1989

Possession and Title to Land in English Law

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Source Publication:
Common Law Aboriginal Title (Oxford: Clarendon Press, 1989)

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In order to determine whether English law would bestow title on indigenous people who were in occupation of lands in a territory at the time it was annexed to the Crown's dominions by settlement, we need to have a clear understanding, first, of the English law relationship between possession and title, and, secondly, of the position of the Crown with respect to lands held by subjects within the realm. The second issue, which involves a discussion of the doctrine of tenures, is the subject of the next chapter. We shall therefore leave it aside while examining the connection between possession and title. For our purposes, the basic question is this: Does a mere possessor of land, i.e. a person whose possession is not known to have commenced with or to be supported by right, or is known to be wrongful, have a title in English law? In other words, does either unexplained or wrongful possession of itself entail or give rise to a title, and if so, in what circumstances and against whom?

In this context, the word 'possession' is used in a broad sense to express a conclusion of law arising from a sufficiently close physical relationship between a person and a parcel of land, due to his presence on or control over it, either personally or through a servant, agent, or the like, coupled in most cases with an intention to hold it for his own purposes.[1] Thus, 'possession'

[1] This definition is not intended to be exhaustive. As is well known, the legal concept of possession is elusive, and defies precise description: see gen. Holmes, *Common Law*, 206–46; Pollock and Wright, *Possession*, esp. 1–42; Lightwood, *Possession of Land*, 1–27; Harris, 'Concept of Possession', in Guest, *Oxford Essays*, 69, esp. 69–80; Tay, 'Concept of Possession', 4 *MULR* 476, and Harris's 'Comment', ibid. 498; Lawson, 'Excursus', in Buckland and McNair, *Roman Law*[2], 71; *Salmond on Jurisprudence*[12], 265–97. Kocourek (*Jural Relations*[2], 361–423) argued convincingly that the idea of possession as a continuing legal fact is meaningless; instead, an initial act simply creates a right of possessing which continues until terminated by some other act. At p. 413 he wrote that it is 'artificial and unnecessary' to construct an idea of possession as the substrate of this right. See also Hart, 'Definition and Theory', 70 *LQR* 37, at 44 n. 9. Be that as it may, judges often speak of possession as though it were a continuing condition, underlying and distinct from a right of possessing, with the result that many cases are difficult to analyse on any other basis. Furthermore, it is sometimes necessary to determine whether a person is (or was) in possession without reference to the manner in which the alleged possession was obtained. Under the old forms of action, for example, a demandant on a writ of right relied on his own or an ancestor's possession without explaining how it had been acquired: see text acc. nn. 78–9 below. Even today, a defendant in an action for the recovery of land who relies simply on his own possession does not have to say how he got it.

here refers to what some writers call 'possession in law' (legal or civil possession), rather than 'possession in fact' (actual or natural possession). The latter, which involves determining who is physically present on or in control of land without concluding to whom the law would accord possession, is referred to as 'occupation'. Because the person occupying land may be acting on behalf of another, he is not necessarily in possession himself; but in the absence of evidence that he is so acting, possession is commonly attributed to him.[2] Accord-

[2] Copyhold lands, which do not concern us here, were exceptional, for though the copyholder occupied them for his own purposes, in law his 'possession' was the possession of the lord of the manor: see Williams, *Seisin*, 35, 126 (note, however, that the copyholder could bring trespass, even against the lord: see *Lewis* v. *Branthwaite* (1831) 2 B. & Ad. 437). There was, and probably still is, a further exception respecting Crown lands because, due to the rule (to be discussed in ch. 3 below) that the Crown cannot be dispossessed, an intruder who occupied such lands would not technically be in possession. At one time he was even denied trespass against subsequent intruders: see *Paramour* v. *Yardley* (1579) 2 Plow. 539, at 546 n.; *Plow. Quaeries*, 68, s. 373; *Anon.* (1588) 4 Leon. 184. This strict rule was later relaxed (perhaps for political reasons): see *Johnson* v. *Barret* (1646) Aleyn 10; *Harper* v. *Charlesworth* (1825) 4 B. & C. 574; *Corp. of Hastings* v. *Ivall* (1874) LR 19 Eq. 558; *Fowley Marine* v. *Gafford* [1968] 2 WLR 842. Cf. *Graham* v. *Peat* (1801) 1 East 244, at 245; *Waugh* v. *Sheehy* (1888) 7 NZLR 81; *Pearce* v. *Boulton* (1902) 21 NZLR 464, at 481–2. However, it has been held, in Canada at least, that an intruder could bring trespass only if his occupation was with the privity or consent of the Crown: see *Juson* v. *Reynolds* (1873) 34 UCQB 174, at 200; *Bruyea* v. *Rose* (1890) 19 OR 433, at 436–8; *Marchischuk* v. *Lee* [1954] 2 DLR 484, at 493–4; *Georgian Cottagers' Assoc.* v. *Corp. of Flos & Kerr* (1962) 32 DLR (2d) 547, at 563–7; cf. *McConaghy* v. *Denmark* (1880) 4 SCR 609, at 638–9. See also n. 10 below.

ingly, a person who is in unexplained or wrongful occupation is, in most cases, a possessor.

In English land law, possession may be either leasehold or freehold, depending on the nature of the estate the possessor holds. Possession of either sort appears to have been called 'seisin' in the early days of the common law, but by the fifteenth century this term had come to be reserved for freehold possession, while the word 'possession' itself, when applied to land, generally took on the narrow meaning of leasehold possession.[3] After the legislative reforms of the 1830s, however, the term 'seisin' gradually gave way to 'possession', which is now commonly used in the broad sense in which we have defined the term. The last change, however, was terminological rather than substantive: the concept of seisin, or freehold possession, still exists, and is distinct from leasehold possession, though the word 'possession' is now used for either.[4] Although possession is exclusive in that two or more persons claiming adversely to one another cannot possess the same land

[3] See Littleton, *Tenures*, s. 324; Williams, *Seisin*, 4–5; Pollock and Maitland, *History of English Law*[2] (hereinafter P. & M.), II. 36–7, 110. Though 'seisin', or rather 'to be seised', may at one time have referred to being put in possession by a feudal lord (see Milsom, *Legal Framework*, 24, 39–41, 184–5, and *Historical Foundations*[2], 119–22; cf. Hackney's review of the latter, 5 *J. of LH* 79, at 83), it is generally accepted, despite Lord Mansfield's attempt to reconnect seisin with feudal investiture in *Taylor d. Atkyns* v. *Horde* (1757) 1 Burr. 60, at 107, that by the 13th cent. at least it simply meant possession: see Coke, *Commentary upon Littleton*[19] (hereinafter *Co. Litt.*), 153[a]; Maitland, 'Seisin of Chattels', 1 *LQR* 324, and 'Mystery of Seisin', 2 *LQR* 481; P. & M. II. 29–35; Holdsworth, *History of English Law* (hereinafter *HEL*), III[5]. 88, VII[2]. 43–4; Simpson, *History of Land Law*[2], 40–1. Joüon des Longrais's definition of seisin, in *La Conception anglaise de la saisine*, 45 ('une jouissance toute pénétrée d'éléments de droit, elle se fond avec le droit, sous toutes ses formes, et ne s'en distingue pas dans sa nature'), though adopted by Plucknett (*Concise History*[5], 358) was later admitted by its author to be inapplicable to medieval England, at least from the time of Henry II: see 'Henry II and His Justiciars', esp. 4–5. The tendency to confuse seisin with title which arose later, especially in the 19th cent., was probably due to a failure by some to understand the term rather than to a change in its legal meaning: see *Leach* v. *Jay* (1878) 9 Ch. D. 42; cf. Sweet, 'Seisin', 12 *LQR* 239.

[4] See Hargreaves, 'Terminology and Title in Ejectment' (1940) 56 *LQR* 376 (hereinafter Hargreaves, 56 *LQR*); cf. Sweet, loc. cit.; Bordwell, 'Seisin and Disseisin', 34 *Harv. LR* 592, esp. 603–4. See also n. 293 below.

at the same time,[5] one person can be seised for a freehold estate while another is in leasehold possession.[6] Due to the doctrine of estates, possession may be 'split' in this way because the respective interests of freeholder and leaseholder do not conflict: the possession of each is on a separate plane and has different consequences. This division of possession, while rich in possibility, presents conceptual difficulties which may be partly responsible for the unfortunate confusion of seisin with title in the minds of some. However, difficulties of this sort do not arise in the absence of a leaseholder, for possession is then undivided: the seisin of the freeholder is possession in the broad sense of the term.[7]

Since our discussion involves mere possessors—persons whose possession is either unexplained or known to be wrongful—we shall not be concerned with leaseholders and the problems of divided possession. One who enters land pursuant to a lease obviously is not a mere possessor. Nor can a mere possessor (with one or two exceptions mentioned below) be a leaseholder. If his presence on or control over the land is unexplained, the law presumes him to be seised rather than in leasehold possession, because possession is prima-facie evidence of seisin.[8] If, on the other hand, he is in wrongful possession, he is almost invariably seised, for whether he dispossessed a freeholder or leaseholder, he would have acquired seisin in fee simple.[9] There is, however, an exception to this last rule where the dispossessed person was a lessee for years of the Crown.

[5] See ch. 7 nn. 67–8 and text below.

[6] Technically, the possession of a leaseholder *is* the possession (i.e. the seisin) of the freeholder: *Sec. of State for India* v. *Krishnamoni* (1902) LR 29 IA 104, at 114; *Parks* v. *Hegan* [1903] 2 Ir. R. 643, at 647.

[7] See P. & M. II. 110.

[8] *Peaceable d. Uncle* v. *Watson* (1811) 4 Taunt. 16, at 17; *Doe d. Hall* v. *Penfold* (1838) 8 Car. & P. 536, at 537; *Doe d. Carter* v. *Barnard* (1849) 13 QB 945, at 953; *Doe d. Devine* v. *Wilson* (1855) 10 Moo. PC 502, at 523–4; *Asher* v. *Whitlock* (1865) LR 1 QB 1, at 6. Though these authorities state that possession is prima-facie evidence of seisin in fee simple, this is a double presumption because at common law the fee simple aspect could be rebutted without destroying the seisin, e.g. if shown the possessor was seised for a life estate rather than the fee: see P. & M. II. 58; Hargreaves, 56 *LQR* 382 n. 24; *Doe d. Carr* v. *Billyard* (1828) 3 M. & Ry. 111.

[9] See *Elvis* v. *Archbishop of York* (1619) Hob. 315, at 323; *Wheeler* v. *Baldwin* (1934) 52 CLR 609, at 632; and auth. in n. 12 below.

Since the Crown cannot be disseised, a wrongdoer who ousts the Crown's lessee acquires leasehold possession rather than seisin.[10] It has also been suggested that a wrongdoer who ousts a lessee whose landlord is not the Crown can acquire the term by specifically claiming it rather than the freehold,[11] and thus obtain leasehold possession rather than seisin, but on the existence of this exception the authorities are divided.[12]

Before discussing whether a mere possessor has a title, we also need some idea of what 'title' means in the context of English land law. Though employed in various ways,[13] it is generally used to describe either the manner in which a right to real property is acquired, or the right itself.[14] In the first sense, it refers to the conditions necessary to acquire a valid claim to land; in the second, it refers to the legal consequences of such conditions.[15] These two senses are not only interrelated, but inseparable: given the requisite conditions, the legal consequences or rights follow as of course; given the rights, conditions necessary for the creation of those rights must have been satisfied. Thus, when the word 'title' is used in one sense, the other sense is necessarily implied. For this reason, the term may be taken to refer equally and concurrently to conditions and consequences, both of which are aspects of it, the one causal, the other resultant. While one aspect may predominate in any particular context, the point is that the other aspect is inevitably present as well. Accordingly, it is in this dual sense that the term will be used here. When necessary to distinguish between these two aspects of title, the former will be referred to as 'entitling conditions' and the latter simply as 'rights'.

While most titles are derivative in that they come from

[10] *Anon.* (1582) 3 Leon. 206; *Lee* v. *Norris* (1594) Cro. Eliz. 331; *Thurston's Case* (1594) Owen 16; cf. *Wyngate* v. *Marke* (1592) Cro. Eliz. 275. Though statutes have been enacted permitting adverse possession against the Crown, as we shall see in ch. 3 it is unlikely that the rule that the Crown cannot be disseised was thereby changed.

[11] See *Co. Litt.* 271[a], Butler's n. 1; Preston, *Conveyancing*, II. 314–23.

[12] Compare *Mayor of Norwich* v. *Johnson* (1681) 3 Lev. 35, upon which Butler and Preston relied, with *Leigh* v. *Hudson* (1565) 2 Dyer 238[b], *Thurston's Case* (1594) Owen 16, and *Helyar's Case* (1599) 6 Co. R. 24[b].

[13] See Rudden, 'Terminology of Title', 80 *LQR* 63, at 65.

[14] See Sweet, *Dictionary of English Law*, 'Title', 1. 1; *Co. Litt.* 345[b].

[15] See Honoré, 'Ownership', in Guest, *Oxford Essays*, 107, at 134.

another, the predecessor in title, it is evident that the chain must start somewhere, that there must be an original title, which in some cases will also be the first, to any presently-owned piece of property.[16] The principal mode of acquiring title to property that belongs to no one is occupancy, i.e. the taking of actual possession.[17] In English law, this method of acquisition applies mainly to chattels. Thus, given that he is not a trespasser, a person who kills or captures a wild animal, provided it is not a whale, sturgeon, or swan, which belong to the Crown by prerogative when found within the realm, acquires an original title.[18] The same rule applies to inanimate things, such as rain-water collected in a cistern. The entitling conditions are the fact that the chattel was previously unowned and unoccupied, and the act of taking; the rights, which generally include the right to use, consume, or alienate the chattel, are collectively known as the right of property.

With respect to land, acquisition of title by occupancy is severely restricted by the English law fiction (to be examined in Chapter 3) that all lands in the realm were originally possessed, and accordingly owned, by the Crown.[19] Due to this fiction, subjects have been excluded by law from acquiring first title to real property in England. After some hesitation, however, the common law did recognize the acquisition of an original title by taking in one instance where the freehold in land previously held by another was in abeyance. This happened when a

[16] See Holmes, *Common Law*, 245.

[17] Blackstone, *Commentaries* (16th edn., unless stated otherwise, marginal page nos.), II. 3–9; cf. Maine, *Ancient Law* (1930 edn.), 273–80, and Pollock's n. O at 324–5.

[18] See *Sutton* v. *Moody* (1697) 1 Ld. Raym. 250; *Blades* v. *Higgs* (1865) 11 HLC 621; *Crossley Vaines' Personal Property*[5], 427–9; 8 & 35 *Halsbury's Laws*[4], par. 1519–20, 1136, resp.

[19] In this context the Crown has been referred to as 'universal occupant': see *Bacon's Abr.*, 'Prerogative', B. 1; *The King* v. *Steel* (1834) 1 Legge 65, at 66; *Mitchel* v. *US* (1835) 9 Pet. 711, at 748; *A.-G.* v. *Brown* (1847) 1 Legge 312, at 318; *Doe d. Wilson* v. *Terry* (1849) 1 Legge 505, at 509. This can be misleading, if taken to mean the Crown is entitled to all lands to which no one else can show title. That view, though sometimes encountered (e.g. see *Williams* v. *A.-G. for New South Wales* (1913) 16 CLR 404, at 439), was authoritatively rejected in *Bristow* v. *Cormican* (1878) 3 App. Cas. 641, esp. 667; see also *Johnston* v. *O'Neill* [1911] AC 552, and further discussion in ch. 3 below.

tenant *pur autre vie* died during the life of the *cestui que vie*. Since the *pur autre vie* estate continued after the tenant's death, and no one in particular had a right to it, it fell vacant and could be acquired by the first person to enter, who was called a 'general occupant'.[20] If someone was already in occupation when the tenant died, either lawfully, as a tenant for years or at will, or unlawfully, as a disseisor, the law in most cases made that person the occupant, whether he claimed the *pur autre vie* estate or not.[21] Although the occupant was not the first to own the estate, his title to it was original because it arose directly from his entry and occupation, rather than being derived from the

[20] See *Co. Litt.* 41^b; Blackstone, *Commentaries*, II. 259–60; P. & M. II. 81. General occupancy appears to go back to at least the 15th cent.: see Simpson, *History of Land Law*^{2}, 92 n. 33. It was, however, largely abolished by statute long ago: see Blackstone, loc. cit.; Holdsworth, *Historical Introduction*, 63. Note too that it would have been prevented if the *pur autre vie* estate had been given to the grantee *and* his heirs, in which case the heir would have been a 'special occupant': *Co. Litt.* 41^b; Challis, *Real Property*, 287–9. Furthermore, no one could enter as general occupant if the reversion (or, it would seem, the remainder) was in the Crown: *Anon.* (1584) Sav. 62; *Co. Litt.* 41^b; *Bacon's Abr.*, 'Estate for Life and Occupancy', B. 1, 'Prerogative', E. 3, 6; Blackstone, op. cit. II. 259 (cf. 21st edn., 259, Sweet's n. 1). Though the reasons given by these authorities vary somewhat, there is general agreement that the maxim *nullum tempus occurrit regi* applies. Whereas an ordinary reversioner would have had to enter to merge the *pur autre vie* estate with his own, in the case of the Crown this apparently happened the moment the tenant died because no one could anticipate the Crown's entry by entering first. Why, then, did the Crown not acquire the *pur autre vie* estate in every case? The answer, perhaps, is that this would have interfered with the rights of the reversioner (or remainderman), for due to the rule that the Crown could not be a tenant (*Co. Litt.* 1^b; *Bacon's Abr.*, 'Prerogative', E. 1), the reversioner's rights *as lord* would have been suspended for the duration of the estate: see *Rolle's Abr.* II. 513–14; *Bacon's Abr.*, 'Tenure', C. As we shall see in chs. 3 and 5, the law will not deem the Crown to be in possession to the detriment of a subject, for, as a general rule, 'the act of the law doth no man wrong': *Geary* v. *Bearcroft* (1666) Cart. 57, at 62; and see *Sheffeild* v. *Ratcliffe* (1624) 2 Rolle 501, at 502; *Bacon's Abr.*, 'Estate for Life and Occupancy', B. 2. But where there was no mesne lord, the law could safely avoid an abeyance of seisin by attributing possession to the Crown.

[21] *Chamberlain* v. *Ewer* (1612) 2 Bulstr. 11; *Skelliton* v. *Hay* (1618) Cro. Jac. 554; *Geary* v. *Bearcroft* (1666) Cart. 57, aff'd sub nom. *Bearcroft* v. *Geery* (1667) 2 Keb. 285, sub nom. *Geary* v. *Barecroft* (1667) 1 Sid. 346; *Holden* v. *Smallbrooke* (1668) Vaug. 187; cf. *Rushton's Case* (1590) 2 Leon. 121.

former tenant.[22] The situation is analogous to that of a wild animal which is captured, sold, and later escapes and returns to the wild: anyone who captures it thereafter has an original title, just as if it had never been previously owned.[23] In the case of the vacant *pur autre vie* estate, because it was unowned, the entry and occupation were entitling conditions which created a right of property, valid against everyone else for as long as the *cestui que vie*, or the occupant, or his alienee, continued to live.[24] As a general rule, then, the taker or occupier of unowned property, whether personal or real, has a title as against all the world.[25] This title (and any title derived from it) may be described as proprietary, in the sense that there is no better.

Since it is a precondition of occupancy that the thing involved be unowned, this method of acquiring a proprietary title is of limited application. One can none the less acquire a relative or lesser title to the property of another in some instances by taking possession of it. At common law, the finder of a lost chattel acquires a title in this manner, which enables him to retain the chattel against, or if deprived of it, recover it

[22] '[H]is title is by his first occupation' (*Co. Litt.* 41^b). See also Sweet, *Dictionary of English Law*, 'Title', I. 2; Bordwell, 'Disseisin and Adverse Possession', 33 *Yale LJ* 1, 141, 285, at 290; cf. Goebel, *Falkland Islands*, 103.

[23] Equally, title to a chattel which has been absolutely abandoned by its owner, if that is permissible, may be acquired by occupancy: see Hudson, 'Divesting Abandonment', 100 *LQR* 110.

[24] Accordingly, the occupant could recover the land if taken from him: see *Skelliton* v. *Hay* (1618) Cro. Jac. 554. In an action he would have had to claim by a *que estate*, and aver the *cestui que vie*'s life: *Co. Litt.* 41^b.

[25] See *Holden* v. *Smallbrooke* (1668) Vaug. 187, at 188–91; Blackstone, *Commentaries*, II. 258, 400–1; *Salmond on Jurisprudence*^{12}, 433–4. The same rule, apparently derived from Roman sources, appears in Bracton: Thorne, *Bracton*, II. 42–3. See also Nichols, *Britton*, I. 214. Though Bracton was careful to exclude property which belonged to the Crown by prerogative, this does not detract from the generality of the rule, for obviously such property would not be unowned. Furthermore, since the Crown's original title to lands was itself due to fictional possession, in the eyes of the law occupancy was probably the source of first title to all lands in the realm: see n. 19 and text, above. In *The 'Fama'* (1804) 5 C. Rob. 106, at 114, Sir W. Scott stated as a general proposition that 'all corporeal property depends very much upon occupancy. With respect to the origin of property, this is the sole foundation, *Quod nullius est ratione naturali occupanti id conceditur*.'

or its value from, all but the rightful owner.[26] However, a 'finder's title' is not acquired by a trespasser, or one who has a dishonest intention to keep a found chattel in violation of the true owner's rights.[27] But a dishonest finder or taker does have a title of sorts, which, because entailed by his possession rather than arising from his taking, may be described as strictly possessory. Though frailer than that of an innocent finder, this title will allow him to defend his possession of the chattel against, and recover it or its value from, subsequent wrongdoers and those claiming through them.[28] It will not, however, enable him to recover if the chattel is taken from him by force of law by one who, though lacking a title himself, is not a wrongdoer, for the title of a dishonest finder or taker depends on possession, and once that is lawfully divested, he has no further right.[29]

Unlike chattels, land cannot be lost. One cannot acquire the equivalent of a finder's title because entering and taking possession of land without right to do so is a wrong to the person who is thereby deprived of possession. According to the old terminology, a wrongdoer who enters upon land left vacant by the death of a freehold tenant is either an abator or an intruder, depending on whether the person wronged is entitled

[26] *Armory* v. *Delamirie* (1722) 1 Str. 505. See also *Sutton* v. *Buck* (1810) 2 Taunt. 302; *Bourne* v. *Fosbrooke* (1865) 18 CB (NS) 515; *The Winkfield* [1902] P. 42, esp. 54–6; *Eastern Construction* v. *National Trust* [1914] AC 197, esp. 209–11. However, note that the *Torts (Interference with Goods) Act*, 1977, c. 32, s. 8, probably modified this common law rule by allowing a third-party right to be used as a defence in this situation: see *Salmond and Heuston on Torts*[18], 104.

[27] *Parker* v. *British Airways* [1982] QB 1004, at 1009–10, 1017; and see *Hibbert* v. *McKiernan* [1948] 2 KB 142, esp. 151. Equally, one who kills game while trespassing does not acquire a title to it; for, as a general rule, one cannot acquire a right of property by a wrongful act: see *Blades* v. *Higgs* (1865). 11 HLC 621, esp. 632, 641.

[28] *Parker* v. *British Airways* [1982] QB 1004, at 1010; *Bird* v. *Fort Frances* [1949] 2 DLR 791. However, where the statute cited in n. 26 above applies, proof of a third-party right would now be a defence (in *Parker* no third-party right was shown).

[29] *Buckley* v. *Gross* (1863) 3 B. & S. 566; Pollock and Wright, *Possession*, 91–2, 99–100, 147–8. See also *The Queen* v. *Lushington* [1894] 1 QB 420; *Irving* v. *National Provincial Bank* [1962] 2 QB 73; *Raymond Lyons* v. *Metropolitan Police Commissioner* [1975] QB 321. It seems to follow that a dishonest finder who in turn loses the chattel cannot recover from a subsequent finder; but an innocent finder can, at least in the United States: see *Clark* v. *Maloney* (1840) 3 Har. Del. R. 68; Holmes, *Common Law*, 237; cf. Atiyah, 'Re-examination of *Jus Tertii*', 18 *MLR* 97, esp. 102–5, 107.

as heir or devisee, or as reversioner or remainderman.[30] If the wrongdoer enters and ousts a freehold tenant, he is a disseisor; if he ousts a leaseholder, then *vis-à-vis* the lessee he is an ejector.[31] Because his entry is unlawful, he is in by wrong rather than by title.[32] Consequently, his taking is not an entitling condition, and cannot result in a right of property. Like one who finds or takes a chattel with a dishonest intent or while trespassing, one who takes land by wrong does not *thereby* acquire a title. His possession is therefore a '*mere naked possession*, unsupported by any right'.[33] However, because he has possession, English law accords him an interest in the land, in most cases an estate in fee simple.[34] Though tortious and defeasible, this estate has a bundle of rights attached to it, such as the right to sell or devise the interest,[35] or to claim compensation if the lands are expropriated by the Crown.[36] Furthermore, because because the law protects possession for its own sake, a wrongful possessor will be able to defend his possession against trespassers and adverse claimants who have no better right.[37] His

[30] *Co. Litt.* 277[a]; Blackstone, *Commentaries*, III. 167–9.

[31] See Blackstone, op. cit. III. 169–70, 199. In most cases an ejector would also be a disseisor; for though he ousted a leaseholder, he would have acquired seisin: see auth. in n. 9 above; for exceptions see text acc. nn. 10–12 above.

[32] *Co. Litt.* 268[a]; *Leach* v. *Jay* (1878) 9 Ch. D. 42.

[33] *Co. Litt.* 239[a], Butler's n. 1; and see ibid. 266[a], Butler's n. 1, 275[b], Butler's n. 1. See also Blackstone, *Commentaries*, II. 195–6.

[34] See *Co. Litt.* 274[a]; Preston, *Abstracts*[2], 293, 390; Williams, *Seisin*, 7–8; *Wheeler* v. *Baldwin* (1934) 52 CLR 609, at 631–3. But if he ousted a tenant of the Crown, he has whatever estate the tenant had: see Co. Litt. 239[a], 276[a], and auth. in n. 10 above.

[35] See *Asher* v. *Whitlock* (1865) LR 1 QB 1; *Ex parte Winder* (1877) 6 Ch. D. 696; *Rosenberg* v. *Cook* (1881) 8 QBD 162; *Mussammat Sundar* v. *Mussammat Parbati* (1889) LR 16 IA 186; *Calder* v. *Alexander* (1900) 16 TLR 294. Similarly, at common law his interest would descend to his heir if he died seised: *Doe d. Pritchard* v. *Jauncey* (1837) 8 Car. & P. 99. See also Maitland, 'Mystery of Seisin', 2 *LQR* 481, at 488.

[36] See *Perry* v. *Clissold* [1907] AC 73, discussed in n. 121 below. See also Wiren, 'Plea of *Ius Tertii*', 41 *LQR* 139, at 159–61.

[37] See *The King* v. *Bishop of Worcester* (1669) Vaug. 53, at 58, 60; *Graham* v. *Peat* (1801) 1 East 244; *Catteris* v. *Cowper* (1812) 4 Taunt. 547; *Asher* v. *Whitlock* (1865) LR 1 QB 1; *Corp. of Hastings* v. *Ivall* (1874) LR 19 Eq. 558; *Bristow* v. *Cormican* (1878) 3 App. Cas. 641, at 651, 657, 660; *Nicholls* v. *Ely Beet Sugar* [1931] 2 Ch. 84. For this reason, a plaintiff in an action of ejectment can recover only on the strength of his own title: see auth. in n. 149 below.

possession, like that of a dishonest finder or taker of a chattel, thus entails a frail possessory title, which we shall call 'the title that goes with possession'.[38] However, since this title depends on and is contemporaneous with possession, it cannot survive the loss of possession. A wrongdoer who is lawfully deprived of possession, e.g. by the entry of the person wronged, or pursuant to a court order, whether justifiably made or not, loses both his estate and his title.[39] Thereafter, he has no further interest in the land, and no right to recover possession. If, on the other hand, he is ousted by a second wrongdoer, this wrong to his possession creates a right to recover possession, exercisable by entry or action against the second and any subsequent wrongdoer, and those claiming through them.[40] The ousted party thus has a title, which some might refer to as possessory, but which we are going to call a 'title by being wrongfully dispossessed', for two reasons: first, to distinguish it from the title that goes with possession, which he had *before* being ousted and which is now in the person who ousted him; and secondly, to emphasize that the entitling conditions upon which it depends are prior possession *and* wrongful ouster. Failure to keep the above distinction clearly in mind, and to realize that wrongful ouster is a distinct entitling condition which must be satisfied before a wrongful possessor can be said to have a right to recover lost possession (in an action of ejectment, if not in a writ of right), have been responsible for a lot of confusion in this area of English law.[41]

These introductory remarks raise a number of vital, and no doubt controversial issues, particularly in relation to the various forms of action by which a claim to recover possession

[38] Were this not so, a 'free-for-all' might result, as Donaldson LJ remarked (respecting chattels) in *Parker* v. *British Airways* [1982] QB 1004, at 1010.

[39] See *Groom* v. *Blake* (1857) 6 Ir. CLR 400, (1858) 8 Ir. CLR 428, discussed below in text acc. nn. 249–59; *Co. Litt.* 239ª, Butler's n. 1; Blackstone, *Commentaries*, II. 196, III. 177; Pollock and Wright, *Possession*, 91–2, 99.

[40] See auth. in nn. 50, 169–71 below. This, of course, is in absence of a release destroying the first wrongdoer's right: see Littleton, *Tenures*, s. 473.

[41] This confusion is partly due to loose terminology, as others have pointed out: see Hargreaves, 56 *LQR* 397–8; Simpson, *History of Land Law*², 289. The need for precise language justifies our invention of new terms for the purposes of this discussion.

of land could be made at common law. They also assume that all the facts are known, ignoring questions of presumption and burden of proof. The remainder of this chapter is devoted to an examination of these complex matters from a historical perspective.

1. The Old Real Actions

The relationship between possession and title in English law cannot be adequately understood without examining the old real actions. Though gradually displaced by the more expedient action of ejectment, these proceedings were available until 1834–5 when, with the exception of writs of dower and *quare impedit*, they were abolished by statute.[42] Our discussion will be limited to the most important of these actions: the assizes of novel disseisin and mort d'ancestor, the writs of entry, and, more particularly, the writ of right, starting with the analysis of Bracton.[43]

In his celebrated treatise *On the Laws and Customs of England*[44] Bracton divided the real actions into possessory and proprietary.[45] The issue in the former was limited to the right to

[42] *Real Property Limitation Act*, 3 & 4 Will. IV, c. 27, ss. 26–7.

[43] Due to time restraints and to the secondary importance of the early law to our main theme, which relates to the post-1600 colonial period, Bracton is relied upon here as the principal source for the law of medieval England. However, Glanvill and Britton, and some of the major abridgements and digests—Fitzherbert, Brooke, Rolle, Viner, Bacon, and Comyns—have also been consulted, as have any relevant cases found summarized therein, without anything additional to the authorities referred to in the following notes having been discovered. The obvious explanation for the absence of cases relating to the question concerning us most—whether a writ of right could be successfully brought by a wrongful possessor who had lost seisin—is that someone in that position would almost invariably have proceeded by novel disseisin or a writ of entry.

[44] Thorne's translation, hereinafter *Bracton*. Though commonly thought to have been written between 1240 and 1256, Thorne suggested that parts may have been written earlier, possibly by Bracton's mentor William of Ralegh: see Translator's Introduction to *Bracton*, III, pp. xiii–lii. Be that as it may, for simplicity's sake we shall refer to the treatise as though it had been written by Bracton in its entirety. The problem of additions is ignored here as well, except in quotations, where they are designated as *addiciones* (whether Bracton's or not is often unknown: see Plucknett, *Legal Literature*, 63–5). Note too that in quotations Thorne's footnotes are omitted.

[45] *Bracton*, II. 296–7.

possession, whereas in the latter both the possessory and proprietary rights were determined.[46] Though the distinction Bracton made between these two sorts of right is difficult to discern, if we ignore the quasi-proprietary writs of entry for the moment, it seems to have amounted to something like this: the proprietary right known as 'mere right' involved a fee based on seisin which had been 'of right' and exploited by the taking of esplees (fruits or profits),[47] whereas possessory rights involved either (1) a fee based on seisin which need not have been 'of right' or exploited, or (2) some interest less than a fee, such as a free tenement (the life estate of later law).[48] However, this broad differentiation leaves much unanswered, in particular the fundamental question of what was meant by 'of right'. Unless we can answer this, Bracton's distinction between proprietary and possessory rights is likely to elude us. The solution, if it is to be found at all, must be sought in the actions themselves.

(a) The Assize of Novel Disseisin

In an assize of novel disseisin, the question put to the jurors was whether the defendant had wrongfully (*injuste*) and without judgment disseised the plaintiff of his free tenement in a named vill since some recent date.[49] The manner in which the plaintiff had acquired seisin was irrelevant, as long as it appeared that the defendant had ousted him without right to do so. Prior seisin, though wrongful, thus sufficed to recover in an assize against a stranger who had ousted the plaintiff, because 'everyone who is in possession, though he has no right, has a greater right [than] one who is out of possession and has no

[46] Ibid. II. 320, III. 282, 312, IV. 47. But note that it was sometimes necessary to take cognizance of, without giving judgment upon, the proprietary right in a possessory action: ibid. II. 321.

[47] See Rastell, *Termes of the Lawes*, 'Esplees'; P. & M. II. 34.

[48] See *Bracton*, II. 24, III. 13, 325–6, IV. 43–5, 170. Bracton's exclusion of free tenements from the proprietary category may have been due to a failure to grasp the implications of the '"fragmentation" of ownership' caused by the then still emerging doctrine of estates: see Simpson, *History of Land Law*[2], 66.

[49] *Bracton*, III. 72; P. & M. II. 48. Note that the assize could be brought by any disseisee, for anyone seised as of fee apparently had the free tenement.

right.'[50] Where, however, the plaintiff had been ousted by a defendant who had a better right, the assize would not have lain if it appeared that the defendant had a right of entry at the time. This depended on how long the plaintiff had been seised, for if he had come to the land by wrong, in most cases the person wronged was given a reasonable time, the length of which depended on the circumstances, to recover seisin by self-help.[51] If that person waited too long, whether by reason of acquiescence, negligence, or weakness, he lost his right of entry. Thereafter, to recover the land he would have had to bring an action. If he took the law into his own hands, and ousted the wrongdoer, he would have committed a wrong himself, for which the assize of novel disseisin would have lain against him.[52]

According to Bracton, then, the position of one who acquired seisin by disseisin or equivalent wrong was strengthened by the passage of time. At first his possession was naked, at least as against the person wronged, because unprotected by any vestment; it had only the barest minimum of possession and nothing at all—not the slightest spark—of right.[53] Because it was liable to be defeated at any moment by entry, Bracton described it as tenuous (*tenera*).[54] Furthermore, it did not give the wrongdoer a free tenement or the fee as against the person wronged, as long as the right of entry remained.[55] Accordingly, if that person exercised his right by ousting the wrongdoer in time, and an assize of novel disseisin was brought against him,

[50] *Bracton*, III. 134; and see 27, 30, 70, 98, 122. In other words, while seised the wrongful possessor would have had what we have called the title that goes with possession; if ousted by someone having no right of entry, he would then have a title by being wrongfully dispossessed: see text acc. nn. 37–41 above.

[51] On situations where a right to use self-help arose, and its duration, see Sutherland, *Novel Disseisin*, 97–118. But although Sutherland described as a myth the four-day rule referred to in *Bracton* (III. 22) and accepted by Maitland ('Beatitude of Seisin', 4 *LQR* 24, 286, at 29–34) there is some support elsewhere for this rule's early existence: see Thorne, Translator's Introduction to *Bracton*, III, p. xxxiii n. 14.

[52] *Bracton*, III. 21–5, 121, 133; P. & M. II. 49.

[53] *Bracton*, II. 122, III. 13.

[54] See ibid. II. 123.

[55] Ibid. 157. But as against those who had no right, a wrongful possessor had a 'quasi-free tenement' (ibid. III. 134–5).

he could have replied that the plaintiff had had only tenuous seisin and no free tenement. A stranger, on the other hand, who disseised the wrongdoer, could not have raised the exceptions of tenuous seisin and no free tenement, due to the advantage accorded to possessors and the odium attached to disseisin.[56]

Once the right of entry had been lost, however, the position of the wrongdoer improved substantially. Because he could no longer be ousted without judgment, his seisin lost its tenuous quality, and became firm and good.[57] Whereas before he had merely been 'in seisin', now he was seised, as against the person wronged as well as others.[58] Moreover, he now had a title (*titulo*)—which might be called a 'title by time', created by peaceful seisin for the time necessary to destroy the right of entry—as well as a free tenement and the fee.[59] Of course his seisin, title, free tenement, and fee would all have been defeasible, whether in an action on the possession or a proprietary action on the 'right', but otherwise he would have been as secure as one who had acquired seisin by lawful title.

(b) The Assize of Mort d'Ancestor

Like novel disseisin, the assize of mort d'ancestor determined only the possessory right; but instead of depending on the plaintiff's own seisin, it was brought on the seisin of his

[56] Ibid. III. 27; and see 70, 98, 122, 133–5.

[57] See ibid. II. 123, III. 27, 278.

[58] Ibid. III. 124–5. Apparently, 'in seisin' means in physical occupation, i.e. in actual or natural possession, whereas 'seised' refers to legal or civil possession: see also ibid. II. 122, III. 23. Note that Coke likened Bracton's 'civilem et naturalem possessionem' to later law's freehold (seisin) in law and freehold (seisin) in deed: *Co. Litt.* 266^{b}; see also P. & M. II. 50, and n. 275 and text below. Note too that even in modern law it seems possible to retain possession after losing occupation to a trespasser: see *Browne* v. *Dawson* (1840) 12 Ad. & E. 624, approved in *McPhail* v. *Persons Unknown* [1973] Ch. 447, at 456.

[59] See *Bracton*, II. 102, 123, 127, 142, 156–7, IV. 351. Cf. ibid. III. 133, 135, where Bracton referred to the interest acquired over time by a wrongdoer as a 'quasi-free tenement', perhaps to indicate that it could still be taken away by judgment. Note that a title by time could not be acquired by possession that was by licence (i.e. at will), or clandestine, or forcible: ibid. II. 157–8, III. 13, 163.

immediate ancestor, which it was designed to recover.[60] It was therefore essential for the seisin of the ancestor to have been as of fee,[61] since a free tenement could not be inherited. Furthermore, the ancestor must have died seised,[62] for if he had delivered seisin to another, such as a life tenant, his heir would have had to bring a writ of entry instead in the event that seisin was withheld from him at the conclusion of the life interest.[63] However, it was immaterial whether the ancestor had used the land or taken esplees.[64] Nor was it necessary for him to have come to the land by lawful title:

> It does not matter what sort of seisin the ancestor had, by disseisin or intrusion, by gift of a lord or a non-lord, provided he dies seised, so to speak, of a fee [*quasi de feodo*], as to which, if he were ejected while alive, he could recover his seisin by an assize of novel disseisin.[65]

Apparently, it would not have mattered either if the ancestor's seisin had been tenuous, as where it had been acquired by disseisin and the disseisee still had a right of entry when the ancestor died; for the descent would have taken away that right, and made it unlawful even for the disseisee to prevent the heir from taking seisin.[66] If an 'abator' (to use the terminology of later law) other than a rival heir[67] anticipated the heir by entering before him, then, whether his ancestor's seisin had been tenuous or not, mort d'ancestor would have lain against the wrongdoer.[68]

[60] Ibid. III. 245.

[61] Ibid. 270, 274.

[62] Ibid. 269–71, 277–8.

[63] Ibid. IV. 21.

[64] Ibid. III. 276.

[65] Ibid. 270; see also 245.

[66] See Sutherland, *Novel Disseisin*, 105, 160, 163.

[67] Against whom mort d'ancestor did not lie: *Bracton*, III. 282, 295.

[68] It could not be said that the seisin, because tenuous, had not been as of fee, for though not of fee as against the person wronged, it gave a quasi-free tenement, and a quasi-fee ('quasi de [*or* in] feodo': ibid. III. 270, IV. 351), as against those who had no right at all: see III. 134–5, and 275 where Bracton wrote that if those who enter without rightful title die in seisin, they die seised as of fee, the 'as' there being taken to mean 'as though' (*quasi*).

(c) The Writs of Entry

Writs of entry provided the means for recovering land in a variety of situations in which the possessory assizes did not lie, as where possession had been delivered to another for a term that had expired, or a tortious feoffment had been made. Apart from the writ of entry *sur disseisin* and a few others, Bracton regarded these writs as proprietary.[69] His reason for so classifying them appears to be that, unlike novel disseisin and mort d'ancestor, they were not based on a wrong to the plaintiff's own seisin or to his right to succeed to the seisin which his ancestor had when he died.[70] Either possession had been willingly given up by him or his ancestor, or someone who lawfully possessed had wrongfully transferred the lands to another. However, writs of entry were not proprietary in the same sense or to the same extent as the writ of right, for they did not decide the mere right, and accordingly did not preclude the parties from resorting to that final action.[71] Furthermore, writs of entry were available to tenants who held for life, whereas the writ of right lay only for a fee, which must have been exploited by the taking of esplees.[72] By calling writs of entry proprietary, Bracton may have meant that they involved rights which, though less than the mere right, were not possessory in the sense of having been created by a violation of possession or of a right to succeed to possession. Thus, when he wrote that those who hold for life, or 'in fee only, without the mere right, that is, without use and esplees . . . , though they have right, of some kind and to some degree, as the possessory right, may not claim the proprietary right nor bring it before the court, because they do not have it',[73] he may have been

[69] P. & M. II. 72.

[70] See *Bracton*, IV. 21.

[71] See P. & M. II. 72–5. Where a plaintiff on a writ of entry alleged seisin as of fee and of right with the taking of esplees, as well as an entry, the defendant had the option of contesting the entry or the right. If he chose the latter, the action was converted into a writ of right, so the mere right was determined. If he chose to deny the entry, the mere right was not in issue, and the action proceeded as a writ of entry. See *Bracton*, IV. 43–6.

[72] *Bracton*, IV. 43–5.

[73] Ibid. 45.

distinguishing the proprietary right known as mere right from lessor rights, which could be either proprietary or possessory.[74] If so, possessory and proprietary rights may both have been a matter of degree, possibly with no firm line between them.[75]

(d) The Writ of Right[76]

i. Bracton's Account The writ of right was the ultimate proceeding for claiming lands, the last resort in the heirarchy of actions that began with novel disseisin. Judgment on the writ of right was final, precluding further litigation on the dispute between the parties, regardless of whether the lesser actions had already been brought or not.[77] In it, the demandant (plaintiff) alleged in his count that the tenant (defendant) was wrongfully deforcing him of lands which were his right and inheritance, in that he, or one of his ancestors, had been seised in demesne as of fee and of right, in time of peace during the reign of a named king, having taken esplees of a stated value.[78] The demandant thus relied on prior seisin, without necessarily alleging that he had been wrongfully deprived of it.[79] Nor need

[74] See ibid. 44, where Bracton explained how 'one proprietary action [a writ of entry] is changed into another on the property [the writ of right]' (*addicio*). Cf. ibid. III. 13, where, in classifying possessions, he wrote that the possessions of a wrongdoer before acquiring a vestment through time, a tenant for years, and a life tenant, have 'nothing of right', whereas the possession of one having free tenement and fee has 'much of right', and that of one having free tenement, fee, and *proprietas* has a 'maximum . . . of right', though another may have greater right. See also ibid. II. 24–5, 122–3, IV. 350–1.

[75] See P. & M. II. 72–5; Sutherland, *Novel Disseisin*, 40–2.

[76] Following Bracton, we will discuss the writ of right generally, without distinguishing between the *praecipe quod reddat* and *breve de recto*, as this distinction is of little relevance to the issues considered here.

[77] *Bracton*, IV. 47; P. & M. II. 74–5.

[78] Turner (Introduction to *Brevia Placitata*, 66 SS, pp. lxxi–lxxiii, lxxxix) suggested that up to early in Henry III's reign, a demandant on a writ of right may have *had* to count on ancestral seisin. According to Bracton, however, a demandant could rely on his own seisin: *Bracton*, III. 325, IV. 43–5, 47; see also *Casus Placitorum*, 69 SS, 7, pl. 33. Depending on when *Bracton* was written (see n. 44 above), this may indicate a change in the law.

[79] The demandant could, however, allege disseisin, at least on a writ of right according to the custom of the manor: see *Novae Narrationes*, 80 SS, B277.

he have alleged an entry.[80] If he or his ancestor had been seised in demesne as of fee and of right, and had taken esplees, that sufficed to oblige the tenant to answer. This the tenant could do in two ways: first, by raising an exception by way of special plea, or secondly, by joining the mise (as the general issue was called) on the mere right, with or without details as to why he had greater right to hold than the demandant to demand.[81] If he chose the first course, the special issue would be tried by a common jury; if the second, he could elect to have the mise tried either by battle or the grand assize.

Whatever the form of trial on the mise, the demandant had to prove his allegations.[82] In battle, this was done by testing the oath of his champion, who was theoretically a witness, by combat. The champion swore that he or his father, who had commanded him on his deathbed to offer proof if required, had personal knowledge, through sight and hearing, of the facts relied on by the demandant.[83] Before the grand assize the demandant might produce documents, and even call 'witnesses', in support of his claim, and possibly the tenant would do the same.[84] The question which the grand assize would then have to decide was which party had the greater right to the disputed lands. In this context, right meant mere right—the proprietary right upon which the mise was joined. It did not, however, need to be absolute, in the sense of being good against all the world, for Bracton wrote that 'there may be several proprietary rights and several may have a greater right than

[80] Had he done so, the tenant could have elected to deny the entry, in which case the action would have proceeded as a writ of entry: *Bracton*, IV. 45.

[81] See P. & M. II. 63. For examples of pleas where details were given, see *Novae Narrationes*, 80 SS, B20–1, C15–16, C18B, C24–5, C27, C27A–C.

[82] *Bracton*, IV. 171, 246–7, 353.

[83] Ibid. 172; P. & M. II. 605–7. The statute 3 Ed. I, c. 41, did away with the part of the oath involving personal knowledge of the seisin of the demandant, as it was an open invitation to perjury: see Coke, *2nd Institutes*, 246–7; Booth, *Real Actions*, 100–1.

[84] See P. & M. II. 627–8. In later law, at least, the tenant was required to present his case first: see *Spyrtie* v. *Rede* (1566) 2 Dyer 247[b]; *Heidon* v. *Ibgrave* (1587) 3 Leon. 162; *Andrews* v. *Cromwell* (1605) Moo. KB 762; and n. 143 below. On the onus and manner of proving exceptions see *Bracton*, IV. 245, 248, 301–2.

others, according as they are earlier or later.'[85] In what sense, then, was the mere right proprietary?

To answer this question, we must go back to the demandant's count, and notice first of all that the seisin relied upon had to be 'as of fee'. The proprietary or mere right involved nothing less than the greatest interest a person could have in land.[86] Secondly, the seisin must have been 'of right'.[87] The reason for including these words appears to have been to put the proprietary right into question.[88] But what did they imply? Was the demandant necessarily alleging that the seisin had been lawfully acquired, as by descent or feoffment, or at least made rightful by release? If so, why not ask whether his predecessor's seisin had been of right, and so on back in time? To do that would have been out of the question in an age when rights to land often depended on the testimony of neighbours. Due, perhaps, to this problem of proof, the writ of right at one time limited the inquiry to the memory of two generations. The demandant's champion swore that he or his father had witnessed the seisin counted upon. According to Bracton, that was why the seisin had to be in the reign of a named king, for beyond a certain time one could not prove anything, since no one could speak 'of his own sight, or of the sight of a father who enjoined his son to be a witness if he should hear it disputed.'[89] But if no inquiry beyond the seisin counted upon was made, how was one to know if it had been of right?

The answer to this last question may lie in the requirement that the seisin be accompanied by the taking of esplees. When

[85] *Bracton*, IV. 351. See also ibid. II. 25, 103, III. 13; P. & M. II. 75.

[86] See nn. 72, 74 and text above.

[87] *Bracton*, IV. 169–70, referring to a claim on ancestral seisin; but a demandant who counted on his own seisin also included an allegation that it had been of right: ibid. III. 325–6, IV. 44–5; *Novae Narrationes*, 80 SS, B32C–D, B277.

[88] See *Bracton*, III. 325.

[89] Ibid. IV. 170–1; and see 175. Note, however, that the requirement that the seisin be in the reign of a named king may have been due to the original purpose of the writ, which some have suggested was to return the lands of those who had been disinherited during the troubled reign of Stephen: see Milsom, *Legal Framework*, 178–9, and *Historical Foundations*[2], 128–9; Palmer, 'Feudal Framework', 79 *Mich. LR* 1130, and 'Origins of Property', 3 *Law & Hist. R.* 1, esp. 8–13.

speaking of the mere right, Bracton often referred to the taking of esplees as well.[90] Apparently the two were closely linked, for he wrote that unlike the possessory right 'the proprietary right cannot exist without use and esplees'.[91] The reason why esplees were so important was that without them the seisin would have been tenuous, and '[o]n tenuous and momentary seisin, without use and esplees, an action by writ of right on the property never lies'.[92] Elsewhere he said that use 'sometimes supplies a vestment, and after a fictitious gift makes seisin evident, as does, and in the same way, the taking of esplees.'[93] Similarly, where one who wrongfully cultivated the land of another carried off the crops there was a 'manifest disseisin'.[94] Taking esplees thus seems to have been the means by which seisin was made apparent to the world.[95] No one who had not done so could have the mere right.

Though it does not follow that seisin as of fee would necessarily be of right if accompanied by the taking of esplees, proof that esplees had been taken seems to have at least been evidence to that effect. Where a donor made a feoffment with livery of seisin, the donee had to use the land 'to make his possession evident, lest the gift be considered fictitious'; if the donor continued to use the land or take the profits, the gift failed, for 'the will of the donor cannot be ascertained except by use'.[96] Use (e.g. cultivation) thus seems to have been some evidence of rightful seisin, but to be really secure (that is, to be able to recover seisin by a writ of right should he lose it) the donee had to take esplees (e.g. gather the harvest) as well.[97]

[90] e.g. *Bracton*, III. 325, IV. 43, 45.

[91] Ibid. III. 326; and see II. 132, III. 125. In fact, if a plaintiff in a possessory action mentioned esplees and the mere right, the action failed: ibid. III. 325. Thus, in such an action 'no mention of esplees is ever made, though use is sometimes mentioned' (ibid. III. 125).

[92] Ibid. IV. 170 (*addicio*); and see III. 125.

[93] Ibid. III. 276 (Bracton's *addicio*); and see II. 125, 131, 149–50, III. 325.

[94] Ibid. II. 156.

[95] P. & M. II. 34. See also *Dumsday* v. *Hughes* (1837) 4 Scott 209, at 229.

[96] *Bracton*, II. 150, 153.

[97] One effect of the distinction between use and taking esplees appears in Bracton's example of one who allowed a wrongdoer to cultivate his land in order to gain the fruits; in that case there was no disseisin, unless the wrongdoer actually carried off the crop: ibid. II. 156, III. 169.

The taking of esplees by a person who was seised in demesne as of fee appears, then, to have been prima-facie proof of right, which may explain why an allegation that esplees had been taken was included in the demandant's count in the first place.[98]

This raises the vexed question of whether the prima-facie right thereby established could be rebutted not only by proof of a better right in the tenant, but also by proof of a *jus tertii*. Lightwood, Maitland, and Holdsworth all thought it could not.[99] That may have been so, where the seisin counted upon, though initially wrongful, had been fortified by a title by time, as it commonly would have been had esplees been taken.[100] However, there were situations (e.g. if the person wronged was in the Holy Land)[101] where the wrongdoer could have taken esplees without having acquired a title by time. What of a writ of right brought on such a wrongdoer's seisin? Could the tenant answer that it had been tenuous, or that the wrongdoer did not have the fee, due to the outstanding right of entry? Bracton did not answer this question, perhaps because he did not finish his treatment of the writ of right. But it may be remembered that

[98] How else, one might ask, could the demandant's champion (or, for that matter, the knights of the grand assize) know if the seisin had been of right, unless he went behind it to see from whence it came, which may have taken him back to a time of which no one could speak of his own sight or that of his father? Glanvill, in his example of a demandant's count, included an allegation that profits of a certain value had been taken, but omitted the words 'of right' entirely: Hall, *Glanvill*, 22–3. Was that because proof of such taking was proof of right, making a separate allegation thereof superfluous? Or was it because seisin then involved feudal investiture, so that, once established, it would necessarily have been of right in the only sense the feudal world may have known in that it had been given by the lord? See Milsom, *Legal Framework*, esp. 40–1, 184–5, and *Historical Foundations*[2], 120–1. Be that as it may, by Bracton's day wrongful seisin was common, and the words 'of right' were in the count. (Apparently a writ of entry could be changed into a writ of right without these words in the count: see *Bracton*, IV. 45. But on a writ of right proper they were essential: *Bracton*, IV. 169–70, applied in *Dowland* v. *Slade* (1804) 5 East 272.)

[99] See Lightwood, *Possession of Land*, 73–5; P. & M. II. 76–7; *HEL* III[5]. 89–90. Cf. Milsom, Legal Introduction to *Novae Narrationes*, 80 SS, pp. xxxvii–xxxviii.

[100] It would be negligent in most cases for a landholder to acquiesce while another took the fruits of the land: see *Bracton*, III. 169.

[101] In which case he may have had up to three years to enter: ibid. 23.

the reasons he gave for denying the exceptions of tenuous seisin and no fee or free tenement in an assize of novel disseisin brought by a wrongdoer who had himself been disseised were the advantage attached to the wrongdoer's possession and the odium connected with the disseisin. Had it been otherwise, any interloper could usurp by ouster what he could not acquire by legal process.[102] These reasons for denying the exceptions would not apply to a writ of right. Unless the demandant mentioned disseisin in his count, he would not be alleging a wrong to his possession.[103] He would simply be claiming that the land was his property, and one may wonder how it could be that if the seisin counted upon (especially if his own) had been wrongful and tenuous, given that the tenuous seisin of a wrongdoer is naked (that is, though protected against subsequent wrongdoers, it does not have the slightest spark of right).[104]

In his apparently incomplete discussion of the exceptions to a writ of right, Bracton wrote that an exception arises out of the demandant's claim to the land as his right.[105] Regrettably, he did not specify the nature of the exception. Instead, he went on to distinguish between possessory and proprietary rights, the latter being the mere right, and then explained how more than one proprietary right to the same land could be created:

> . . . as where, when the proprietary right descends to an elder brother and nearer heir, a younger brother puts himself in seisin, and after so long an interval that he cannot be ejected without writ, dies so seised; he transmits to his heirs, with the possessory right, which he had, so to speak, in fee, a kind of proprietary right with that possessory right which ought to follow the first *proprietas*, and so from heir to heir *ad infinitum*.[106]

From this it appears that the younger brother, because in seisin long enough for the elder brother's right of entry to be lost,

[102] See ibid. 27, 70, 98, 122, 133–5.

[103] Quaere whether a demandant who had been disseised after taking esplees could have recovered on that basis, regardless of any exception of tenuous seisin. In later law apparently he could: see n. 133 and text below.

[104] See text acc. nn. 53, 92 above.

[105] *Bracton*, IV. 350.

[106] Ibid. 351.

would have had at least a possessory right.[107] But though a proprietary right would have been transmitted to his heirs, it is not clear whether Bracton thought the younger brother would have had such a right himself. Assuming he had taken esplees, and subsequently found himself out of possession, then, whether one classifies his right as possessory or proprietary, there does not seem to be any reason why he could not have recovered the land on a writ of right from a tenant who relied simply on his own later seisin. As between the parties, the writ determined both rights. Where neither had a proprietary right by descent (or, one might add, by purchase), prior seisin as of fee, if made evident by the taking of esplees, and fortified by time sufficient for title, must have prevailed. If, on the other hand, the seisin counted upon had been tenuous, in the sense that it could have been taken away by lawful entry, it is possible that, though esplees had been taken, the land could not be recovered on a writ of right.[108]

Because Bracton left so many questions unanswered, it is difficult to draw firm conclusions from his treatment of the writ of right. Perhaps the writ had been extended in the first quarter of the thirteenth century so that it could be used by persons, such as purchasers, who could not rely on ancestral seisin.[109] If so, persistence of the old idea that proprietary right depends on descent may explain Bracton's vagueness as to whether the younger brother in the passage quoted above had a proprietary right. Be that as it may, once it was permissible for a demandant to count on his own seisin, one would expect that seisin which would support a writ of right for an heir would do the same for the ancestor who had been firmly seised. Due, no doubt, to his Roman learning, Bracton wanted to draw a firm line between possession and property, but, as his own analysis of the writs of entry reveals, he failed to do so.[110] For him, the

[107] Cf. ibid. II. 24–5, where the duration of the seisin is not mentioned. But this is an *addicio*, a simplified version of the passage just quoted.

[108] Novel disseisin would, of course, be available in appropriate circumstances and an heir could bring mort d'ancestor, though his ancestor's seisin had been wrongful and tenuous: see text acc. nn. 65–8 above.

[109] See n. 78 above.

[110] See P. & M. II. 78; Turner, Introduction to *Brevia Placitata*, 66 SS, pp. lxx–lxxi; Philbrick, 'Seisin and Possession', 24 *Iowa LR* 268, at 280 n. 60, 285.

writ of right was the most proprietary of all the actions, but in fact all it decided was which party had the better right to the land.[111] If a wrongdoer had been firmly seised as of fee (that is, if his seisin had been protected by a title acquired through time), and he had taken esplees, apparently he or his heirs could recover the land on a writ of right from a tenant whose own claim was based solely on later seisin. Though one may be tempted to say that the demandant's right in this situation would be possessory rather than proprietary, that is really irrelevant, for as between the parties the action decided all questions of right.[112]

ii. From Littleton's Day Between Bracton's time and the appearance of Littleton's classic work on *Tenures*,[113] the land law underwent many changes, not least among them the extension of the remedy of self-help against wrongdoers. Whereas Bracton wrote that a right of entry would be lost if the person wronged did not act with reasonable haste, by Littleton's day mere passage of time would no longer have this effect.[114] Some other event, such as a descent cast, had to occur for the right to be cut off or 'tolled'.[115] A wrongful possessor might create a title by means of a fine or recovery, but peaceful seisin over time would not have this effect. Until statutes of limitation once again placed a time-limit on rights of entry,[116] his seisin, because defeasible without judgment, would always

[111] Perhaps the creation of the grand assize by Henry II, and the form of the question put to it, permitted the action to encompass almost any right, provided the other requirements of the writ were met. If so, that would help to explain the extension of the writ to persons who counted on their own seisin, if they had ever been denied it.

[112] On the English law difficulty of classifying land rights and real actions as possessory or proprietary see Simpson, *History of Land Law*[2], 37–40.

[113] Published about 1481 (herein the law French text in Hargrave and Butler's 15th edn. of *Co. Litt.* and the English translation appearing in the 19th edn. of the same work have been used).

[114] This change probably occurred around 1310: see Sutherland, *Novel Disseisin*, 153–8.

[115] See Littleton, *Tenures*, s. 385; *Co. Litt.* 237[b]–238[a]; Maitland, 'Beatitude of Seisin', 4 *LQR* 24, 286.

[116] The first was 21 Jac. I, c. 16, which limited rights of entry to 20 years in most cases. The effect of these statutes will be considered below in discussion of the action of ejectment.

be tenuous in the Bractonian sense. But though Bracton wrote that tenuous seisin did not give a free tenement or the fee as against the person wronged, this does not seem to have been the case in later law. After being ousted, a disseisee was left with nothing but a right, exercisable by entry or by action: the fee simple was in the disseisor.[117] Firm seisin, title, and fee no longer went hand in hand, as they once did when all were acquired simultaneously the moment the right of entry was lost. But if tenuous seisin now gave a disseisor the fee as against all the world, what about title? Though the disseisor could not acquire a title by time, did the fact that he was seised as of fee, though tenuously, mean that he had a title none the less? In other words, was seisin as of fee necessarily titled?

To answer this, we need to recall the distinction made above between the title that goes with possession, which enables every possessor to defend his possession against anyone who does not have a better right, and title which enables one who has lost possession to recover it. A disseisor clearly would have a title of the former sort as long as he retained seisin.[118] He would also have the fee. But it is doubtful whether he would have a title of the second sort, for his seisin would be tenuous.[119] If someone with a right of entry put him out, he would never be able to recover the land, no matter into whose hands it fell thereafter.[120] The title that went with his possession would have

[117] See YB 11 & 12 Ed. III (RS) 200, at 202; *Elvis* v. *Archbishop of York* (1619) Hob. 315, at 322; Littleton, *Tenures*, s. 467; *Rolle's Abr.* II. 553; Preston, *Abstracts*[a], II. 284; *HEL* III[5]. 91–3, VII[2]. 47; and auth. in n. 34 above.

[118] See Gilbert, *Tenures*[4], 21; *Rosenberg* v. *Cook* (1881) 8 QBD 162; and auth. in n. 37 above.

[119] 18th-cent. writers, at least, described a disseisor's seisin as naked, because unsupported by title or right, and liable to be defeated by entry: see Blackstone, *Commentaries*, II. 195–6, III. 177; *Co. Litt.* Butler's notes 239[a] n. 1, 275[b] n. 1.

[120] The entry, wrote Butler, would have put a 'total end' to the disseisor's possession, and he had no title apart from possession: *Co. Litt.* 239[a] n. 1. By the same token, if the disseisor leased the land for life, and the disseisee recovered possession by entry, the reversion would be divested: *Co. Litt.* 241[a]; and see Littleton, *Tenures*, s. 474. Similarly, a release by one who had a right of entry to a person who disseised the disseisor would have destroyed the first disseisor's title: YB 9 Hen. VII, 25, pl. 12; Littleton, *Tenures*, s. 473; *Co. Litt.* 277[b]. Nor would the disseisor's heir, if he lost possession to the disseisee by judgment, have had any title left: Gilbert, *Tenures*[4], 21.

been lost the moment seisin was lost, and he would have no other.[121] Only if ousted by a second wrongdoer could he recover—by novel disseisin, and possibly writ of right—for the ouster would have created what we have called a title by being wrongfully dispossessed.[122]

An example may help to clarify this. A, a rightful freeholder, is disseised by B. B acquires the fee, but his seisin is tenuous, as it would have been in Bracton's day until A's right of entry had been lost through time. B has the title that goes with possession, good as against all the world except A, just as a disseisor who was in tenuous seisin would have had in Bracton's day. But his possession is naked because he does not have a title capable of surviving the loss of his seisin. Nor, prior to the enactment of statutes of limitation, could passage of time give him a title. A then enters, as is his right, and ousts B. Thereafter, B has no right whatever: he is a perfect stranger to the land.[123] Should A then be disseised by C, B could not recover the land from C, for B lost the title he had while seised when A ousted him. But let us suppose that B was ousted by C instead of A. B could then recover the land from C on an assize of novel disseisin, and possibly a writ of right, because, though the title B had while in possession would no longer be in him, the wrong to his possession would have created a title by being wrongfully dispossessed, on the strength of which possession could be recovered.

[121] *Perry* v. *Clissold* [1907] AC 73, where it was held that a mere possessor had sufficient title to establish a prima-facie case for compensation when the land he occupied was expropriated by the Crown, may appear to be a contrary authority. But there, though the possessor was out of possession at the time the claim was made, the issue was whether he had a title at the time of expropriation (i.e. while he was in possession); for even the 'owner' (who was unknown) would not have had a title thereafter.

[122] While there can be no doubt about the availability of an assize, a writ of right would not have lain if the tenant could have raised tenuous seisin as an exception. We shall return to this issue in a moment.

[123] See *Liford's Case* (1614) 11 Co. R. 46^b, at 51, where it was said that by a fiction of law the disseisee's entry had relation to the time of the disseisin, for after the entry the law supposes the freehold always continued in the disseisee, permitting him to have an action of trespass against the disseisor for cutting trees and crops. In other words, it is as though the disseisor had never been in possession at all. See also Gilbert, *Tenures*^{4}, 45.

We suggested above that a writ of right may not have lain in Bracton's day on the tenuous seisin a wrongdoer would have had while a right of entry was outstanding.[124] Be that as it may, it has commonly been concluded that the writ would have lain in those circumstances in later law.[125] This conclusion is generally based on the following passage from Littleton:

> Also, if a man be disseised by an infant, who alien in fee, and the alienee dieth seised, and his heire entreth, the disseisor being within age, now it is in the election of the disseisor to have a writ of *dum fuit infra aetatem*, or a writ of right against the heire of the alienee, and which writ of them he shall chuse, hee ought to recover by the law.[126]

Here, the disseisor's seisin would have been tenuous at the time of the alienation, because the disseisee could have entered upon him;[127] it would have been naked, protected solely by the title that goes with possession. Yet Littleton said the disseisor could recover on a writ of right. However, the tenant from whom he could recover came in under the alienee, in which case the tenant would have been estopped from denying the disseisor's title.[128] In other words, the exception of tenuous seisin may have been denied the tenant due to this circumstance, rather than because the exception did not exist.

In another section, however, Littleton reveals that a writ of right would have lain on seisin which had not only been tenuous because wrongfully acquired, but had actually been defeated by entry. In the example given, a remainderman in fee disseised the tenant for life, who recovered seisin by entry. The life tenant then lost the land in a feigned action (a recovery), and died. The remainderman could have recovered the land on a writ of right brought upon his own unlawful seisin because, said Littleton, 'the mise shall be joyned only

[124] See text acc. nn. 99–104 above.

[125] See Lightwood, *Possession of Land*, 74–5; P. & M. II. 77 n. 1, 78 n. 5.

[126] Littleton, *Tenures*, s. 478.

[127] The fact that the disseisor was an infant would not have barred the entry: see Littleton, *Tenures*, ss. 407–8; *Co. Litt.* 238^b.

[128] This was the explanation given in *Dowland* v. *Slade* (1804) 5 East 272, at 289. On this application of estoppel see Lightwood, *Possession of Land*, 126–7; Wiren, 'Plea of *Ius Tertii*', 41 *LQR* 139, at 161–6.

upon the mere right'.[129] To those who would object that the remainderman would not have had more mere right in the land 'in the manner as he demandeth', because his seisin had been defeated by entry, Littleton replied that these are words of form of pleading, not words of substance.[130] It seems, therefore, that by Littleton's day it did not matter whether the seisin had been tenuous or of right, as long as the demandant had more mere right than the tenant.[131] Mere right probably meant any right to hold the land in fee, if the demandant or his ancestor had been seised and taken esplees during the period of limitation, though as between the parties the writ was none the less proprietary in the sense that one who had a right to recover in a possessory action could not recover on a writ of right against a tenant who, all things considered, had a better right.[132] Accordingly, a disseisor who had in turn been disseised by another probably could, in the absence of a release, have recovered on a writ of right from the second disseisor, or anyone who came in under or after him without better right.[133]

However, would a demandant who relied solely on his own

[129] Littleton, *Tenures*, s. 482; cited, with apparent approval, in *Bearcroft* v. *Geery* (1667) 2 Keb. 285. Note that a remainderman who had not been seised could not recover by writ of right, though he could recover by formedon in the remainder, probably as a result of *De Donis Conditionalibus*, 13 Ed. I, c. 1: see Littleton, *Tenures*, s. 481; P. & M. II. 10 n. 1, 24–5, 28.

[130] Littleton, *Tenures*, ss. 482–3.

[131] See also ibid., s. 514: 'And so alwayes in a writ of right, if the possession whereof the demandant counteth bee in the king's time, as hee hath pleaded, then the charge of the grand assise shall be only upon the meere right, although that the possession were against the law'.

[132] See ibid., ss. 487–8.

[133] In *Buckmere's Case* (1609) 8 Co. R. 86[a], at 87[b], it is written that one real action may be brought with respect to lands acquired by several titles where the action is founded on a tort or deforcement, and does not comprehend any title in it, 'as if divers manors descend to me from several ancestors, and I am disseised or deforced of them, I may have a writ of right, or a writ of entry in the nature of an assise, or a writ of assise, and comprehend all these rights in one and the same writ, because in these cases no title is made in the writ.' I.e. a wrong, such as disseisin, would support a writ of right, without other title; it was the wrong which created the right to recover. See also Blackstone, *Commentaries*, III. 193, and Roscoe, *Actions*, I. 19, both of which state that a writ of right lay concurrently with all other real actions in which the fee simple might be recovered. This, however, must be qualified by adding that the demandant or his ancestor must have been actually seised (see *Dally* v. *King* (1788) 1 H. Bla. 1), and must have taken esplees, and, even then, though he may have recovered in a possessory action, on a writ of right there was always the possibility of the tenant having a greater right.

prior seisin have had any right at all if his seisin had been wrongful? In both Littleton's examples there was another factor: the voidable alienation by the minor in one, the title to the remainder in the other.[134] To these may be added the case of a demandant who had been disseised. But what if it were merely a matter of the prior seisin of the demandant against the present seisin of the tenant? The applicable rule, we have been told, is that the better right is that which is rooted in the earlier seisin.[135] A form of this rule appears in Bracton.[136] In his day, however, it may not have been bare seisin that created such a right, but seisin for sufficient time to take away a right of entry. One who had been seised long enough to take esplees, though a wrongdoer, commonly would have acquired a title by time in this way. By Littleton's day, he would have lacked this title: he could have been ousted by the person he had wronged at any time, after which he would have been left with no right at all. In that case, seisin would not be a root of title. But if a wrongdoer relied merely on his own prior seisin, who was to say that he had not lost it by being lawfully ousted? If he had been disseised, and claimed a right to recover on that basis, why should he not be required at least to allege the wrong and designate the disseisor, thereby giving the tenant a chance to show that the ouster had been lawful?[137]

Though no direct authority one way or the other has been found (possibly because writs of right had fallen out of general use by the late thirteenth century), these considerations lead one to suspect that a wrongdoer who relied simply on his prior seisin in a writ of right would have been in a vulnerable position once the law evolved in favour of extended rights of

[134] See *Co. Litt.* 278[b], Butler's n. 1.

[135] Lightwood, *Possession of Land*, 75. See also P. & M. II. 46; *HEL* III[5]. 91.

[136] See *Bracton*, IV. 351.

[137] On the burden of proof, it seems that even on an assize the allegation that the disseisin had been done 'wrongfully and without judgment' was sufficient to cast the onus of showing a right of entry or a judgment on the defendant. Bracton, at least, treated this allegation as answerable by an 'exception': *Bracton*, III. 121–4. See also n. 308 below.

entry. Proof of seisin and the taking of esplees probably would have established a prima-facie case in his favour,[138] but had the tenant answered by showing that the demandant's seisin had been naked because unsupported by title (other than that which goes with possession), it is difficult to see on what basis the demandant, in the absence of an allegation that he had been disseised, could be said to have a right once out of possession. But perhaps the writ of right did not take account of the change in the law respecting rights of entry. Perhaps this form of action was so rigid that, except for the purpose of proving a better right in himself, a tenant was invariably precluded from going behind the seisin counted upon, even in cases where the seisin had been wrongful and the demandant had no other right.[139] Or perhaps the law was willing to presume that the seisin had been unlawfully taken away.

Be that as it may, when writs of right were revived in the late eighteenth century after a long period of relative disuse,[140] we find the courts surprisingly hostile towards them. One reason for this was that the limitation period—set in 1540[141] at sixty years for demandants who counted on ancestral seisin and thirty for those who relied on their own—permitted long, peaceful possession to be disturbed. English judges, in that age at least, were reluctant to sanction this.[142] Another reason

[138] See Booth, *Real Actions*, 111: 'Possession is an Evidence of Right and Property'; and *HEL* III[5]. 95: 'Seisin is prima facie ownership.' That is, title is presumed from possession: see Blackstone, *Commentaries*, II. 196, III. 177, 180; *Co. Litt.* 239[a], Butler's n. 1.

[139] See YB 27 Ed. III, 9, pl. 26, where it was held that a tenant who admitted the demandant's seisin thereby admitted his right by degrees. In other words, seisin itself (if accompanied by the taking of esplees) appears to have been undeniable proof of right: to deny the right, one had to deny the seisin. However, as the tenant in that case in fact had a better right than the demandant, this was probably a matter of pleading because the tenant could undoubtedly have answered the demandant's count by alleging earlier seisin in herself, as long, it seems, as she made a general denial first. Note too that even before the extension of rights of entry, a tenant could safely admit the demandant's seisin if he went on to allege that the right had passed to himself, e.g. by feoffment: see *Novae Narrationes*, 80 SS, B20, B20A–C, B20E–21, C15–16, C18B, C24, C27, C27A–C.

[140] See *Co. Litt.* 239[a], Butler's n. 1.

[141] By 32 Hen. VIII, c. 2.

[142] See *Galton* v. *Harvey* (1798) 1 Bos. & Pul. 192; *Charlwood* v. *Morgan* (1804) 1 Bos. & Pul. (NR) 64; *Adams* v. *Radway* (1815) 1 Marsh. 602; *Twinning* v. *Lowndes* (1835) 2 Scott 260.

seems to have been that the tenant was required to present his evidence first, and thus reveal his title, however weak, to the world, before the demandant had established any claim at all.[143] But beyond these explanations, there seems to have been a judicial reaction against the very idea that a demandant could rely simply on prior seisin, which may have been wrongful and lawfully taken away, or even delivered to another, against a tenant who was presently in peaceful possession. In *Jayne* v. *Price*, decided in 1814, Chambre J. observed:

> It would make writs of right the most mischievous proceedings in the world, if this doctrine could prevail, that because a simple possession is shewn to have existed 40 years ago, without any account of the title, all the succeeding adverse possession shall therefore be put out of consideration.[144]

Judicial attitudes thus appear to have changed considerably between the time when writs of right were in common use and the period just prior to their abolition. Was this partly because the form of action precluded the rightfulness of the seisin counted upon from being questioned, thereby allowing a wrongdoer who had been seised for a season, or his heirs, to recover land without even alleging that the seisin had been lost by disseisin or other wrong, from a person who had been in peaceful possession, perhaps in perfect good faith, for many years? Had judicial thinking become unaccustomed to this seemingly unjust state of affairs due to the rise of that great rival, the action of ejectment, which eventually replaced the old real actions entirely? To this subject we now turn our attention.

[143] See *Worley* v. *Blunt* (1833) 9 Bing. 635. At one time the tenant may have been able to avoid this by tendering a demi-mark, which obliged the demandmant to prove the seisin at the time alleged, but later cases held that this did not affect the order of proof: see *Tooth* v. *Bagwell* (1826) 11 JB Moo. 349; *Spires* v. *Morris* (1833) 3 Moo. & Sc. 118. Note, however, that the last two cases reveal that proof of possession by the tenant would have been sufficient title as against a demandant who failed to prove a better right; and see *Sidney* v. *Perry* (*c.*1771–80, CP, unreported), cited in *Co. Litt.* 239[a], Butler's n. 1; *Davies* v. *Lowndes* (1835) 1 Bing. (NC) 597, at 612.

[144] 5 Taunt. 326, at 328. The court got round the doctrine by holding that the presumption of seisin in fee arising from possession could be rebutted by circumstantial evidence, as the jury had found it had been.

2. The Action of Ejectment

The action of ejectment, in the form of *ejectione firmae*, was originally the termor's remedy, created out of trespass and extended to give the lessee for years a means of recovering possession, the real actions not being available to him because he did not have seisin of the freehold.[145] The attractiveness of the remedy, however, led to its adoption by freeholders, first by means of granting an actual lease, then through the device of an action based on a 'string of legal fictions'.[146] Thus, if A wished to recover freehold possession (seisin) from B, he would start an action in the name of a fictitious lessee, commonly John Doe, who would allege a lease from A, entry, and ouster by a casual ejector, Richard Roe. A letter in the name of Roe would then inform B of the action, and Roe's intention to default, whereupon B would be allowed to defend on condition that he admitted the lease, entry, and ouster. The action would then be styled *Doe, on the demise of A* v. *B*. Since the capacity of A to make the lease would have depended on his having a right of entry, the action would determine who between A and B had the better right to possess.[147]

[145] Lightwood, *Possession of Land*, 105; Sedgwick and Wait, 'History of Ejectment', in *Select Essays*, III. 611, at 618–23.

[146] Blackstone, *Commentaries*, III. 205. The name 'ejectment' was applied to the transformed action, 'ejectione firmae' being reserved for the action to recover leasehold possession.

[147] See ibid. 200–6; Sedgwick and Wait, 'History of Ejectment', in *Select Essays*, III. 611–36; *HEL* VII². 4–19; Simpson, *History of Land Law*², 144–9; *Commonwealth of Australia* v. *Anderson* (1960) 105 CLR 303, at 312, 320–1. The need to resort to these fictions was done away with by the *Common Law Procedure Act*, 15 & 16 Vict., c. 76, ss. 168–9. In 1875 new Rules of Court enacted by the *Judicature Act*, 38 & 39 Vict., c. 77, substituted the name 'action for the recovery of land' for 'action of ejectment'. The proceeding, however, remained substantially the same, the major difference being that equitable as well as legal interests could be put in issue: see *Gledhill* v. *Hunter* (1880) 14 Ch. D. 492; *Danford* v. *McAnulty* (1883) 8 App. Cas. 456. After the abolition of the fictions, the real plaintiff (A in our example) naturally brought the action in his own name. Prior to that, he was technically the lessor of the plaintiff. For the sake of simplicity, however, we will ignore that distinction, and refer to him throughout as the plaintiff. We will also refer to the action simply as 'ejectment', bearing in mind that since 1875 it has been termed an 'action for the recovery of land'.

Although the plaintiff in ejectment has to prove a right of entry, the defendant is entitled to rely on his present possession. It is thus a rule that the plaintiff can recover only on the strength of his own title,[148] not on the weakness of the defendant's.[149] What then must the plaintiff prove before the defendant is obliged to answer? Is evidence of prior possession enough to establish his title, or must he prove something else? And can the defendant defeat whatever title the plaintiff sets up by showing a better title, not in himself, but in some third party, i.e. by relying on a *jus tertii*?

Learned opinion has divided sharply on these questions. Holdsworth thought that for a plaintiff in ejectment to recover on prior possession alone, it must have lasted for the period of limitation, set at twenty years by the statute of limitations of 1623.[150] Proof of possession for a lesser period does not raise an inference of right by virtue of the statute, and so does not entitle the plaintiff to recover the land. But according to Holdsworth there are two exceptions: (1) if the defendant acquired possession by a 'trespass' (i.e. a wrong) committed by him against the plaintiff, the plaintiff can recover merely on proof of his possession and its disturbance by the defendant (that is, on what we have called his title by being wrongfully dispossessed); and (2) if the defendant's possession is not adverse (that is, if he came in under the plaintiff), he is

[148] Title alone, however, without a right of entry, is insufficient. Thus, if the plaintiff's entry had been barred by descent cast, discontinuance, or statutory limitation, he would have had to resort to a real action in the days when those actions were still available: see *HEL* VII². 20–1; Simpson, *History of Land Law*², 149–50.

[149] *Roe d. Haldane & Urry* v. *Harvey* (1769) 4 Burr. 2484, at 2487, 2488; *Goodtitle d. Parker* v. *Baldwin* (1809) 11 East 488, at 495; *Bristow* v. *Cormican* (1878) 3 App. Cas. 641, at 661; *Danford* v. *McAnulty* (1883) 8 App. Cas. 456, at 460–1, 462, 464–5. See also *Lyell* v. *Kennedy* (1883) 8 App. Cas. 217, esp. 232–3.

[150] *HEL* VII². 63–5, 67. The statute in question, 21 Jac. I, c. 16, which barred rights of entry, and thus ejectment, was superseded in 1833 by the *Real Property Limitation Act*, 3 & 4 Will. IV, c. 27 which, with certain exceptions, extinguished title and barred all other actions as well after 20 years: see ss. 2, 34, and Lightwood, *Time Limit*, 6, 116. This period was reduced to 12 years by the *Real Property Limitation Act*, 37 & 38 Vict., c. 57, s. 1 which came into force on 1 Jan. 1879.

estopped from denying the plaintiff's title.[151] Holdsworth then went on to say that unless the plaintiff can bring himself within one of these exceptions, or show possession for the period of limitation, any title he sets up will be negated if it appears that a third party, through whom neither he nor the defendant claims, has a better title. In other words, the defence of *jus tertii* is available in ejectment.[152] From this, Holdsworth concluded that the action introduced the concept of an absolute right of ownership of land into English law, for the plaintiff has to prove a right that is not merely better than the right of the defendant in possession, but better than any existing right provable by him.[153]

Holdsworth's views were trenchantly criticized by A. D. Hargreaves in a persuasive article,[154] which has been regarded by some as having virtually put the matter to rest.[155] Like it or not, Hargreaves wrote, 'the medieval principles of relativity of titles' are still with us.[156] Talk of ownership of land, let alone absolute ownership, is inappropriate.[157] In ejectment, as in the old real actions, the issue to be determined is not which party has *the* title, but which has the *better* title. Accordingly, the *jus tertii* is irrelevant except in so far as it reveals that the plaintiff

[151] *HEL* VII². 61, 65. These 'exceptions' are already familiar to us: on estoppel see n. 128 and text above. But note that a tenant can deny his landlord's title from the time he is no longer in possession under it: *Government of Penang* v. *Beng Hong Oon* [1972] AC 425, at 433. Also, he can show his landlord's title to be at an end: *England d. Syburn* v. *Slade* (1792) 4 TR 682; *Doe d. Jackson* v. *Ramsbotham* (1815) 3 M. & S. 516. Furthermore, by the *Real Property Limitation Act*, 3 & 4 Will. IV, c. 27, ss. 7–8 the possession of a tenant at will became adverse one year at the latest after the tenancy began, and of an overholding tenant at the time his tenancy determined: see Lightwood, *Time Limit*, 97–8, 102–5. See also the *Limitation Act*, 1939, 2 & 3 Geo. VI, c. 21, s. 9, and the *Limitation Act*, 1980, c. 58, Sch. 1, par. 5.

[152] *HEL* VII². 65–7.

[153] Ibid. 62–4, 68; Holdsworth, 'Terminology and Title', 56 *LQR* 480.

[154] Hargreaves, 56 *LQR* 376; cf. Holdsworth, ibid. 480.

[155] e.g. by Wade, 'Real Property' [1956] *Camb. LJ* 177; Megarry and Wade, *Real Property*⁵, 106 n. 64. See also Simpson, 'Real Property', *ASCL 1972*, 320, at 326, and *History of Land Law*², 288–9.

[156] Hargreaves, 56 *LQR* 377. Holdsworth conceded this, with a reservation: see text acc. nn. 197–9 below.

[157] Hargreaves, 56 *LQR* 377.

has no title at all.[158] Furthermore, where the interest claimed by the plaintiff is not a leasehold, he can rely simply on his prior possession, for although '[m]ere possession is never a title', it is evidence of seisin, and when this evidence is unrebutted, the

> . . . possession can *create* a title by investing the tenant with a freehold estate derived from seisin. It is this estate, and the right of entry which remains after the estate has been divested by disseisin, which is the 'title'.[159]

Later, however, in summing up his conclusions, Hargreaves omitted any reference to disseisin:

> The plaintiff must establish a title in himself. Mere possession is not a title, and gives no such right of action in ejectment as it does in trespass. Seisin, however, creates a title by virtue of the freehold estate which is vested in the tenant so seised; and any possession, however short, is deemed to be seisin until the contrary be shown.[160]

It is thus evident that Hargreaves did not regard disseisin as an essential condition of title in these circumstances. Proof of prior possession, however short, is sufficient to establish the plaintiff's title, provided there is no evidence to rebut the presumption of seisin. Accordingly, he dismissed Holdsworth's 'twenty years' rule' as non-existent, and regarded the exception respecting trespassers as an attempt 'to explain the many cases in which judgment has been given in favour of plaintiffs with less than twenty years' possession to their credit.'[161]

However, it is difficult to understand in what sense the freehold estate which a possessor who is seised admittedly has can be a title that will support an action of ejectment once possession has been lost.[162] Where the possession is wrongful,

[158] Ibid. 380, 393–6; e.g. where a plaintiff claimed as his father's heir, and the existence of an elder brother was shown: see P. & M. II. 76.

[159] Hargreaves, 56 *LQR* 391.

[160] Ibid. 397.

[161] Ibid. 390; see also 396 n. 3.

[162] In addition to the passages already quoted see ibid. 377 n. 7, where it is written that the disseisor's estate 'is his title'. Cf. Hargreaves, 'Modern Real Property', 19 *MLR* 14, at 21: 'One aspect of an estate is that it represents the tenant's title to the land which he possesses.' Although this looks like a shift in Hargreaves' position, its meaning is unclear.

the estate is tortious because unsupported by right.[163] Though rights of enjoyment and dealing, as we have seen, are inherent in every freehold estate, those rights are lost when possession and the estate that goes with it are lost.[164] Admittedly, the former possessor may then have a right to reacquire the estate by entry,[165] but under what conditions does that right arise? Proof that he had an estate in the past does not necessarily mean that he has a present right to it, no more than proof of past possession establishes a present right to possess, especially when the estate and possession are known to have been wrongfully acquired. The problem the mere possessor faces is that, once out of possession, he can no longer rely on the title that goes with possession.[166] Since he is attempting to recover rather than defend possession, he has to prove some other title. Nowhere does Hargreaves explain how an estate 'derived' from possession can be a title after the estate and possession have been lost.

This is not to say the fact that the possessor had an estate is entirely irrelevant to the issue of whether he has a present title, as we shall see in a moment. First, however, it is essential to understand the significance of his former possession. As a general rule, every possession is presumed to be lawful until shown to be otherwise.[167] Thus, although he cannot rely on the title that goes with possession once possession has been lost, he can rely on the *presumption* of title that his former possession

[163] See *Matheson & Trots Case* (1589) 1 Leon. 209; *Co. Litt.* 2ª, 276ᵇ, and Butler's notes, 296ᵇ n. 1, 297ᵇ n. 1; Pollock and Wright, *Possession*, 94.

[164] See *HEL* VII². 47–8.

[165] Note that prior to 1845 a right of entry could not be assigned: see n. 212 below.

[166] See Thayer, 'Possession and Ownership', 23 *LQR* 175, 314, esp. 181.

[167] See n. 138 above, and *Doe d. Draper* v. *Lawley* (1834) 3 N. & M. 331; *Doe d. Smith & Payne* v. *Webber* (1834) 1 Ad. & E. 119; *Allen* v. *Roughley* (1955) 94 CLR 98. In *Emmerson* v. *Maddison* [1906] AC 569, at 575, it was held that the 'presumption of title which arises from simple occupation or possession' could be answered by proof that the lands were owned by the Crown. See also *Goodtitle d. Parker* v. *Baldwin* (1809) 11 East 488, where Lord Ellenborough viewed 36 years' quiet possession as sufficient for a jury to presume a title by Crown grant until a statutory prohibition against granting the lands in question was revealed.

raises.[168] The two are quite distinct. The presumption is of a title *other than* that which goes with possession; that is, of entitling conditions that would give the possessor a right to recover the land after *losing* possession. This presumption can be rebutted by proof that the possession was wrongful, i.e. by proof of a *jus tertii*. But even in the face of such proof, the former possessor can establish a prima-facie right to recover by showing that he was ousted because, unless it appears that the ouster was lawful, he then would have a title by being wrongfully dispossessed.[169] Since this right could be exercised by entry,[170] proof of dispossession, whether by force, peaceful entry while the possessor was absent, or fraud, would, in the absence of evidence that the dispossessor had a right of entry, be sufficient of itself to maintain ejectment.[171]

[168] See *Doe d. Osborne* v. *M'Dougall* (1848) 6 UCQB 135; *Doe d. Carter* v. *Barnard* (1849) 13 QB 945, at 953; *Lessee of Smith* v. *McKenzie* (1854) 2 NSR (James) 228; *Doe d. Eaton* v. *Thomson* (1860) 9 NBR (4 Allen) 461; *Allen* v. *Roughley* (1955) 94 CLR 98, esp. 136–41; *Wogama Pty.* v. *Harris* (1968) 89 WNNSW (Pt. 2) 62, esp. 64. Cf. Philbrick, 'Seisin and Possession', 24 *Iowa LR* 268, at 293–4.

[169] See Maitland, letter to Ames, in Hazeltine, 'Gossip about Legal History', 2 *Camb. LJ* 1, at 7; Philbrick, op. cit. 292. On the burden of proof see also n. 307 below. Note, however, that someone with a better right who acquired possession after the wrongdoer would in certain instances be remitted to his superior title, thereby defeating the former possessor's right: see gen. *Co. Litt.* 347ᵇ, Butler's n. 1; Blackstone, *Commentaries*, III. 19–21, 190; Lightwood, *Possession of Land*, 100–3.

[170] See Burton, *Compendium of Law of Real Property*⁸, 126.

[171] See *Bateman* v. *Allen* (1594) Cro. Eliz. 437; *Doe d. Hughes* v. *Dyeball* (1829) M. & M. 346; *Doe d. Johnson* v. *Baytup* (1835) 3 Ad. & E. 188; *Doe d. Davy* v. *Gent* (1844) 2 LT (OS) 420; *Lessee of Smith* v. *McKenzie* (1854) 2 NSR (James) 228, at 229; *Davison* v. *Gent* (1857) 1 H. & N. 744; *Doe d. Eaton* v. *Thomson* (1860) 9 NBR (4 Allen) 461, at 470–4; *Asher* v. *Whitlock* (1865) LR 1 QB 1, at 5–6; *Whale* v. *Hitchcock* (1876) 34 LT 136, at 137; *Allen* v. *Roughley* (1955) 94 CLR 98, at 107–8, 115, 128, 137; *Spark* v. *Whale Three Minute Car Wash* (1970) 92 WNNSW 1087, at 1103–4. Wrongful dispossession may be the basis of the obscure decision in *Allen* v. *Rivington* (1670) 2 Wms. Saund. 108, as Holdsworth suggested (*HEL* VII². 60 n. 1; cf. Hargreaves, 56 *LQR* 391 n. 79, 393). However, Holdsworth apparently thought that the title so created is good only against the wrongdoer himself: op. cit. 61, 65. This cannot be so, for by the time the action of ejectment had developed, the ways in which a disseisee's right of entry could be tolled were already strictly limited, descent cast being the principal cause; and in 1833 they were further

Where, however, a plaintiff in ejectment who claims to have been ousted had neither seisin nor leasehold possession at the time (i.e. where he was in occupation but lacked possession) he cannot recover the land. The most common example of this is in the case of Crown land, for the Crown cannot be disseised or dispossessed.[172] Thus, though an intruder on the Crown's demesne can bring trespass,[173] ouster by a subsequent intruder will not give him a right to recover the land in ejectment. The explanation commonly given for this is that because he had neither seisin nor leasehold possession while in occupation, he did not have an estate or interest in the land; and since without an estate or interest he could not make a lease,[174] ejectment is not available to him.[175] If this is the only obstacle to ejectment being brought by the intruder, then arguably it was removed when the requirement of a fictitious lease was abolished in 1852.[176] However, the difficulty probably goes deeper than this. The object of ejectment is to recover possession. Since the intruder lacked possession while in occupation, if he could bring ejectment after being ousted he would be able to recover

restricted by the *Real Property Limitation Act*, 3 & 4 Will. IV, c. 27, s. 39, and the *Fines and Recoveries Act*, 3 & 4 Will. IV, c. 74, s. 2, leaving possession for the requisite limitation period as the sole means of extinguishing a right of entry. As long as the disseisee could enter, he could recover in ejectment, no matter how many times the land had changed hands. See also Pollock and Wright, *Possession*, 91–2, 96–7.

[172] See discussion in ch. 3, esp. text acc. nn. 39–41.

[173] At one time even this action was denied him: see n. 2 above.

[174] *Willion* v. *Berkley* (1561) 1 Plow. 223, at 233. This probably explains as well why the plaintiff in ejectment at one time had to make his lease on the land, for as long as another was in adverse possession, he had a mere right of entry, which would not support a lease. This requirement apparently disappeared when the lease became fictitious: see Adams, *Action of Ejectment*[4], 10; *HEL* VII[2]. 10–12.

[175] *Johnson* v. *Barret* (1646) Aleyn 10; *Harper* v. *Charlesworth* (1825) 4 B. & C. 574, at 592. See also Hargreaves, 56 *LQR* 383–5. But note that although an intruder on Crown lands cannot acquire seisin, he can acquire leasehold possession if he ousts a termor holding of the Crown. This possession will enable him to make a lease upon which *ejectione firmae* will lay against anyone, other than the ousted termor or on claiming through him, who ejects the lessee: see *Anon.* (1582) 3 Leon. 206; *Lee* v. *Norris* (1594) Cro. Eliz. 331. Accordingly, ejectment will lay for the intruder in case he is ejected himself.

[176] By 15 & 16 Vict., c. 76, ss. 168–9. On this Act's effect see *Commonwealth of Australia* v. *Anderson* (1960) 105 CLR 303, at 312–13, 315, 323–4.

that which he never had, and to which he could claim no right. Be that as it may, we see the same sort of problem arising where a lessee enters under a lease which is later made void by statute. If ousted thereafter, he cannot bring ejectment because he can rely neither on the void lease nor on his prior occupation which, because acquired under the lease, could not be seisin and therefore could not give him a freehold estate.[177] From these exceptional cases it is apparent that an occupier who did not have possession and therefore did not have an estate or interest cannot succeed in ejectment after being ousted; however, it does not follow from this, as Hargreaves seemed to think, that a successful former possessor recovers *because* he had an estate or interest, or that his estate or interest, provided it was capable of being projected by ejectment, is his title.[178] It is not so much lack of an estate or interest as lack of possession that negates title in these instances.[179] Moreover, we shall see

[177] See *Doe d. Crisp* v. *Barber* (1788) 2 TR 749, and Hargreaves' comments, 56 *LQR* 386. The reason why the plaintiff there did not have at least leasehold possession seems to be that there can be no such possession without a valid lease. This is apparent from the rule that a wrongful entrant, to claim a leasehold (where that is possible: see nn. 10–12 and text above), can do so only if a lease exists: see *Co. Litt.* 271[a], Butler's n. 1; Preston, *Abstracts*[2], II. 295–6. It is noteworthy that the lease in *Barber* was not made void *ab initio* by the statute in question (13 Eliz. I, c. 20), for if it had been the plaintiff would likely have been a disseisor: see *Matheson & Trots Case* (1589) 1 Leon. 209, at 210; *Buckler's Case* (1597) 2 Co. R. 55[a], at 55[b]; *Rosenberg* v. *Cook* (1881) 8 QBD 162; cf. *Blunden* v. *Baugh* (1631) Cro. Car. 302. The result was that the statute created a shield for wrongdoers, as the court remarked with regret. However, someone in the plaintiff's position, like an intruder on Crown lands, could bring trespass while in occupation: see *Graham* v. *Peat* (1801) 1 East 244. Note too that a tenant at sufferance seems to have encountered a similar problem: see *Doe d. Harrison* v. *Murrell* (1837) 8 Car. & P. 134, at 135; Tudor, *Leading Cases*[3], 10; Hargreaves, 56 *LQR* 380. If due solely to his inability to make a fictitious lease ('one tenant at sufferance cannot make another': *Thunder d. Weaver* v. *Belcher* (1803) 3 East 449, per Lord Ellenborough at 451), that problem may have been overcome by 15 & 16 Vict., c. 76. A tenant at will, by contrast, though his estate is also inalienable (*Co. Litt.* 57[a]), could bring *ejectione firmae*, relying on the actual lease to himself: see Hargreaves, 56 *LQR* 384 n. 34. This a tenant at sufferance could not do because his lease was at an end.

[178] Hargreaves, 56 *LQR* 377 n. 7, 391, 397.

[179] Lack of an estate or interest is a *consequence* of lack of possession, which is why a landholder who loses possession loses his estate: see nn. 34, 117 and text above.

that although one who is in possession does have an estate or interest, it does not follow that he will have a title after losing possession. In fact, a former possessor's right to recover in ejectment is not derived from the estate or interest he had; rather, it depends on the presumption of title arising from his prior possession, or on wrongful dispossession and the title resulting therefrom. The difficulty faced by a claimant who was in occupation but lacked possession is that he can rely on neither of these.

This brings us to the controversial defence of *jus tertii*.[180] Where a plaintiff in ejectment proves he was ousted, a defendant who has no title of his own (other than that which goes with possession) will none the less prevail if he can show that (1) the plaintiff, though in occupation, was not in possession (and therefore lacked an estate or interest), either because the lands were Crown lands, or because he came in under a lease made void by statute;[181] (2) the plaintiff was ousted by someone who had a right to enter and take possession from him;[182] (3) subsequent to the ouster of the plaintiff, someone with a better title either released his right to a person in possession, or acquired possession himself and was remitted to his former title;[183] or (4) the plaintiff's prima-facie title by being wrongfully dispossessed was otherwise lost or extinguished (e.g. prior to 1833 by fine).[184] But the defendant cannot rebut the plaintiff's title simply by proving the existence of an older third-party right, because once it has been established that the plaintiff was ousted, then, subject to the exceptions just listed,

[180] For a valuable survey of auth. see Wiren, 'Plea of *Ius Tertii*', 41 *LQR* 139; other references in Hargreaves, 56 *LQR* 378 n. 9. For an indication that the debate over the availability of this defence has yet to be resolved, compare *Salmond and Heuston on Torts*[18], 43–4, with *Clerk and Lindsell on Torts*[15], 1128–9. On chattels see Atiyah, 'Re-examination of *Jus Tertii*', 18 *MLR* 97; Jolly, 'Jus Tertii', 18 *MLR* 371.

[181] Prior to 1852, at least, proof that the plaintiff had been a tenant at sufferance probably would have been a defence as well: see n. 177 above.

[182] See n. 120 and text above.

[183] See Littleton, *Tenures*, s. 473; n. 169 above.

[184] See Blackstone, *Commentaries*, II. 348–57. Forfeiture would also have had this effect: see ibid. IV. 381; Chitty, *Prerogatives*, 216–17.

his right to recover depends not on the presumption of title arising from his former possession, but on the wrong implicit in the ouster.[185] Thus, in *Asher* v. *Whitlock*[186] Cockburn CJ stated that a possessor who is turned out, whether forcibly or by peaceful entry during his absence, by one who has no title, can recover possession in ejectment.[187] Although the defence of *jus tertii* was not expressly discussed, at trial evidence of a third-party right had been given, which the Chief Justice, who presided there as well, significantly ruled to be sufficient for the purpose of proving that right,[188] and the case appears to have been argued in light of this.[189] But given that the defendant was

[185] The basis of the plaintiff's right to recover in ejectment in this situation is the same as it was under the old assize of novel disseisin and writ of entry *sur disseisin*: see P. & M. II. 48–9, 52, 64–7; Maitland, letter to Ames, in Hazeltine, 'Gossip about Legal History', 2 *Camb. LJ* 1, at 7. If the defence of *jus tertii* were available against such a plaintiff, then ejectment would not have completely replaced those actions because it would have been unable to perform the same function (i.e. protecting possession against wrongdoers regardless of title): see *Buckmere's Case* (1609) 8 Co. R. 86[a], at 87[b], where it is said that real actions founded on a tort or deforcement (i.e. a wrong to the plaintiff's possession) do not comprehend any 'title' in them (other than what we have called a title by being wrongfully dispossessed).

[186] (1865) LR 1 QB 1, 35 LJQB 17, 11 Jur. (NS) 925 (note that there is considerable variation in wording in these reports).

[187] (1865) LR 1 QB 1, at 5–6. The plaintiff in that case was not the possessor himself, but the heir of one of his devisees. The defendant, if he acquired adverse possession at all, did so by entering before devisee B on the termination of the earlier estate of devisee A. Thus, although there was not an actual ouster, the defendant was none the less a wrongdoer, an intruder in the technical language of the old law. But the right of devisee B, and hence of her heir, to recover possession was no different than the right the possessor himself would have had if the defendant had ousted him. The moment the estate of devisee A came to an end, devisee B acquired seisin in law, which was divested by the wrongful entry of the defendant: see Blackstone, *Commentaries*, III. 167–9; Preston, *Abstracts*[2], II. 300.

[188] 35 LJQB 17, at 17 n. 1.

[189] See LR 1 QB 1, at 2–5. This point seems to have been overlooked by some commentators: see Wiren, 'Plea of *Ius Tertii*', 41 *LQR* 139, at 156; Hargreaves, 56 *LQR* 396 n. 2. Their observations should therefore be read with this in mind. The decision in *Nagle* v. *Shea* (1874) Ir. R. 8 CL 224 may be attributed to the same oversight: see per Keogh J. at 230; cf. per Monahan CJ, dissenting, at 231–2.

a wrongdoer, the *jus tertii* was clearly irrelevant,[190] which explains why it was not mentioned in the judgments.[191]

If, on the other hand, the plaintiff does not prove he was ousted, but relies merely on his prior possession and the presumption of title arising therefrom, the defendant can rebut the presumption with evidence of a third-party right.[192] Where

[190] See *Glenwood Lumber* v. *Phillips* [1904] AC 405, at 410–11; *Oxford Meat* v. *McDonald* [1963] SRNSW 423, at 427; and auth. in n. 171 above. Cf. *Doe d. Carter* v. *Barnard* (1849) 13 QB 945, and *Nagle* v. *Shea* (1874) Ir. R. 8 CL 224, discussed in n. 192 below. That the *jus tertii* is irrelevant where there was a wrong, either to the plaintiff's possession, or, as in *Asher* v. *Whitlock*, to his right to possess, is further shown by the decision in *Smith* v. *Tyndal* (1705) 2 Salk. 685 that ejectment would lie by a disseisor against the disseisee where the latter entered after his right of entry had been lost; see also Preston, *Abstracts*[2], II. 294. The law is the same with respect to chattels: see *The Winkfield* [1902] P. 42, at 54, where Collins MR stated that 'the position, that possession is good against a wrongdoer and that the latter cannot set up the jus tertii unless he claims under it, is well established in our law'; see also Atiyah, 'Re-examination of *Jus Tertii*', 18 *MLR* 97, esp. 98, 108.

[191] Note, however, that Mellor J. is reported to have said that the defendant 'in order to succeed, ought to have gone on and shewn the testator's title to be bad, as that he was only tenant at will, but this he did not do' (LR 1 QB 1, at 6). Though this has been taken as a reference to the defence of *jus tertii* (see Wiren, 'Plea of *Ius Tertii*', 41 *LQR* 139, at 156), it does not mean that the defendant could have succeeded by proving the title of the person dispossessed by the testator, for we have seen that that had been done at trial, as Mellor J. must have been aware, since he stated that the possession (evidently of the testator) 'is the possession of the disseisor' (35 LJQB 17, at 20). What he may have had in mind when he said that the defendant should have shown the testator's title to be bad, in addition to the example he gave of a tenancy at will, which is determined by the death of the tenant, and accordingly cannot be devised (see *James* v. *Dean* (1805) 11 Ves. Jun. 383, at 391; *Doe d. Stanway* v. *Rock* (1842) Car. & M. 549), are the sorts of exceptions discussed at the beginning of the paragraph accompanying this note. Cf. *McCormack* v. *Barnett* (1892) 2 SCJ & PC 1965.

[192] See *Doe d. Carr* v. *Billyard* (1828) 3 M. & Ry. 111, ed.'s n. (*a*) at 112; *Doe d. Harding* v. *Cooke* (1831) 7 Bing. 346, at 348; *Brest* v. *Lever* (1841) 7 M. & W. 593; *Doe d. Carter* v. *Barnard* (1849) 13 QB 945; *Nagle* v. *Shea* (1874) Ir. R. 8 CL 224; Pollock and Wright, *Possession*, 91–2; cf. Philbrick, 'Seisin and Possession', 24 *Iowa LR* 268, at 293–301. The last two cases were probably wrongly decided, at least in so far as they depended on the defence of *jus tertii*, but not, as Hargreaves thought, because the defence is non-existent (see 56 *LQR* 393–6); rather, the judges erred in failing to take into account the fact that the defendant in each instance had wrongfully dispossessed the plaintiff. With respect to *Nagle* v. *Shea* one may question whether the defendant was a

the defendant succeeds in doing so the plaintiff will lose, not simply because the right is in another, but because the existence of that right negates his own title.[193] This is the correct use of the defence of *jus tertii*—that is, as a sword to cut down the plaintiff's prima-facie title rather than as a shield to shelter the defendant.[194]

wrongdoer (and see n. 189 above), but no such doubt exists in the case of *Barnard*, for there a person under whom the defendant claimed had already failed to recover the land in an action of ejectment against the plaintiff before the defendant ousted her: see *Doe d. Goody* v. *Carter* (1847) 9 QB 863. The decision is all the more troubling for that reason, and its correctness was understandably doubted by the Privy Council which, in *Perry* v. *Clissold* [1907] AC 73, at 79, found it 'difficult, if not impossible', to reconcile with *Asher* v. *Whitlock* (1865) LR 1 QB 1: see also *Groom* v. *Blake* (1857) 6 Ir. CLR 400, at 410; *Nair Service Society* v. *Alexander* (1968) 55 AIRSC 1165, at 1172–5; Ames, 'Disseisin of Chattels', 3 *Harv. LR* 23, 313, at 324 n. 2; *HEL* VII[2]. 66–7. Perhaps it can be justified on the basis that the plaintiff attempted to rely on a title which turned out to be vested in another (see arg. in *Asher* v. *Whitlock* (1865) 35 LJQB 17, at 18; Pollock and Wright, *Possession*, 22 n. 1, 97; note, however, that Pollock's attempt to rationalize the decision in *Barnard* was described by Maitland as 'desperate': Hazeltine, 'Gossip about Legal History', 2 *Camb. LJ* 1, at 15), but it is hard to see why this should have prevented her from relying on her own possession and the disseisin: see *Denn d. Tarzwell* v. *Barnard* (1777) 2 Cowp. 595, and *Davison* v. *Gent* (1857) 1 H. & N. 744, where failure in each case to prove an alleged lease did not preclude the plaintiffs from relying on their prior possession; see also *Hadden* v. *White* (1845) 4 NBR (2 Kerr) 634; *Freeman* v. *Allen* (1866) 6 NSR (2 Oldright) 293; *Mussammat Sundar* v. *Mussammat Parbati* (1889) LR 16 IA 186; cf. *Doe d. Woodhouse* v. *Powell* (1846) 8 QB 576; *McCormack* v. *Barnett* (1892) 2 SCJ & PC 1965, at 1970–1.

[193] Note that proof of a *jus tertii* is essential in these circumstances; the presumption cannot be rebutted merely by showing the plaintiff did not come to the land by title: see Wiren, 'Plea of *Ius Tertii*', 41 *LQR* 139, at 148–9; Jolly, 'Jus Tertii', 18 *MLR* 371, at 372–3; cf. Atiyah, 'Re-examination of *Jus Tertii*', 18 *MLR* 97, at 109 n. 48. Were it otherwise, an adverse possessor could not acquire a good title by statutory limitation, for English statutes of limitation have generally been negative rather than positive in operation; yet it has been held that, once a statute extinguishes the right of every person to challenge the prima-facie evidence of right arising from possession, that evidence becomes conclusive: see *Atkinson & Horsell's Contract* [1912] 2 Ch. 1, at 9, 17. The effect of statutes of limitation is discussed below in text acc. nn. 225–48.

[194] See P. & M. II. 76; Hargreaves, 56 *LQR* 380; *Oxford Meat* v. *McDonald* [1963] SRNSW 423, at 427; and, re chattels, Atiyah, op. cit., esp. 100–1; Jolly, op. cit. 371. Hargreaves, however, failed to recognize its application against the prior possessor because he did not understand that his title is presumptive: see 56 *LQR* 381, 397.

At this point an important question arises which, although somewhat collateral to our discussion of the title of mere possessors, deserves attention because it goes to the root of the disagreement between Holdsworth and Hargraves, and thereby clarifies the nature of the debate: In the absence of proof of dispossession, can the defence of *jus tertii* be used where the plaintiff's claim of title rests not just on his own possession, and the presumption of title arising therefrom, but on a descent, devise, or conveyance from an earlier possessor? No doubt the defendant can disprove the plaintiff's title by showing that he no longer has it, as would be the case if the plaintiff had alienated his interest,[195] or it had expired,[196] or the land had been lawfully taken from him by, or been remitted to, someone with a better title. But can the defendant negate the plaintiff's title by proving that a predecessor from whom that title is traced was a wrongdoer, and setting up the earlier outstanding title of another, through whom neither he nor the plaintiff claims? Holdsworth probably would have answered yes. That is why he concluded that, through ejectment, 'the new conception of ownership, as an absolute right available against the whole world, was introduced into the English law.'[197] But, he later admitted, this does not mean that the medieval principle

[195] e.g. *Roe d. Haldane & Urry* v. *Harvey* (1769) 4 Burr. 2484, where the plaintiffs lost because it appeared that Haldane had conveyed her interest to Urry, but adequate evidence, though available, was not produced to show that Urry had acquired title. Although the decision has been criticized (for one of the plaintiffs must have had title, and that should have sufficed: see *Doe d. Carr* v. *Billyard* (1828) 3 M. & Ry. 111, ed.'s n. (*a*) at 112; *Bate* v. *Kinsey* (1834) 1 CM & R. 38, at 43; *Doe d. Danson* v. *Parke* (1836) 4 Ad. & E. 816; Chitty, *Treatise on Pleading*[6], 1. 187), it proves the obvious point that a plaintiff who has conveyed his interest to another cannot recover in ejectment. See also *NRMA Insurance* v. *B. & B. Shipping* (1947) 47 SRNSW 273, at 279.

[196] As where the plaintiff's title depended on a lease, the term of which had run out: *England d. Syburn* v. *Slade* (1792) 4 TR 682. See also *Doe d. Jackson* v. *Ramsbotham* (1815) 3 M. & S. 516; Adams, *Action of Ejectment*[4], 41. Note that *Balls* v. *Westwood* (1809) 2 Camp. 11, which was said in *Hatfield* v. *Alford* (1846) 1 Legge 330, at 342 (and see 335) to have added the qualification that there must also have been an eviction in consequence of the determination of the plaintiff's interest, was disapproved of in *Mountnoy* v. *Collier* (1853) 1 E. & B. 630, and is probably not good law. For a discussion of this issue in relation to bailment of chattels, see Atiyah, 'Re-examination of *Jus Tertii*', 18 *MLR* 97, at 98–102.

[197] *HEL* VII[2]. 68; see also ibid. 63 n. 3.

of relativity of titles is dead. One title is still good until a better is shown.[198] The difference, according to Holdsworth, is that in modern law a defendant can defeat the plaintiff's title by showing a better title, not necessarily in himself, but in some third party.[199] In Hargreaves' view, of course, this was pure heresy. For him, in modern law as in the Middle Ages, the better title is that which is based on the earlier seisin; because seisin still 'creates a title' which will support a claim to recover the seisin after it has been lost, the *jus tertii* is of no more use now than it was then to defeat such a claim.[200]

This takes us back to our earlier discussion of the real actions. We saw that a disseisor or other wrongdoer acquired a title, beyond the title that goes with possession which every possessor has, at the moment the disseisee's right of entry was lost. According to Bracton, this title was acquired by the passage of time. By Littleton's day, however, time no longer tolled the disseisee's right of entry: some other event, such as a descent cast, had to occur. Thus, until statutes of limitation once again placed a time-limit on rights of entry, while in possession the only title a disseisor (assuming he was known to be a disseisor, which would have eliminated the possibility of a presumptive title) could have had was the title that goes with possession. Furthermore, a conveyance by him (other than by the special mechanisms of fines and recoveries, which need not concern us here) would not have taken away the disseisee's right of entry.[201] Coke none the less wrote that a deisseisor's feoffee, like his heir, was 'in by title'.[202] But though the feoffment might have affected the rights of others,[203] the feoffee had no more right than the disseisor to hold the land against the disseisee.[204] Since the disseisee could still enter, to

[198] See P. & M. II. 77.

[199] See Holdsworth, 'Terminology and Title', 56 *LQR* 479, at 479–80.

[200] Hargreaves, 56 *LQR* 381, 393–7. See also Wade, 'Real Property' [1956] *Camb. LJ* 177, at 178–9.

[201] *Co. Litt.* 237[b].

[202] Ibid. 268; see also 238[a], Butler's n. 2.

[203] According to Coke it meant that the lord lost his right of escheat on the death of the disseisee without heirs: ibid. 268.

[204] As Maitland pointed out, if the feoffee did have a better right, and no inquiry as to his good faith was made, every disseisor would have had a feoffee ready to hand: 'Beatitude of Seisin', 4 *LQR* 24, 286, at 297–8. See n. 213 below.

say that the feoffee was in by title was simply another way of saying that he came to the land by an apparently lawful act, that he was not himself a wrongdoer.[205] His right, however, was no greater than that of the wrongdoer to whom he owed his title, for *nemo dat quod non habet*.[206] The heir of a disseisor who died seised, however, would have a title by descent equivalent to the title by time accorded to a disseisor by Bracton because, as long as the disseisor had been in peaceful possession for five years, the descent cast would have tolled the entry of the disseisee.[207] This remained the law until 1833 when the tolling of entries by descent cast was abolished by the *Real Property Limitation Act*.[208] But this was not the only distinction between feoffees and heirs, for prior to 1845 a feoffee did not acquire a legal interest in the land until he had taken livery of seisin,[209] whereas an heir did acquire a legal interest before entry, and even a kind of possession called 'seisin in law', if his ancestor died seised.[210] Other distinctions must be drawn with respect to a devisee who, although seised in law when the testator died seised, and entitled to obtain possession from an abator who wrongfully entered before him,[211] did not have a title equivalent to the title by descent accorded to an heir because the right of entry of the disseisee was not taken away by the death of the testator. We need, therefore, to consider the position of each of these persons in turn.

Prior to 1845, a disseisor would have had to be in possession in order to make a conveyance. If wrongfully dispossessed

[205] See Maitland, 'Mystery of Seisin', 2 *LQR* 481, at 487.

[206] See *Taylor d. Atkyns* v. *Horde* (1757) 1 Burr. 60, at 114.

[207] The five-year requirement was imposed by 32 Hen. VIII, c. 33: see *Co. Litt.* 238ª. Note that there were other situations where the entry was not tolled, as where the disseisee was under disability: see gen. Littleton, *Tenures*, ss. 385–413; Blackstone, *Commentaries*, III. 177.

[208] 3 & 4 Will. IV, c. 27, s. 39: see Maitland, 'Beatitude of Seisin', 4 *LQR* 24, 286, at 298–9.

[209] *Doe d. Wilkins* v. *Cleveland* (1829) 9 B. & C. 864, esp. 868. There were, of course, ways of getting round this requirement of livery prior to 1845 (e.g. by means of a lease and release or a statute of uses conveyance), but not until the *Real Property Act*, 8 & 9 Vict., c. 106, s. 2 enacted that all corporeal tenements and hereditaments lie in grant as well as in livery did it become possible to make a direct grant of a freehold estate without livery.

[210] See nn. 275–6 and text below.

[211] See *Co. Litt.* 111ª; *Stokes* v. *Berry* (1699) 2 Salk. 421.

himself, he could neither enfeoff another nor assign his right to recover possession through entry or action.[212] While in possession, his title, other than that which goes with possession, would have been merely presumptive. As his feoffee's title could be no better,[213] then in the absence of evidence that the feoffee had himself been dispossessed, an action of ejectment brought by the feoffee to recover lost possession could be met by rebutting his presumptive title with proof of the *jus tertii* of the disseisee. Since 1845, however, the situation has been more complex because even after being dispossessed a disseisor can convey what in effect is a right of entry to his alienee (who technically is not a feoffee because he does not take livery of seisin).[214] In that event, the alienee has not just a presumptive title, but also the disseisor's title by being wrongfully dispossessed to support that right of entry.[215] Accordingly, the *jus tertii* is irrelevant.[216] Furthermore, if the disseisor was in possession at the time of the conveyance but a wrongdoer anticipated the alienee by entering before him, the entry would be a wrong to the alienee,[217]

[212] A mere right, without possession, could not be assigned: *Lampet's Case* (1603) 10 Co. R. 46ᵇ, at 48ª; *Co. Litt.* 214ª; Maitland, 'Mystery of Seisin', 2 *LQR* 481, at 483–4, 489–96. This rule was changed by the *Real Property Act*, 8 & 9 Vict., c. 106, s. 6: see Carson and Bompas, *Real Property Statutes*², 524 n. 1.

[213] In *Denn d. Tarzwell* v. *Barnard* (1777) 2 Cowp. 595, the title of an assignee of a lease was apparently only as good as that of the assignor; and see *Whale* v. *Hitchcock* (1876) 34 LT 136, where the same assumption was made with respect to a conveyance in fee. Note that in the latter case defence counsel alleged that the conveyance had been made solely in view of the action; however, the court did not mention this, as one would have expected it to do had it mattered. See also *Doe d. Jackson* v. *Ramsbotham* (1815) 3 M. & S. 516; *Allen* v. *Roughley* (1955) 94 CLR 98. Cf. the erroneous dictum of Lefroy CJ in *Groom* v. *Blake* (1858) 8 Ir. CLR 428, at 433.

[214] See *Challis's Real Property*³, 397.

[215] See *Whale* v. *Hitchcock* (1876) 34 LT 136, per Cleasby B. at 137 (quoted in n. 233 below).

[216] See *Ocean Estates* v. *Pinder* [1969] 2 AC 19, at 25.

[217] In *Copestake* v. *Hoper* [1908] 2 Ch. 10 it was held that a statutory conveyance under the *Real Property Act*, 8 & 9 Vict., c. 106 gave the alienee seisin. Whether this is seisin in law or in deed is arguable: see Sweet, 'Seisin', 12 *LQR* 239, at 245, and the debate between Sweet and T. C. Williams in 51 *Sol. J.* 288, 478, 496, 512, 52 *Sol. J.* 510, 527, 549, 579. But in *Parks* v. *Hegan* [1903] 2 Ir. R. 643, at 648–9, 652–3, it was decided that a conveyance cannot give the alienee actual seisin, at least if the alienor remains in possession. Cf.

and consequently he could recover possession in ejectment irrespective of the *jus tertii*.

Turning now to the heir, if a disseisor dies seised his heir has a title by descent. Prior to 1833, and assuming the disseisor had been in peaceful possession for five years if he died after 1540, the descent cast would have tolled the entry of the disseisee. As a result, the heir could not only obtain possession from an abator, but could recover possession once acquired by his own entry and then lost, without any proof of ouster and regardless of the *jus tertii*.[218] Where, however, his ancestor was a known disseisor and did not die seised, the heir would not acquire a title by descent for the purposes of ejectment (though he may have for a writ of right), but had the ancestor been wrongfully dispossessed the heir would inherit a right of entry. In any case, whether he had title by descent or a right of entry arising from dispossession of his ancestor, the *jus tertii* would not be available against him.[219] Since 1833, however, the heir's position can be no better than his ancestor's because a descent cast does not toll a disseisee's right of entry. This change does not affect whatever right the heir may have to bring ejectment where his ancestor does not die seised. Where the ancestor *does* die seised, the heir can still acquire possession from an abator irrespective of the *jus tertii*; but for the heir to recover possession once taken by him and lost he must, in absence of proof that he was ousted, rely on the presumption of title arising from his own and his ancestor's possession, and this presumption can be rebutted by proof of the *jus tertii*.[220]

As for the devisee, prior to 1833 his position depended on whether the testator died seised of the lands in question.[221] If he did not, the devisee acquired nothing, because even if the testator had a right of entry, such a right could not be devised.[222] Where the testator did die seised, the devisee's position was analogous to that of the heir after 1833; that is, he could obtain possession from an abator,[223] but any claim by him to recover possession once acquired and lost could, in the absence of proof of dispossession, have been met by the defence of *jus tertii*. Since 1838, when rights of entry became devisable,[224] the devisee's position has been as good as that of the post-1833 heir; for even where the testator does not die seised, if he was wrongfully dispossessed his devisee can rely on his right of entry irrespective of the *jus tertii*.

All this, of course, disregards the effect of statutes of limitation, which it is now essential to clarify. We have seen that an Act passed in 1623 extinguished rights of entry after twenty years from the time they accrued (since 1879 this period has been twelve years).[225] Because a plaintiff in ejectment has to have a right of entry, this statute effectively limited the time for

Ocean Estates v. *Pinder* [1969] 2 AC 19, at 25–6, where Lord Diplock suggested that an alienee can rely on the possession of his predecessor in title and the deed of conveyance in trespass, thereby implying that the deed transfers actual possession. But be that as it may, entry by a stranger would have been a wrong to the alienee, equivalent to disseisin.

[218] See *Stokes* v. *Berry* (1699) 2 Salk. 421. Cf. *Doe d. Draper* v. *Lawley* (1834) 3 N. & M. 331, where the court relied on the presumptive title arising from 20 years' possession (see text acc. nn. 227–38 below), apparently without taking account of the fact that the plaintiff had a title by descent as well, and *Doe d. Harding* v. *Cooke* (1831) 7 Bing. 346, 5 Moo. & P. 181, 9 LJCP 118, where Alderson J. seemed to suggest that the defence of *jus tertii* would be available against an heir; see also per Tindal CJ at 5 Moo. & P. 184. These dicta, however, ignore the fact that prior to 1833 an heir would have prevailed in ejectment even against one with a better right: *Smith* v. *Tyndal* (1705) 2 Salk. 685. *A fortiori* he would have prevailed against a stranger, regardless of the *jus tertii*. Perhaps the dicta in *Doe d. Harding* v. *Cooke* contemplate evidence that the plaintiff was not the heir (as was in fact argued by the defendant, without sufficient proof), or that he had subsequently lost his title (e.g. through remitter: see n. 169 above), or parted with his interest, or that the right of entry had not been tolled by the descent cast (e.g. due to a disability: see n. 207 above).

[219] See discussion of *Asher* v. *Whitlock* (1865) LR 1 QB 1 in nn. 186–91 and text above.

[220] See discussion of *Groom* v. *Blake* (1857) 6 Ir. CLR 400, (1858) 8 Ir. CLR 428 in text acc. nn. 249–59 below.

[221] Note that the testator had to have the lands at the time the will was made as well, for lands acquired later would not pass under a devise: see Blackstone, *Commentaries*, II. 378–9. Note too that, prior to the *Statute of Wills*, 32 Hen. VIII, c. 1 freeholds could be devised only where local custom permitted: see Simpson, *History of Land Law*[2], 62, 138–9.

[222] See Maitland, 'Mystery of Seisin', 2 *LQR* 481, at 484–5.

[223] See *Asher* v. *Whitlock* (1865) LR 1 QB 1.

[224] By the *Wills Act*, 1 Vict., c. 26, s. 3.

[225] 21 Jac. I, c. 16, s. 1; and see n. 150 above and n. 246 below. However, for persons under disability s. 2 allowed a period of 10 years from the time the disability ceased.

bringing the action.[226] On the other side, it meant that after twenty years' adverse possession a disseisor or other wrongdoer acquired what might be called a 'title by limitation'[227] equivalent to Bracton's title by time or the title by descent an heir would have had prior to 1833.[228] If ousted by the disseisee thereafter, the disseisor could bring ejectment and recover possession, regardless of the fact that the disseisee would win on a writ of right.[229] By the same token, the disseisor could recover from anyone else irrespective of the disseisee's right (i.e. the *jus tertii*). This is the origin of the so-called twenty years' rule. Holdsworth, however, was wrong to conclude that in the absence of proof that the defendant was a 'trespasser' (i.e. a wrongdoer) or came in under the plaintiff, twenty years' possession *had* to be shown by the plaintiff if he had no other title.[230] Though he could not set up a title by limitation without

[226] See *The King* v. *Parishioners of Wilby* (1724) 8 Mod. 287. Before their abolition in 1833, a claimant could none the less have resorted to one of the real actions, provided he did so before they were barred as well: see *HEL* VII^2. 20; Simpson, op. cit. 149–50.

[227] Also called a 'statutory title' (see *Ex parte Winder* (1877) 6 Ch. D. 696, at 701), which is somewhat misleading because it implies that the operation of statutes of limitation is positive in that they give the possessor a title. This kind of thinking led to the erroneous view that the *Real Property Limitation Act*, 3 & 4 Will. IV, c. 27 created a parliamentary conveyance. This view was authoritatively discarded in *Tichborne* v. *Weir* (1892) 67 LT 735, where it was pointed out that statutory limitation is negative in effect: see Lightwood, *Time Limit*, 117; Megarry and Wade, *Real Property*^{5}; 109.

[228] See *Stokes* v. *Berry* (1699) 2 Salk. 421.

[229] *Smith* v. *Tyndal* (1705) 2 Salk. 685; Preston, *Abstracts*^{2}, II. 294.

[230] *HEL* VII^2. 64–5. *Stokes* v. *Berry* (n. 228 above), cited by Holdsworth at 63, decided that 20 years' possession was sufficient to maintain ejectment, not that a lesser period was insufficient (see *Allen* v. *Roughley* (1955) 94 CLR 98, at 140). The same may be said of other cases where the 20 years' rule appears: see *Yard* v. *Ford* (1670) 2 Wms. Saund. 172, at 175, citing *Lewis* v. *Price*, apparently unreported; *Denn d. Tarzwell* v. *Barnard* (1777) 2 Cowp. 595; *Doe d. Harding* v. *Cooke* (1831) 7 Bing. 346; *Doe d. Draper* v. *Lawley* (1834) 3 N. & M. 331; *Doe d. Danson* v. *Parke* (1836) 4 Ad. & E. 816, at 818. In the second case relied on by Holdsworth, *Doe d. Wilkins* v. *Cleveland* (1829) 9 B. & C. 864, it was held that livery of seisin could not be presumed from less than 20 years' possession, but as Hargreaves pointed out, this is another issue entirely: see 56 *LQR* 382–3, 389 and *Allen* v. *Roughley* 128–9, 140–1. However, in *Brest* v. *Lever* (1841) 7 M. & W. 593, 10 LJ (NS) Ex. 337, an action in trespass *quare clausum fregit*, the defendant by way of justification alleged that the land was his freehold, relying on his own prior possession for 17 years. This was held to be insufficient. Parke B. wrote (7 M. & W. 593, at 595): 'By the plea of liberum tenementum, the defendant admits that the plaintiff is in possession, and that he himself is, primâ facie, a wrong doer; but he undertakes to shew a title in himself, which shall do away with the presumption arising from the plaintiff's possession. This he was bound to do, either by showing title by deed, in the usual way, or by proving a possessory title for twenty years. But here the defendant has only proved acts of ownership extending over seventeen years, and has not connected them with any prior title; it amounts therefore, to nothing more than a longer against a shorter possession—a mere priority of possession—and for a period insufficient to confer a title, except against a mere wrong doer.' The judgment must, however, be read in light of the facts, which reveal that the plaintiff proved the title of a third party, under whom neither he nor the defendant claimed. Upon this point being raised in argument, Parke B. observed (10 LJ (NS) Ex. 337): 'The defendant's title seems to be cut off at both ends; for he begins by admitting the plaintiff to be in actual possession, and falls short in proving a possessory title of twenty years.' It would seem, therefore, that 17 years was insufficient because the plaintiff had rebutted the presumption of title arising therefrom by proving the right of another. Thus, instead of supporting the 20 years' rule as formulated by Holdsworth, the case is merely an example of the application of the plea of *jus tertii*. To interpret it otherwise would be inconsistent with the decision participated in by Parke J. (as he then was) in *Doe d. Smith & Payne* v. *Webber* (1834) 1 Ad. & E. 119, applied by Field J. in *Whale* v. *Hitchcock* (1876) 34 LT 136.

so showing, as long as he proved prior possession, however short, that would be prima-facie evidence of title.[231] Thus, in *Whale* v. *Hitchcock*[232] although the defendant argued that no presumption of title was raised by possession for less than the statutory period, the court held otherwise. Field J. wrote:

[231] See *Doe d. Pritchard* v. *Jauncey* (1837) 8 Car. & P. 99, at 102, where Coleridge J. rejected the argument that 20 years' possession is necessary to have a good title and a descendible interest, and instructed the jury that the moment a man takes possession, if he dies and the owner does not interfere, the property will descend to his son. In *Doe d. Humphrey* v. *Martin* (1841) Car. & M. 32, Lord Denman told the jury that proof of receipt of rent for 4 or 5 quarters by a plaintiff in ejectment was sufficient to cast the burden on the defendant to show a title in himself. As the defendant failed to do so, a verdict was given for the plaintiff. See also *Lessee of Smith* v. *McKenzie* (1854) 2 NSR (James) 228; *Doe d. Eaton* v. *Thomson* (1860) 9 NBR (4 Allen) 461; *Asher* v. *Whitlock* (1865) 11 Jur. (NS) 925, at 926; *Freeman* v. *Allen* (1866) 6 NSR (2 Oldright) 293, at 294–6; *Dawson* v. *Pyne* (1895) 16 NSWLR (CL) 116; *Atkinson & Horsell's Contract* [1912] 2 Ch. 1, at 9, 17; *Robinson* v. *Osborne* (1912) 8 DLR 1014, at 1018–19; *NRMA Insurance* v. *B. & B. Shipping* (1947) 47 SRNSW 273, at 279; *Allen* v. *Roughley* (1955) 94 CLR 98, at 109–11, 127–32, 134–41, 143–5, cf. 113–15, 118; and discussion in Wiren, 'Plea of *Ius Tertii*', 41 *LQR* 139, at 141–52.

[232] (1876) 34 LT 136.

The plaintiff proved possession previous to that of defendant. The defendant has present possession, but from the evidence does he show a better title? I think the presumption is in favour of the earlier possession, but at all events, it is a matter for a jury.[233]

We concluded above that under the 1623 Act adverse possession for the statutory period would result in a title by limitation equivalent to the title by descent acquired by an heir prior to the abolition of the tolling of entries by descent cast. But there is an important distinction between the two. As we have seen, a title acquired by descent prior to 1833 generally could not be rebutted by proof of an earlier right in some third party. This is true of a title by limitation as well, with this difference: adverse possession took away only those rights of entry that had accrued more than twenty years before. Accordingly, it did not take away rights of entry of reversioners and remaindermen until twenty years after they had vested. A descent cast, on the other hand, did toll those rights, even where the reversioner or remainderman was not entitled to enter at the time.[234] Thus, twenty years' possession, though prima facie as good as a descent cast, was not necessarily so. Furthermore, as in the case of descent cast, there were exceptions with respect to persons under disability.[235] In a sense, then, a title by limitation was still presumptive, though it differed from the presumptive title arising from possession for less than the statutory period because mere proof of a third-

[233] Ibid. 137. The facts were these: the plaintiff claimed under a conveyance from one Myatt, who had been in possession 13 years; the defendant came on to the land without Myatt's permission 5 or 6 years prior to the action, and before the conveyance. Under the old law, the defendant probably would have been a disseisor in these circumstances. But for some reason the court did not seem to see it that way. Cleasby B., at 137, stated: 'It is not disputed that, if the defendant had turned Myatt out of possession, the plaintiff's title would have prevailed.' In the absence of a title by being wrongfully dispossessed, the outcome depended on the relative strength of the presumptive title of each of the parties. Though earlier possession prima facie raises a stronger presumption, circumstances may tip the balance the other way, and whether this has happened in any particular case is a matter of fact for the jury to decide. See also *Doe d. Harding* v. *Cooke* (1831) 7 Bing. 346, 5 Moo. & P. 181, 9 LJCP 118, esp. per Park J.

[234] See *Wimbish* v. *Tailbois* (1550) 1 Plow 38, at 47; *Co. Litt.* 238[a].

[235] See above, n. 225 and, on descent, n. 207.

party right would not have sufficed to rebut it.[236] The defendant would have had to go further and prove that, either by reason of disability or because the right of entry had accrued within twenty years, it had not been barred.[237] Thus, the twenty years' rule, though not non-existent as Hargreaves thought, was not as important as Holdsworth made out.[238]

A further word needs to be said about the impact of the *Real Property Limitation Act*[239] of 1833 on our discussion. We have already noted that this Act abolished the tolling of entries by descent cast, with the result that an heir would no longer have a qualitatively better title than his ancestor. But the Act also introduced a major change respecting the effect of adverse possession. Whereas under the 1623 legislation adverse possession for the statutory period took away the right of entry without affecting title or the right to bring most real actions,[240] under the new Act it barred all actions respecting land and extinguished title as well.[241] At the same time the Act abolished the real actions, with the exception of writs of dower and *quare impedit* for the recovery of advowsons.[242] Apart from those writs (and Crown proceedings, to be discussed in Chapter 3) ejectment was left as the sole action for recovering possession of land. Because the Act extinguished title, a landholder who had

[236] See *Doe d. Smith & Payne* v. *Webber* (1834) 1 Ad. & E. 119, at 121; *Doe d. Draper* v. *Lawley* (1834) 3 N. & M. 331; *Calder* v. *Alexander* (1900) 16 TLR 294. Note that in this sense a title by descent was presumptive as well to the extent that it could be rebutted by proof of a right of entry outstanding due to an exception: see n. 207 above.

[237] Note that proof of a reversion or remainder would defeat a title by limitation only if the particular estate upon which it was expectant had come to an end, for until then the reversioner or remainderman would not have had a right of entry and could not himself have succeeded in ejectment: see *Doe d. Fellowes* v. *Alford* (1843) 1 Dowl. & L. 470; *NRMA Insurance* v. *B. & B. Shipping* (1947) 47 SRNSW 273; *Oxford Meat* v. *McDonald* [1963] SRNSW 423; *Fairweather* v. *St Marylebone Property* [1963] AC 510.

[238] Holdsworth, of course, attached unwarranted importance to it because he mistakenly thought that possession for a lesser period raised no inference of title: *HEL* VII[2]. 64–5.

[239] 3 & 4 Will. IV, c. 27.

[240] Formedon, which the Act limited to 20 years, was an exception. Limitation periods for most of the other real actions had been set by 32 Hen. VIII, c. 2: see *Co. Litt.* 115[a]; *HEL* IV[2]. 484–5.

[241] See n. 150 above.

[242] 3 & 4 Will. IV, c. 27, s. 36.

slept on his rights for the period of limitation could no longer be restored to his former position by remitter.[243] However, the 1833 Act, like the old statute, took away only those rights that had accrued more than twenty years before,[244] and there continued to be exceptions for persons under disability.[245] So although a title by limitation under the 1833 and subsequent statutes[246] is potentially good as against all the world,[247] it none the less remains presumptive in most cases, especially because one can rarely be sure an unknown reversioner or remainderman does not exist.[248]

For the purpose of bringing together the various elements of our discussion of the action of ejectment, it may be helpful to take a close look at the largely-ignored Irish case of *Groom* v. *Blake*.[249] That was an action of ejectment brought on the basis of prior successive possessions for thirty years of the plaintiff and his father, who had entered without title in 1819 on the death of one Robert Blake, through whom the defendant claimed as devisee of the fee simple in remainder after a life estate which had terminated in 1848. In 1849 the defendant had succeeded on the strength of the will in an action of ejectment against the present plaintiff, and was put in possession under an *habere facias possessionem*. However, the plaintiff in the present action claimed that a mistake of fact had been made, and that the lands now in question should not have been included in the 1849 judgment because Blake's interest in them had been a mere life estate. This was proved at trial, for, after hearing evidence of a third-party title, the jury found that

[243] See n. 169 above.

[244] 3 & 4 Will. IV, c. 27, s. 2.

[245] Ibid., ss. 16–19. However, s. 17 imposed a limit of 40 years on the application of these exceptions. Note too s. 26, which provided that, in case of concealed fraud, time did not run until the fraud was, or with reasonable diligence might have been, discovered.

[246] The *Limitation Acts* of 1939(2 & 3 Geo. VI, c. 21, s. 16) and 1980 (c. 58, s. 17) both extinguish title as well, subject to the *Land Registration Act*, 15 & 16 Geo. V, c. 21, s. 75, upon expiry of the time-limit for bringing an action to recover land, which, since 1879, has been 12 years in most cases: see n. 150 above.

[247] See *Perry* v. *Clissold* [1907] AC 73, at 79; *Atkinson & Horsell's Contract* [1912] 2 Ch. 1, at 9.

[248] See *Allen* v. *Roughley* (1955) 94 CLR 98, esp. 139–40; Hargreaves, 56 *LQR* 376–7; Simpson, *History of Land Law*[2], 153.

[249] (1857) 6 Ir. CLR 400 (CP); (1858) 8 Ir. CLR 428 (Ex. Ch.).

Blake had not been seised in fee. The title of the defendant under the will was therefore bad. However, it also appeared that from 1825 to about 1840 a receiver had been in receipt of rents, in light of which the trial judge instructed the jury that if the receipt of rents had been for the purpose of paying the debts of Blake the possession of the plaintiff's father would have been disturbed, in which case the plaintiff could not recover, not having a title created by twenty years' continuous possession. The jury found that due to the appointment of the receiver the plaintiff's father did not hold undisputed possession for twenty years, and accordingly returned a verdict for the defendant. On a motion to set aside the verdict on the grounds of misdirection, the Court of Common Pleas held that the trial judge should have informed the jury that the appointment of the receiver did not interrupt the father's possession so as to prevent the statute of limitations from conferring a title upon him. A new trial was ordered. This judgment was affirmed by the Court of Exchequer Chamber.

The decision in the earlier action, by which the present defendant first acquired possession, illustrates the vulnerability to remainders of a title by limitation. But it is the second action which is of real interest because it raised a number of vital issues, some of which were scarcely noticed by the judges. Monahan CJ, who delivered the Common Pleas decision, agreed with the trial judge that twenty years' uninterrupted possession would have given the plaintiff a title,[250] thereby implicitly accepting his ruling that possession for a lesser period would have been insufficient.[251] Counsel for the plaintiff, however, had argued on good authority that prior possession, even for less than twenty years, gave the plaintiff 'a presumptive title as against a party who had wrongfully evicted him'.[252] Why was this argument ignored? First, though Monahan CJ at one point described the defendant as 'a party who put him [the plaintiff] out of possession without legal right so to do',[253] he earlier stated the issue to be:

[250] 6 Ir. CLR 400, at 409.

[251] The Exchequer Chamber also took this for granted: 8 Ir. CLR 428, at 432.

[252] 6 Ir. CLR 400, at 405.

[253] Ibid. 409.

... whether though the present defendant had, at the time in question, no title, yet, *inasmuch as he obtained the possession of the lands under legal process*, the present plaintiff had such an estate in the lands as will entitle him to recover them, in an ejectment on the title against the present defendant ..., who is now in possession?[254]

Since the defendant came in under the *habere*, he was not a wrongdoer. Accordingly, the plaintiff could not rely on wrongful dispossession as the basis of a right to recover.[255] He had to prove some other title.[256] Although prior possession, however short, raises a presumption of title in the possessor,[257] the plaintiff's second problem was that a third party had been

[254] Ibid. 407; emphasis added.

[255] See *Taylor d. Atkyns* v. *Horde* (1757) 1 Burr. 60, at 114. Likewise, novel disseisin generally did not lie for one who had been dispossessed pursuant to a judgment, though erroneously given, of the king's court: see Sutherland, *Novel Disseisin*, 78–80. For the application of the same principle to chattels see auth. in n. 29 above.

[256] A parallel situation arose where an inquest of office mistakenly found a title for the Crown to lands in the possession of a subject, and the Crown entered. In the absence of a manifest error on the face of the office, the subject could not recover the lands by merely traversing the facts as found; he had to prove a title in himself: Staunford, *Prerogative*, 62[b]; Farrer, 'Another Prerogative Fallacy', 50 *LQR* 411, at 414. Farrer, however, argued at 417–22 that the prior possession of the subject, even if wrongful, would have been sufficient title unless it appeared that it had not been seisin. In other words, Farrer believed that the *jus tertii* was of no avail to the Crown against one who proved prior seisin. This is what Hargreaves said with respect to the use of this defence by subjects: 56 *LQR*, esp. 381, 393–7. But Farrer, like Hargreaves, failed to realize that prior seisin raises a mere presumption of title. Entry by the Crown under the authority of an office which was not erroneous on its face was no wrong to the possessor, for, according to Staunford, an 'office that fyndes the kyng to have a right or title to entre, makes ever the king a good title allthough it bee false, and his highnes therby maye take possession against any other that is seised of the lands, and reteyne untill such time as thoffice be traversed by him that hath title' (*Prerogative*, 62[b]). Not having a title by being wrongfully dispossessed, the subject who relied simply on his prior seisin was liable to have the presumption of title arising therefrom rebutted by proof of a *jus tertii*. Staunford (again at 62[b]) wrote: 'it is a good generall grounde if the kynge be once seised, his highnes shall reteine against all other that have noe title, notwithstandinge it be found allso that the kynge had no title but that the other had possession before him'. Inquests of office, and the Crown's title generally, are discussed in ch. 3 below.

[257] See nn. 230–3 and text above.

shown to have a title.[258] As the plaintiff's presumptive title had been rebutted by the *jus tertii*, he had to prove a title by limitation, i.e. uninterrupted possession for twenty years.[259]

3. Abandonment of Possession

Before concluding this chapter a few words should be said respecting abandonment of possession of land, for this will help to explain the presumptions, and hence the burden of proof, in actions for the recovery of land. Maitland thought it 'very doubtful whether a man could (or can) get rid of a seisin once acquired, except by delivering seisin to some one else.'[260] A person lost seisin at death, and it could be taken away, either lawfully by entry or action, or unlawfully by disseisin; but it could not be simply abandoned, for the result would be an abeyance of the freehold, which the common law has always abhorred.[261] With respect to seisin which is firm in that it cannot be divested by lawful entry, undoubtedly Maitland was right. But what of tenuous seisin? Bracton wrote that a disseisor who had not acquired a title by time was 'in seisin', but not

[258] In *Doe d. Smith & Payne* v. *Webber* (1834) 1 Ad. & E. 119, a plaintiff recovered on the basis of prior possession for less than 20 years in spite of the fact that the defendant had acquired possession under a *habere*, but there a *jus tertii* does not appear to have been proved, and furthermore the *habere* had been issued under an arbitration award which was ruled inadmissible.

[259] Since none of the judgments mentioned presumptive title and rebuttal thereof by proof of the *jus tertii*, it is possible that the judges, like Holdsworth (see text acc. n. 150 above), thought that, in the absence of wrongful dispossession, proof of 20 years' possession was necessary for a plaintiff without other title to succeed in ejectment. However, we have seen that that view of the 20 years' rule is incorrect: see nn. 230–3 and text above. In order, therefore, to reconcile *Groom* v. *Blake* with other authorities we are justified in taking account of the *jus tertii*.

[260] P. & M. II. 54 n. 2. But apparently a tenant could waive his tenancy, thereby restoring it to his lord: see *Bracton*, II. 237, IV. 196; P. & M. II. 81.

[261] The reason why an abeyance was generally not tolerated was that someone had to do feudal services and answer actions brought in respect of the land: see *Geary* v. *Bearcroft* (1666) Cart. 57, at 60, 61, 65; *Taylor d. Atkyns* v. *Horde* (1757) 1 Burr. 60, at 107–8; *Co. Litt.* 216[a], Butler's n. 2. With chattels, since no such rationale applies, abandonment is probably possible: see gen. Hudson, 'Divesting Abandonment', 100 *LQR* 110.

'seised'.[262] Though he had seisin as regards strangers, he was not seised as regards the disseisee.[263] In some sense the disseisee retained seisin until he lost his right of entry.[264] Furthermore, the disseisor did not have the free tenement (or the fee), at least as against the disseisee, in whom it remained until the disseisor acquired a title by time.[265] What, then, would have happened if the disseisor had abandoned the land prior to that? Since his possession, as against the disseisee, had been naked, without the slightest spark of right,[266] what possible link would he have had with the land after he physically left it with no intention to return?[267] The disseisee's seisin, which had been retained by him because the seisin of the disseisor had been tenuous,[268] must have continued after the disseisor left.

In later law, however, a disseisee, though he retained his right of entry upon the disseisor until barred by limitation, had neither seisin nor freehold.[269] Seisin, and in most cases the fee simple, were in the disseisor the moment he dispossessed the disseisee.[270] The disseisor's seisin was none the less tenuous in that it could be taken away by lawful entry.[271] But could it be lost by abandonment? Would it continue in the disseisor if he

[262] See n. 58 and text above.

[263] See P. & M. II. 51. For a hint of this 'relativity' of possession in later law see *Browne* v. *Dawson* (1840) 12 Ad. & E. 624, approved in *McPhail* v. *Persons Unknown* [1973] Ch. 447, at 456. Pollock, however, doubted whether the trespasser in the former case would have even had possession as against subsequent trespassers: see *Torts*, 312 n. (*f*). Similar questions arise respecting intruders on Crown land: see n. 2 above.

[264] *Bracton*, II. 130, 155, III. 23. See also Maitland, 'Beatitude of Seisin', 4 *LQR* 24, 286, at 28–33; Sutherland, *Novel Disseisin*, 101, citing *Bracton's Note Book*, no. 1801.

[265] See n. 55 and text above.

[266] See n. 53 and text above.

[267] See *Bracton*, II. 140, where it is written that possession is wholly lost when *animus* and *corpus* both fail.

[268] Where a disseisee died prior to losing his right of entry, his heir could have brought mort d'ancestor because the disseisee died sufficiently seised: ibid. III. 157–9, 270.

[269] *Elvis* v. *Archbishop of York* (1619) Hob. 315, at 322. See also *Co. Litt.* 153^{b}, 181^{a}, 277^{a}; Blackstone, *Commentaries*, II. 195–6.

[270] Apparently, however, there still had to be something like acquiescence by the disseisee for dispossession to be complete: see *Browne* v. *Dawson* (1840) 12 Ad. & E. 624.

[271] See text acc. nn. 114–16 above.

left the land with no intention to return, or would it revert to the disseisee? Since the disseisee no longer retained seisin in the sense that Bracton described, he would have to reacquire it when the disseisor left, and for that to happen without an entry, seisin would have to be cast upon him by law.[272] Where possible, possession follows title.[273] Thus, where two persons who are physically present on a parcel of land are disputing the possession, the law accords it to the one who has the better right.[274] Moreover, by Littleton's day the law was attributing 'seisin in law' to various persons the moment they became entitled to possession, provided no one else was seised at the time. Heirs and remaindermen, for example, though they had never set foot on the land which they had a right to possess, had seisin of this sort cast upon them.[275] Although seisin in law is not equivalent to seisin in deed, which in most cases necessitates an entry,[276] its appearance reveals a growing tendency in the law to accord seisin to the person entitled when the possession was in fact vacant. This tendency was probably further encouraged by the *Statute of Uses*,[277] which provided a means of transferring seisin without livery or entry.[278] Later, the *Real*

[272] Note that where a disseisee dared not enter for fear of death or bodily harm he could reacquire seisin from a disseisor without an entry simply by approaching and orally claiming the land to be his; but this procedure, which if repeated yearly was known as continual claim, was exceptional: see Littleton, *Tenures*, s. 419; Blackstone, *Commentaries*, III. 175.

[273] See *Bracton*, II. 24, IV. 350. For modern expressions of this general rule see *Newcastle* v. *Royal Newcastle Hospital* [1959] AC 248, at 255; *Powell* v. *McFarlane* (1977) 38 P. & CR 452, at 470. See also Lightwood, *Possession of Land*, 36–9; Pollock and Wright, *Possession*, 24–5.

[274] Littleton, *Tenures*, s. 701; *Willion* v. *Berkley* (1561) 1 Plow. 223, at 233; *Elvis* v. *Archbishop of York* (1619) Hob. 315, at 322; *Jones* v. *Chapman* (1847) 2 Ex. 803, at 821; *Kynock* v. *Rowlands* [1912] 1 Ch. 527, at 533–4.

[275] See Littleton, op. cit., s. 448; Challis, *Real Property*, 181–2; 39 *Halsbury's Laws*^{4}, par. 488. Note that a hint of the concept of seisin in law may be found in *Bracton*, III. 201: see *Co. Litt.* 266^{b}; cf. P. & M. II. 50, 60, 138–9.

[276] There is an exception respecting the Crown, as seisin in deed is cast upon it in situations where seisin in law would be cast upon a subject: see below, ch. 3 nn. 78–9 and text.

[277] 27 Hen. VIII, c. 10.

[278] See *Green* v. *Wiseman* (1599) Owen 86; *Co. Litt.* 266^{b} n. A; Blackstone, *Commentaries*, II. 333, 338; *HEL* VII^{2}. 29, 35–6. From these authorities it appears that although the *cestui que use* had something more than seisin in law, he did not have the possession necessary to maintain trespass: see also *Parks* v. *Hegan* [1903] 2 Ir. R. 643, at 653.

Property Act, 1845,[279] carried this process one step further by permitting the transfer of seisin (whether in deed or in law is not clear) by deed.[280] Since the effect of all this was to allow seisin to be acquired without an entry, there was no longer any reason why a disseisor could not lose seisin by abandoning the land, for seisin, at least in law, would then follow title and revert to the disseisee, thus avoiding an abeyance.[281]

That this was the law at least by the latter half of the nineteenth century is clear from the decision of the Privy Council in *Trustees, Executors and Agency Company* v. *Short*.[282] The plaintiffs in that case, an action of ejectment, proved a documentary title to the lands in question commencing with a Crown grant, but failed to prove that they, or any person through whom they claimed, had been in possession within the past twenty years. The defendant relied on the *Real Property Limitation Act*, 1833,[283] for although he had not himself been in possession for a sufficient time to bar the plaintiff's claim, he proved that a third party had been in adverse possession more than twenty years before. However, as it appeared that the third party, under whom the defendant did not claim, had left before acquiring a title by limitation, and the defendant did not enter immediately after his departure, the issue to be decided was the effect of the gap in adverse possession. The Privy Council held the gap to be fatal to the defendant's alleged title. In the words of Lord Macnaghten:

> ... if a person enters upon the land of another and holds possession for a time, and then, without having acquired title under the statute, abandons possession, the rightful owner, on the abandonment, is in the same position in all respects as he was before the intrusion took place. There is no one against whom he can bring an action. He cannot make an entry upon himself. There is no positive enactment, nor is there any principle of law, which requires him to do any act, to issue any notice, or to perform any ceremony in order to rehabilitate

[279] 8 & 9 Vict., c. 106: see n. 209 above.

[280] See n. 217 above.

[281] Respecting chattels see *Blades* v. *Arundale* (1813) 1 M. & S. 711. There, however, the person entitled appears to have been in possession of the premises where the chattels were located.

[282] (1888) 13 App. Cas. 793.

[283] 3 & 4 Will. IV, c. 27, which had been adopted in New South Wales where the case arose.

> himself. No new departure is necessary. The possession of the intruder, ineffectual for the purpose of transferring title, ceases upon its abandonment to be effectual for any purpose. It does not leave behind it any cloud on the title of the rightful owner, or any secret process at work for the possible benefit in time to come of some casual interloper or lucky vagrant.[284]

This decision has perplexed and divided legal scholars.[285] Challis was uncertain whether the Privy Council had invented a new application of the doctrine of remitter by holding that abandonment of possession by a disseisor restored the seisin of the disseisee, or had simply interpreted the statute of limitations so that time ceased to run after the first adverse possessor left.[286] In Lightwood's view, if the first intruder (in the non-technical sense) had been a disseisor his seisin and estate would have continued until terminated by transfer, devolution on death, fresh disseisin, or the rightful claimant's re-entry; accordingly, for him the decision appeared 'to be founded rather on the distinction between ownership and possession of the Roman Law than upon the common law distinction between an estate and a right of entry.'[287] Sweet accepted Lightwood's conclusion with respect to continuance of seisin, but thought the case had nothing to do with seisin, disseisin, or remitter, outmoded concepts which the *Real Property Limitation Act* was expressly intended to get rid of. He wrote:

> ... there is this fundamental difference between the seisin of a disseisor and the possession of a wrongful or adverse possessor, that

[284] (1888) 13 App. Cas. 793, at 798–9, applied in Canada in *Handley* v. *Archibald* (1899) 30 SCR 130 and *Robinson* v. *Osborne* (1912) 8 DLR 1014; see also *Sherren* v. *Pearson* (1887) 14 SCR 581, at 592. Note that the rule that time no longer runs after adverse possession ceases was made statutory by s. 10 (2) of the *Limitation Act*, 1939, 2 & 3 Geo. VI, c. 21 (which replaced the earlier statutes), and now appears as par. 8 (2) of Sch. 1 of the *Limitation Act*, 1980, c. 58.

[285] In addition to commentaries referred to in the text see Bordwell, 'Disseisin and Adverse Possession', 33 *Yale LJ* 1, 141, 285, at 2–3; Walsh, 'Title by Adverse Possession', 16 *NYULQR* 532, at 541; Hargreaves, 'Modern Real Property', 19 *MLR* 22 n. 11; Rudden, 'Terminology of Title', 80 *LQR* 63, at 67.

[286] Challis, 'The Squatter's Case', 5 *LQR* 185, commented on by Sweet in *Challis's Real Property*[3], 435–6.

[287] Lightwood, *Possession of Land*, 63.

the former gives the disseisor a title in fee simple by wrong which continues until put an end to by the act of the disseisee, while the latter gives the possessor a title which, until it is perfected by the statute, is only co-extensive with his actual possession; if he abandons the actual possession his title is gone.[288]

Sweet's analysis fails to appreciate that possession, unless acquired in circumstances which would not give a freehold, was, and still is, seisin.[289] Admittedly, under the *Real Property Limitation Act* one could be in adverse possession without being seised,[290] but in the absence of other evidence seisin is presumed from possession.[291] The possession of the first intruder in *Short* therefore must be presumed to have been seisin.[292] One cannot escape this conclusion by observing that 'the operation of the statute does not depend on any question of seisin or disseisin.'[293] But if the first intruder had been seised, Lightwood's adherence to the old rule respecting continuance of seisin appears incompatible with the decision. We must, therefore, re-examine the rule.

[288] Sweet, 'Seisin', 12 *LQR* 239, at 249.

[289] See text acc. nn. 8–12 above.

[290] As in the case of a tenancy at will, or a tenancy at sufferance following an expired term: see n. 151 above.

[291] See n. 8 above.

[292] See *Leach* v. *Jay* (1878) 9 Ch. D. 42, where the possession of an abator was held to be not merely adverse possession but seisin, and *Rosenberg* v. *Cook* (1881) 8 QBD 162, where one who entered under a void conveyance was said to be a disseisor.

[293] Sweet, 'Seisin', 12 *LQR* 239, at 249. Sweet's view that by the time he wrote (1896) the concept of seisin was largely obsolete does not appear to have been accepted by Challis, who thought of 'coming out with bell, book and candle against the heretic' (*Challis's Real Property*[3], 436). Furthermore, it was undermined by *Copestake* v. *Hoper* [1908] 2 Ch. 10. Though it is true that the importance of the old distinction between seisin and the possession of a termor had declined, and that the term 'possession' was often applied to both, who would maintain that freehold and leasehold possession were therefore the same? If the distinction had disappeared, how was it still possible for both a freeholder and his lessee to be in possession at the same time? See *Sec. of State for India* v. *Krishnamoni* (1902) LR 29 IA 104, at 114; *Bligh* v. *Martin* [1968] 1 All ER 1157, esp. 1161–2. The term 'seisin' may have no longer been current, and when used may have connoted title to the uninformed (see Sweet, op. cit. 247), but the concept of freehold possession, which is all seisin really means, was still (and probably remains today) a fundamental part of the law: see *Parks* v. *Hegan* [1903] 2 Ir. R. 643, at 647–8. Cf. *Handley* v. *Archibald* (1899) 30 SCR 130, at 137.

Challis's suggestion that the Privy Council may have invented a new application of the doctrine of remitter, by which a person who acquired possession under one title was remitted to an older and better title,[294] should not be taken seriously. It is unlikely that their Lordships would have implicitly embarked on such a novel course. On the contrary, Lord Macnaghten seems to have been relying on old law when he said that there is no principle which requires a rightful owner to do any act to rehabilitate himself after an intruder abandons possession: the owner 'is in the same position in all respects as he was before the intrusion took place', as the possession of the intruder 'ceases upon its abandonment to be effectual for any purpose.'[295] This looks like a straightforward application of the rule that possession follows title.[296]

We have already seen that the law accords seisin, in most cases seisin in law, to various persons who have never set foot on their land. Why then should a disseisee, who *had* been in possession, not have his seisin restored when the disseisor left? The standard reply, that seisin once acquired must be taken to continue, while valid with respect to seisin which is titled, i.e. supported by some title other than that which goes with possession, does not explain why the same rule should apply to seisin which is untitled in the sense that it can be taken away by lawful entry. There is no reason why seisin, at least in law, should not be restored to the disseisee after the disseisor abandons the land.[297] Surely this is what Lord Macnaghten's

[294] See n. 169 above.

[295] (1888) 13 App. Cas. 793, at 798–9.

[296] See Farrer, 'Another Prerogative Fallacy', 50 *LQR* 411, at 420.

[297] Note that abandonment, which is primarily a question of fact, does not occur if the disseisor leaves the land vacant for a time, as during a drought or for the winter, as long as he returns (or intends to return) thereafter: see *Nicholas* v. *Andrew* (1920) 20 SRNSW 178, esp. 184; *Bligh* v. *Martin* [1968] 1 All ER 1157, esp. 1160–1. Cf. *Sec. of State for India* v. *Krishnamoni* (1902) LR 29 IA 104, where the Privy Council decided that when an adverse possessor was dispossessed by a river changing course and submerging land, his possession did not continue; rather, 'the constructive possession of the land was (if anywhere) in the true owners' (at 115). Note too that where an adverse possessor leaves land in the care of an agent who leaves it unoccupied, apparently the possession continues: see *Chisholm* v. *Marshalleck* (1869) 1 SCJ & PC 801, overruled by *McCormack* v. *Barnett* (1892) 2 SCJ & PC 1965, on the erroneous ground that a disseisor can use the defence of *jus tertii*.

decision, though expressed in terms of possession rather than seisin, imports.[298]

Nor is this approach as novel as others have suggested. In *Green* v. *Wiseman*[299] Anderson CJ stated that where a feoffment was made under the *Statute of Uses* the *cestui que use* acquired possession (i.e. seisin) 'by force of the statute ... before agreement or entry, but if he disagreed, then it shall be out of him presently but not before he disagree.'[300] If the *cestui que use* could lose seisin simply by rejecting the gift, it would have to revert to the donor, regardless of whether he re-entered, for otherwise the freehold would be in abeyance. Again, in *Doe d. Corbyn* v. *Bramston*[301] the plaintiff's ancestor, who had been seised, was held to have discontinued her possession within the meaning of the *Real Property Limitation Act*, 1833,[302] when she abandoned the premises in question and failed to perform any act of ownership prior to her death some forty years later. This decision has been criticized as inconsistent with later authorities which have held that for there to be discontinuance there must be both absence of possession and actual possession by another.[303] But that is because possession supported by title cannot be lost by abandonment. In *Bramston* Lord Denman remarked that

> ... as the title of the plaintiff's ancestor rested on no documents, but was merely evidenced by possession at an earlier period, that ancestor's entire desertion of the premises for so long a time goes far to shew a consciousness that the anterior occupation was without title.[304]

The question of whether the ancestor's seisin had been titled or not would have been relevant only if untitled (as opposed to titled) seisin could be discontinued by abandonment. If this is the real explanation of the decision, then instead of being overruled by later cases which held, in effect, that titled seisin or possession could not be so discontinued, it is an early application of the rule in *Trustees, Executors and Agency Company* v. *Short*. For if the presumption of title arising from the ancestor's seisin was rebutted by the fact that she had completely deserted the premises,[305] then because the plaintiff did not show that his ancestor had some other title, the ancestor must have been a wrongdoer, in which case seisin (in law, at least) would have reverted to the person entitled when the ancestor abandoned possession. Since thereafter the ancestor would have had neither possession nor title, when she died nothing passed to the plaintiff.[306]

As a general rule, then, untitled or tenuous seisin can be taken away by lawful entry or lost by abandonment, whereas seisin which is titled in the sense that it is protected against entry cannot. This rule—assuming it has been the law not only since the ninteenth century, but, as suggested here, from at least the time of Bracton—has significant implications. On a writ of right brought in Bracton's day on the demandant's own wrongfully acquired seisin, that seisin, if protected by a title by time, which it usually would have been had esplees been taken, must have been either lawfully terminated by livery or pur-

[298] See also *Sherren* v. *Pearson* (1887) 14 SCR 581, at 592; *Solling* v. *Broughton* [1893] AC 556, at 561; *Samuel Johnson* v. *Brock* [1907] 2 Ch. 533, at 538; *Ocean Estates* v. *Pinder* [1969] 2 AC 19, at 25. In *Solling*, however, because the first adverse possessor was either a tenant at will or sufferance, it was his lessor who would have been seised.

[299] (1599) Owen 86.

[300] Ibid. 87. See also *Brown* v. *Notley* (1848) 3 Ex. 219, where loss of title also resulted in loss of possession. There, however, the possessor was a leaseholder, which meant that seisin was in the freeholder.

[301] (1835) 3 Ad. & E. 63.

[302] 3 & 4 Will. IV, c. 27, s. 3.

[303] Lightwood, *Time Limit*, 34. See *Smith* v. *Lloyd* (1854) 9 Ex. 562, at 572, cited with approval in *Trustees, Executors and Agency Company* v. *Short* (1888) 13 App. Cas. 793, at 799; *Kynock* v. *Rowlands* [1912] 1 Ch. 527, at 539; cf. Sweet, 'Seisin', 12 *LQR* 239, at 250–1.

[304] 3 Ad. & E. 63, at 66–7. In fact the ancestor appears to have been entitled by will, but that would be of little value unless the devisor's title was shown: see nn.. 221–4 and text above.

[305] Note, however, that this seems inconsistent with the rule that a *jus tertii* must be proved for the presumptive title to be rebutted: see n. 193 above.

[306] Although this explanation means that there was no need to rely on the statute of limitations in reaching the decision, the fact that the statutory period had expired provided an easy rationale for barring the plaintiff's claim, making it unnecessary to consider what his position would have been apart from the statute. For an instance where the Privy Council resorted to statutory limitation to avoid deciding a difficult issue, see *A.-G. for British Honduras* v. *Bristowe* (1880) 6 App. Cas. 143, discussed in ch. 5 below.

suant to judgment, or unlawfully taken away by disseisin. In case of livery, there would have been witnesses; in case of judgment, a record. Lawful termination of the demandant's seisin should, therefore, have been easy to prove, in which case the demandant's title by time would have been either in another, or divested entirely. Failing that, there must have been a disseisin, which would not only have left the demandant's title by time intact, but would have given him a title by being wrongfully dispossessed as well. Thus, in the absence of evidence of lawful termination, the demandant's prior and the tenant's present seisin may well have implied a disseisin. Unless the tenant could prove lawful termination, or establish a better right in himself, the demandant may have been entitled to recover on the basis of that implication alone.

However, after the law extended rights of entry against wrongdoers indefinitely, thereby doing away with Bracton's title by time, any seisin which had been wrongfully acquired could be lawfully terminated by entry or abandonment. Unlike livery and judgment, entry by someone with right and abandonment by the wrongdoer would not always be public acts, and in many cases would be difficult to prove. Given this change in the law, any justification there may have been for implying disseisin from a demandant's prior seisin would seem to have disappeared. Be that as it may, prior seisin, though wrongful, probably continued to prevail in the absence of evidence that it had been lawfully terminated, or that the tenant had a better right. It seems that the writ of right simply failed to adapt to the change respecting rights of entry, no doubt because the writ was seldom used by the time that change occurred. If so, that may partially explain why judges of a later period reacted with hostility when the writ was briefly revived.[307]

The action of ejectment, on the other hand, was created after the extension of rights of entry against wrongdoers. Unlike the writ of right, it was able to take full account of the new law. Though a plaintiff could establish a prima-facie title by proving that he had been seised prior to the defendant, that title could be rebutted by proof that the plaintiff's seisin had

[307] See text acc. nn. 140–4 above.

been wrongful (i.e. by proof of a *jus tertii*) because it was no longer possible for him to have acquired a title by time. Moreover, since the plaintiff's seisin might have been lawfully terminated by entry or abandonment, as well as by transfer or pursuant to judgment, disseisin would not be implied. To establish a prima-facie title by being wrongfully dispossessed the plaintiff would have to prove that he had been ousted.[308] Failing that, and in the absence of a title by limitation, he could not recover the land, since the defendant would be able to rely on his own seisin, even if wrongful, and the title that always goes with it.

4. Conclusions

(a) Occupation and Occupancy

An occupier (that is, a person who is physically present on or in actual control of land) is accorded possession by English law in the absence of circumstances, such as Crown ownership or a master-servant relationship, which show that possession is in another. In other words, occupation is prima-facie proof of possession. However, occupation must be distinguished from occupancy. The latter occurs when a person either enters into occupation of an unowned thing, or is in occupation when a thing becomes unowned. This person, who is known as an occupant, is accorded not only possession, but a 'title by occupancy' as well. In England, this mode of acquiring an original title is of limited application in so far as real property is concerned, due to the fiction that the Crown once possessed, and accordingly owned, all the lands in the realm. For this reason, and because lands cannot become unowned by abandonment, at common law a vacant *pur autre vie* estate was the

[308] However, he would not have to prove that the ouster was wrongful, as that would involve proving a negative, which in this situation might be virtually impossible. Since he had been in possession, he would be able to rely on the rule that even wrongful possession is protected against all who cannot show a better right: see above, nn. 37–8, 50 and text. Accordingly, proof of ouster, if accompanied by an allegation that it was wrongful, would suffice to cast the burden of showing it to be lawful on to the defendant. See also n. 137 above.

only interest that could be acquired by this means. Within the realm, therefore, to prove a title by occupancy a possessor had to show that a *pur atre vie* estate, *que estate* he had, had fallen vacant.

A mere possessor (that is, one whose possession is unexplained or known to be wrongful) is not in a position to claim title by occupancy. Nor is a specific derivative title—e.g. by descent, devise, or purchase—available to him. Depending on the circumstances, however, he may be able to rely on one or more of the following titles.

(b) The Title that Goes with Possession

Because English law protects possession for its own sake, a mere possessor has a title as against trespassers and adverse claimants who cannot show a title in themselves. This title, which we have called the title that goes with possession, will protect him for as long as he remains in possession. It makes no difference if his possession is known to be wrongful, for as against trespassers and adverse claimants who have no title a *jus tertii* is irrelevant. Moreover, every possessor has an estate in the land. In the mere possessor's case, this is presumed to be a fee simple, as seisin for a fee simple estate is presumed from possession. If the possession is wrongful, the estate is tortious. But simply because he has an estate, whether known to be tortious or not, a mere possessor has the bundle of rights attached to it, including the rights to enjoy and use the land, to sell or devise it, and to claim compensation in the event of expropriation by the Crown. However, since this estate and the title that goes with possession both depend on possession for their very existence, a mere possessor will have neither once he is out of possession.[309] To recover possession from a subsequent possessor (other than a possessor who came in under him, e.g. a lessee, who is estopped from denying his lessor's title), he will have to claim by some other title. The title that goes with possession is merely a shield. Unlike the titles we are about to consider, it cannot be used as a sword by one who seeks to recover lost possession because the possession protected by it is that of the very person whose possession he seeks to upset—of the person who is presently on or in control of the land.

[309] So why does an heir or devisee of a mere possessor have a right to acquire possession after the possessor loses possession by dying? Presumptive title aside, the answer is that provided the possessor dies seised of an estate in fee simple, the death is an entitling condition. Since the concept of seisin in law appeared, a form of possession has even been cast upon the heir or devisee by law: see Littleton, *Tenures*, ss. 385, 448. Entry by anyone who does not have a right to do so is thus a wrong to the heir or devisee: see *Asher* v. *Whitlock* (1865) LR 1 QB 1.

(c) A Presumptive Title

A mere possessor whose possession is not known to be wrongful also has a presumptive title, for the law presumes every possession to be rightful until revealed to be otherwise. This title which is *presumed from* possession is quite distinct from the title that *goes with* possession. It exists because possession not only entails an actual title against trespassers and adverse claimants who have no title themselves, but results as well in a presumption of entitling conditions apart from that possession, e.g. a descent, devise, or purchase from someone with title. In other words, possession is evidence of a title that does not depend on the maintenance of possession for its existence. Once established by proof of possession, this presumptive title can be used as a sword to recover the possession after it has been lost. Proof of a seisin that had been exploited and made evident to all by the taking of esplees probably established just such a title for a demandant on a writ of right. Similarly, a plaintiff in an action of ejectment can establish a presumptive title merely by proving that the possession relied upon by him predated that of the defendant. Prior possession prevails not because it creates a title (as some have assumed), but because it creates a presumption of title. As between the parties, then, the relative strength of the presumption in favour of each depends on priority of possession.

However, because the title arising from proof of prior possession is presumptive, it is rebuttable by proof of a better title in the defendant, and should be rebuttable by proof of a *jus tertii* as well. Whether the defence of *jus tertii* was available to a tenant on a writ of right is an open question. Though it seems that the tenant could not answer the presumption arising

from the demandant's prior seisin simply by showing a third-party right, this may have been because in Bracton's day a demandant who had taken esplees usually would have had a 'title by time' (which should, however, have been rebuttable by proof that the seisin had been tenuous) as well as a presumptive title.[310] When rights of entry were extended titles by time disappeared from the law, but possibly the writ of right (which by then was rarely used) failed to adapt. In any case, the action of ejectment, because developed later, was able to take account of the change.[311] In this action, the defence of *jus tertii* is available against a plaintiff who relies solely on prior possession and the presumption of title arising therefrom.

(d) A Title by being Wrongfully Dispossessed

A mere possessor who lost possession by being ousted does not have to rely on the presumptive title arising from his former possession. Every violation of possession is presumed to be wrongful, and creates a prima-facie title by being wrongfully dispossessed. In the absence of a release, this title can be used as a sword to recover possession from the wrongdoer and anyone coming in under or after him without better title. It was on this title that a plaintiff who had been disseised recovered in an assize of novel disseisin or a writ of entry *sur disseisin*. It is equally effective in an action of ejectment. Due to the wrong, the defence of *jus tertii* has never been available against it. Thus, even a mere possessor whose possession is known to have been wrongful will have a prima-facie right to recover if he can prove ouster. However, a title of this sort can none the less be rebutted by showing either that the ouster was lawful (in which case the title would not have been created), or that someone came in with, or while in possession acquired, a better title (in which case the title under consideration here would have been cut off).

[310] Quaere whether the demandant would also have had a prima-facie title by being wrongfully dispossessed, rebuttable by proof that the seisin counted upon had been delivered to another or lawfully divested: see text between nn. 306–7 above.

[311] By 1600 (the time from which we are most concerned), titles to land were tried mainly by ejectment: see *Alden's Case* (1601) 5 Co. R. 105[a], at 105[b].

(e) A Title by Limitation

If a mere possessor remains in possession for the statutory limitation period, he acquires a prima-facie title by limitation. Prior to 1833 this title, like Bracton's title by time (or, in the case of an heir, a descent cast), would have shielded him against entry—and thus against an action of ejectment, but not a writ of right brought by someone with a better title—while he remained in possession. Moreover, it would have served as a sword to recover lost possession, by writ of right or (in the absence of a descent or subsequent title by limitation)[312] an action of ejectment, from anyone who did not have a better title. Since 1833, though a title by limitation is potentially good against all the world for the purpose of either defending or recovering possession, it can still be destroyed by subsequent adverse possession, or rebutted by proof that due to a disability in the person against whom time allegedly ran, or because a reversioner or remainderman has become entitled to possession, it does not exist.

(f) Summary

While in possession, a mere possessor has the *title that goes with possession*. In addition, he has a *presumptive title*, provided his possession has not been shown to be wrongful by proof of a *jus tertii*. If he remains in possession long enough he will also acquire a *title by limitation*, due to which he will no longer be a mere possessor because his possession will then be supported by a known right. If he loses possession, he will lose the *title that goes with possession*, but retain his *presumptive title* and the *title by limitation* (if acquired). If ousted, he will also have a prima-facie *title by being wrongfully dispossessed*. Any one of these last three titles, if unrebutted, will enable him to recover possession in ejectment or, as it has been known since 1875, an action for the recovery of land, against a defendant who cannot show a better title in himself.

[312] Quaere whether a descent cast or subsequent title by limitation would have destroyed his earlier title by limitation as well as barring his entry. If the answer is yes, he should not have been able to recover by writ of right in those situations.

Although the discussion in this chapter may appear to have strayed far from the topic of indigenous land rights, we shall see that much of the perplexity surrounding the concept of aboriginal title may be traced to a lack of understanding of the English law relationship between possession and title to land. As the learned debate between Holdsworth and Hargreaves reveals, the depth of this lack of understanding runs very deep. A detailed analysis of the issue was therefore unavoidable. The present discussion has, however, left to one side the fundamental feature of English real property law known as the doctrine of tenures. It is to this topic, and the special place of the Crown in the English system of landholding, that we now shall turn.