷ *Supra* note 15, at 691 (O.R.).

¹⁸ (1879), 5 Ex. D. 264.

¹⁹ *Supra* note 2, at 553 (T.D.).

gal test.

If the test of “adversity of usage” were definitive, it would be sufficient in the *Masidon* case to show only that, while Mr. Ham was in possession, Masidon did not have any specific expectations with regard to the land nor any desire to use it. Nothing could then have been inconsistent with its rights. Mr. Justice Carruthers was not, however, content to rely simply on this point but, as mentioned earlier, went on to consider a variety of associated issues. He even considered the actual usage made by Mr. Ham as opposed to his intentions in using the land. He found, for example, that Mr. Ham’s use of a portion of the land for growing crops was “at most seasonal and intermittent and therefore not meeting the required test.”²⁰ This precise point had previously been considered in *Piper v. Stevenson* and resolved in the opposite manner. The use of the buildings, including a “hanger” for the airplanes was similarly insufficient to run a possessory period. The use of the airstrip was found to be “open, notorious and peaceful” but Mr. Justice Carruthers questioned “whether it was constant and continuous” or that it was “exclusive of the right of the true owner.”²¹ Whatever his intentions, a person hoping to claim possessory title will have to be vigorous in his occupation of the lands in question if Mr. Justice Carruthers is to be satisfied.

Mr. Justice Blair: The Decision on Appeal

Mr. Ham appealed the decision of Mr. Justice Carruthers and took the matter before Justices Zuber, Blair and Goodman of the Court of Appeal. Mr. Justice Blair wrote on behalf of the bench.

Mr. Justice Blair rehearsed Mr. Justice Carruthers’ factual determinations and adopted his view of the law, going even to the extent of implying that prescriptive and possessory title amounted to the same thing.²² Again, the decisions of Madame Justice Wilson on this topic, and particularly the decision in *Keefer v. Arillotta*, were central to the analysis.²³ Mr. Justice Blair summarized the principles applicable to possessory title as follows:

It is clear that the claimant with possessory title throughout the statutory period must have:

- (1) had actual possession;
- (2) had the intention of excluding the true owner from possession;

²⁰ *Id.* at 551.

²¹ *Id.* at 552.

²² *Supra* note 2, at 567 (C.A.).

²³ *Id.*

(3) effectively excluded the true owner from possession.²⁴

Mr. Justice Blair noted that "the claim will fail unless the claimant meets each of these three tests and time will begin to run against the owner only from the last date when all of them are satisfied."²⁵

Mr. Ham was found to have failed to meet the tests. It is not clear, however, whether he failed on one branch, two branches or all three branches of the analysis. The major issue appears to be whether he "effectively excluded the possession of the true owner." The concept of "effective exclusion" is, in Mr. Justice Blair's treatment, the obverse of the coin of "adversity". A holder of paper title who has no interest in coming on the land cannot be "excluded" by the person in possession. To put the matter another way, a person in possession cannot hold adversely to the interest of someone who does not care what is happening to the land.

It may also be that Mr. Ham failed to demonstrate to the satisfaction of Mr. Justice Blair that he had been in "actual possession" of the land. Mr. Ham's use of the land is treated as being a series of trespasses over an extended period of time, none of which could be connected into a period of actual possession.²⁶ Mr. Ham is found not to have had "the requisite intention to exclude the true owner from possession."²⁷ If such an intention was formed by Mr. Ham it was formed only toward the end of his period of use of the land and, in accordance with the principles quoted above, any possessory period which arose could arise only after that intention could be shown to have existed.²⁸

In Mr. Justice Blair's view (and it is a view echoed by Mr. Justice Robins in the recent Court of Appeal decision in *Giouroukos v. Cadillac Fairview*²⁹) there is something of a moral standard to be resorted to in the application of the doctrines of possessory title. Mr. Justice Blair adopted Mr. Justice Carruthers' observation that perhaps possessory title cannot be obtained in circumstances where land is being held for development purposes:

This result, however, is not surprising. There is no policy reason for concern about the rights of the appellant in this case or, indeed, any trespassers seeking to acquire possessory title to land held for development. The appellant deliber-

²⁴ *Id.*

²⁵ *Id.*

²⁶ *Id.* at 571.

²⁷ *Id.* at 575.

²⁸ *Id.*

²⁹ *Giouroukos v. Cadillac Fairview Corp. Ltd. et al.* (1984), 44 O.R. (2d) 166, 3 D.L.R. (4th) 595, 29 R.P.R. 224.

ately embarked on a course of conduct which ultimately led to an intention to dispossess the respondents of their property. In my opinion, Justice Carruthers was correct in concluding that the purpose of the Limitations Act was not 'to promote the obtaining of possessory title' by a person in the position of the appellant.³⁰

This new test seems to cut in all directions: a person in possession of land without intending to harm the true owner's rights will acquire nothing, a person in possession of land with the intention of acquiring the true owner's right will not have the assistance of the court.

III. *BEAUDOIN V. AUBIN*: THE ADVERSITY TEST DENIED

The facts in *Beaudoin v. Aubin*, as outlined above, are difficult to analyse with reference to some test which makes the intentions of the possessor and of the holder of paper title paramount. The parties there proceeded on the basis of a mutual mistake with regard to their common boundary and their respective rights over the disputed land. The holder of paper title could form no intention with regard to lands which he did not know he owned nor could the possessor be expected to demonstrate that he was acting adversely to the true owner's interests since all he hoped to do was use the property which he thought he owned. Mr. Justice Anderson was called upon to consider the entire body of doctrine with regard to possessory title and, in a thorough and scholarly decision, he concluded that Mr. Beaudoin had, in fact, established an indefeasible title even though he had not acted with that intention. Mr. Justice Anderson began with a close analysis of the history of the *Limitations Act*. He pointed out that, prior to the passage of the *Real Property Limitation Act, 1833* in England, the common law for both Canada and England had employed the concept of "adversity" in a very technical sense when testing the question of whether or not a possessory title had been established.³¹ With the passage of the Act in 1833, the focus shifted to the question of whether or not an action against the possessor should have been brought by the true owner. The Act, after the manner of limitations acts generally, was simply procedural in its nature, not substantive.

Mr. Justice Anderson quoted Mr. Justice Smily in *McGugan v. Turner* to the effect that in the applicable section of the *Limitations Act*:

³⁰ *Supra* note 2, at 579 (C.A.).

³¹ *Supra* note 4, at 86. See also Cheshire, *supra* note 9, at 787. Prior to the 1833 legislation certain types of possession were not considered to be "adverse." Possession by a younger son, for example, was considered to be possession by the heir. The concept of adversity was related to the status of the possessor and bore no relationship to intention or nature of use.

[N]o exception is made . . . of ignorance or mistake as to true ownership. In fact it has been held that a common error by the owners in regard to the true line of division between the properties does not prevent the statute running where the statute does not require it to be shown that possession was adverse and not with acquiescence or permission.³²

Justice Anderson pointed out that the change in the legislation led early commentators in Ontario to state that, for the purposes of this province, the concept of "adverse possession" in its original form had been abolished and the phrase had continued to be used only as a matter of convenience.³³

For at least fifteen years Mr. Beaudoin occupied land that he thought was his by right. Mr. Justice Anderson had to address directly the question of whether it was necessary to show that any particular intention was associated with his acts. He distinguished several cases, in which intention had been found to be an important element, by showing that they focused on factual situations in which the acts of possession were equivocal. He concluded that the possession of the lands by Mr. Beaudoin was certain and unequivocal and the *animus possidendi* could therefore be presumed.³⁴ He ended his analysis with a condemnation of the doctrines requiring demonstration of some subjective intention:

The application of judicial statements, without due regard for the facts of the case in which the statement is made, is a pregnant and perennial source of error. Upon such statements the defence has propounded the argument that, before a party can successfully rely upon Sections 4 and 15 of the statute, he must establish a subjective intention, with knowledge of the rights of the plaintiff present in his mind, to occupy in defiance or denial of those rights. No case which I have considered, when one looks to the facts, supports that proposition and it is utterly inconsistent with the decisions in *Martin v. Weld*, *Babbitt v. Clarke*, *Nourse v. Clark*, and *McGugan v. Turner*.³⁵

IV. POSSESSION, INTENTION, ADVERSITY: A RECONSIDERATION

While *Beaudoin v. Aubin* has, arguably, restated some important

³² *Supra* note 4, at 88. The quotation is from *McGugan v. Turner*, *supra* note 12, at 221.

³³ The same point had, in fact, been made with regard to the English legislation of 1833. Lord St. Leonards commented in 1852, "It is perfectly settled that adverse possession is no longer necessary in the sense in which it was formerly used, but that mere possession may be and is sufficient under many circumstances to give title adversely." (See *Ely (Dean) v. Bliss* (1852), 2 DeG.M. & G. 459 at 476, 477, 42 E.R. 950.) The English legislation, unlike the Ontario statute uses the phrase "adverse possession" even though the original meaning of the phrase has changed.

³⁴ *Supra* note 4, at 94.

³⁵ *Id.* at 96, 97. *Martin v. Weld* (1860), 19 U.C.Q.B. 631; *Babbitt v. Clarke* (1925), 57 O.R. 60, [1925] 3 D.L.R. 55, *aff'd* [1927] S.C.R. 148, [1927] 2 D.L.R. 7; *Nourse v. Clark*, [1936] O.W.N. 563.

principles with regard to possessory title and *Masidon v. Ham* has, similarly, confused the matter once more, it must not be suggested that the tests which Mr. Justice Carruthers and Mr. Justice Blair adopted in *Masidon* are wholly inapplicable. Rather, the analysis which was applied in the *Masidon* case is required by the nature of the legal principles applicable to possessory titles. The objection is that the analysis was wrongly conducted.

The doctrines of possessory title are, as suggested earlier, something of a hybrid in our law. The essential analysis goes back to medieval questions of who is seised of an interest and under what circumstances that person's seisin can be challenged. Onto this medieval root had been grafted a branch of statutory law limiting the time within which a challenge to the estate of the person in possession can be brought. Perhaps it would be useful to separate the two parts of the doctrine in order to see where the various tests of possessory usage arise and where they can be helpful.

The possessory estate, which the common law would have protected against all persons other than the true owner, was an estate established by the possessor acting as if he had an interest of indefinite duration (which was, therefore, a freehold interest and, furthermore, a seised estate) which was his as of right. A mere trespass across a piece of land, or a series of trespasses, would not give rise to the same sort of right. Hence, the requirement that possession be continuous. A person who asserted rights based on a stealthy or secretive use of a piece of property would, of course, face an evidentiary problem but was also thought not to be using the lands in a manner consistent with the assertion of a seised interest; thus the requirement that possession be open and obvious. Similarly, a person whose sole claim to property was that he was physically and violently keeping the true owner away was not seen to be enjoying any estate of his own in the lands. Finally, the common law recognized that a person who was in possession of property with the permission of the true owner was simply exercising the true owner's rights and not enjoying an independent estate of his own. The medieval shorthand for these doctrines was that the possession of land which was defensible as an estate in the land was possession "*nec calme, nec vie, nec precaria*" (without stealth, without violence and without permission).

While we have, in many cases, lost sight of the foundation for the tests which we now use, the principles remain the same. The tests for the running of a limitations period have been reformulated for modern application. The calls for "open, obvious and continuous" usage, "peaceful, open and obvious usage" and "usage as of right" are, how-

ever, all ways in which the court seeks to establish whether or not the claimant to a possessory title has in fact been enjoying the type of estate which the common law protected.

The problem is, of course, that the usages which can and should be made of lands are as varied as the lands themselves. Can someone, such as the farmer in *Piper v. Stevenson*, who simply visits property at seed and harvest time, be said to be in possession at all, let alone continuous possession? Can someone, such as Miss Carson in *Carson v. Musialo*,³⁶ who walks upon a stream bank and picks flowers there from time to time, be said to be threatening the interest of the true owner of the land who did not have any other use for the property?

When it is remembered that the common law looked for a usage of land analogous to that which would be made by a person claiming an estate as of right, the decisions (that Miss Piper did establish a possessory interest and Miss Carson did not) become at least explicable, if not obvious. The requirement that usage be "open" should be treated as being a means of ascertaining that the claimant to possessory title has acted in a manner consistent with the holding of an estate in land. It should not be confused with any expectation on the part of the court that a paper title holder must be given a warning that his interests might be endangered. (The test of possessory title grew up before limitations acts in their present form were available and these tests were, in fact, in place at a time when a true owner's interests could not, at law, have been endangered by any length of possession by another party.)

Openness of possession was one of the indicia of the existence of a possessory estate. Similarly, an intention to possess can also be an indicium of a possessory estate in circumstances where the facts of possession are themselves ambiguous. Where the land is in such condition that a true owner would not be expected to constantly make use of it, a person who is making such use as a true owner would make may have his position advanced somewhat by showing that he had, in fact, intended to use the property as his own. The intention in such a case is an intention with regard to the use of an estate in land, not an intention with regard to the acquisition of an estate of land. The older law would not have recognized the idea that a person actually in possession had anything more to acquire. An intention test is, therefore, not wholly inappropriate in circumstances of ambiguity. It must not, however, be allowed to ripen into a threshold test for the assertion of a possessory interest. In the vast majority of instances, possessory interests arise

³⁶ *Carson v. Musialo*, [1940] O.R. 398.

through mistakes innocently made to which no intention whatever can be attached.

The statutory branch of the analysis is in many respects parallel to the common law doctrine. Just as the common law would focus on the question of whether an estate had been brought into existence, the statute focuses on the question of whether or not "an entry or distress. . . or action to recover any land" can be brought. Just as a series of trespasses would not establish an estate at common law for which an "action for recovery" would be the appropriate remedy, a series of trespasses will not provide the foundation for such an action under the statute. (Trespasses to land are dealt with as "personal actions" under section 45(1)(g) of the Ontario *Limitations Act* and have their own separate limitations periods.) The tests used to establish whether or not a possessory estate exists are, therefore, appropriate as well to the question of whether or not the right to bring an action to recover land has existed. Again, open, obvious and continuous occupation are important considerations, as might be, in ambiguous situations, the establishment of an intention to use land as a true owner would use it.

The question of the true owner's intention with regard to the land is not definitive under either the common law or the statutory branch of the doctrine. As Mr. Justice Anderson pointed out in *Beaudoin v. Aubin*, the intention of the true owner is, in fact, a test peculiar to the jurisprudence of England.

If the analysis which I have been discussing is helpful, the law dealing with possessory interests might be set out under the following principles:

- a) The common law doctrine that a person in peaceful possession of land will himself have a species of seised estate from the commencement of such possession remains the foundation of our possessory doctrine;
- b) The peaceful possession of land which is to be treated as amounting to a possessory estate is the type of possession which a true owner would himself wish to make. Note, however, that this principle is subject to the qualification that property which is not in its nature susceptible to some degree of open and continuous ownership will remain the estate of the paper title holder unless the claimant to a possessory estate takes unusual measures to establish the existence of his interests;
- c) The establishment of a possessory estate can be demonstrated through a variety of indicia, none of which is either sufficient in its own right to establish the estate or necessary to establish the estate. Among these indicia are the enclosure of the lands in ques-

tion, continuous possession, formal repudiation of claims by the true owner and a demonstrated intention to possess the lands as if the claimant were the true owner;

d) Where the facts with regard to open, obvious and continuous possession are well established an "intention to possess" (*animus possidendi*) will be presumed. Indeed, in such circumstances intention is not an issue. Where the facts with regard to possession are equivocal, and especially where the lands in question would not in normal circumstances be in continuous use, the subjective intention of the possessor may be a relevant factor in establishing the existence of a possessory estate;

e) The analysis which can be employed for the purpose of establishing whether or not a possessory estate would exist at common law is useful for the parallel purpose of establishing whether or not a suit to recover the land could (and therefore should) have been brought under the *Limitations Act*;

f) At common law a person in possession of land with the permission of the true owner did not run a possessory period. Similarly, except for the specific instances of tenancies and tenancies-at-will set out in the *Limitations Act*, the fact that a person is in possession without the authorization of the paper title holder is a necessary element in the establishment of a right to bring an action to recover the land and, therefore, a necessary element in the running of a limitations period. For the purposes of the law of Ontario, this is the entire extent of the "adversity" doctrine insofar as the rights and interests of the holder of paper title are concerned.

V. CONCLUSION

As was indicated at the outset, cases dealing with possessory title arise with surprising frequency. What is even more surprising is that they have in recent years become more, rather than less, confusing in their approaches to the problem. These inconsistencies appear to have arisen through insufficient attention to the historical foundations of the doctrine of possessory estates and the manner in which the *Limitations Act* is intended to affect that doctrine. Some of the more recent decisions create a danger that the overall purpose of the *Limitations Act*, which is to reduce areas in which disputes can be prosecuted, may be thwarted by the adoption of a set of rules which will promote, rather than diminish, litigation. It is in the light of these considerations that the decision in *Beaudoin v. Aubin* has provided a welcome restatement

of some long established doctrines and the decision in *Masidon v. Ham* has, rather disappointingly, created new complications.

