

POSSESSORY TITLE

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### HISTORY

To examine the effect of the Limitations Act <sup>1</sup> of Ontario and possessory title resulting therefrom one must have some general understanding of the development of the concept of "limitation" and "prescription". The word "limitation" means the extinction of stale claims and obsolete titles. <sup>2</sup> Although the concept is necessary, for reasons to be discussed later, it was unknown to common law and thus depends upon statute for its vitality. The concept of prescription, on the other hand, was a common law doctrine whereby certain rights, in the main, easements, could be acquired. In essence, <sup>3</sup> prescription is a common law rule of evidence, extended by statute which raises a presumption of a grant from the owner of land to another because of uninterrupted and peaceable user, so that in effect the user acquires title from the presumed grantor. In this sense prescription operates positively, much like a conveyance. Limitation on the other hand operates negatively to extinguish the title of the dispossessed owner.

The law of England relating to the period within which actions could be brought for the recovery of land was codified and simplified by the Real Property Limitation Act of 1833, <sup>4</sup> as amended by the Real Property Limitation Act of 1894.<sup>5</sup> The Limitations Act of Ontario is based upon these Imperial Statutes.

Prior to 1833, the period of limitation varied according to the particular remedy sought. Since there were various remedies available, the period was not uniform in all cases. Although in 1623, the principle that an action must be brought within a fixed number of years became operative (prior to that time the period had been first fixed by the discretion of judges, and then later fixed by certain dates chosen by the legislature), the varying periods of limitation caused some difficulty.<sup>6</sup>

The various forms of actions at common law could roughly be divided into possessory actions, and proprietary actions. The former did not determine the right of property at all, merely the right to possession; the latter determined the right of property. Because the possessory actions offered a speedier remedy the proprietary actions became obsolete and the ancient forms of writ for those actions were abolished.<sup>7</sup>

In addition to the judicial remedy, the person entitled to possession had, and still has, the summary remedy of entry on the land and repossession through self-help (subject, of course, to the general limitations placed upon by the Criminal Code and the tort of trespass to the person if violence is used.) By exercising the remedy of self-help in a symbolic fashion, a form of notional possession in the true owner was maintained so as to prevent the limitation period running against him. This symbolic concept, known as continual claim operated as follows: a person, deterred from entry by menaces or bodily fear, could approach as near as possible to the land and make a claim with certain solemnities. The claim remained in force for a year and a day and amounted to a legal entry. If repeated once in the space of every year and a day (hence "continual claim") the claim prevented bar of the action by the Statute of Limitations.

The Ontario Act abolishes the common law remedy of continual claim,<sup>8</sup> together with the doctrines of descent cast, discontinuance or warranty.<sup>9</sup> Those latter doctrines, of historical interest only, related to the right of entry and continual claim and are beyond the scope of this paper.<sup>10</sup> The Act also specifically provides that "no person shall be deemed to have been in possession of any land within the meaning of this Act merely by reason of having made an entry thereon."<sup>11</sup>

## PURPOSE

The Limitations Act operates so as to extinguish the title to land when land is possessed by another. The possession must be of the quality and duration prescribed by the Act. For reasons of public policy such limitation of actions are necessary even though a wrongdoer may gain thereby. It has been suggested that the concept of limitation automatically quiets titles openly and consistently held; that the concept assists to prove meritorious titles and that it corrects conveyancing errors.<sup>12</sup> Moreover, the concept overcomes some evidenciary problems that would arise in its absence. The passing of time can lead to a clouding of the memories of witnesses or the loss or destruction of documents of title.

## OPERATION OF THE ACT

### (a) GENERAL

As mentioned previously, the Act, in establishing periods of limitation, operates negatively not only to bar an action to recover possession after the expiration of the limitation period, but also to extinguish the title of the person dispossessed.

The bar of the action results primarily from the operation of s. 4 of the Act which provides:

4. No person shall make an entry or distress, or bring an action to recover any land or rent, but within ten years next after the time at which the right to make such entry or distress, or to bring such action, first accrued to some person through whom he claims, or if the right did not accrue to any person through whom he claims, then within ten years next after the time at which the right to make such entry or distress, or to bring such action, first accrued to the person making or bringing it.

The extinguishment of title results from the operation of s. 15 of the Act which provides:

15. At the determination of the period limited by this Act to any person for making an entry or distress or bringing any action, the right and title of such person to the land or rent, for the recovery whereof such entry, distress or action, respectively, might have been made or brought within such period, is extinguished.

Apart from specific provisions relating to the Crown and easements or profits a prendre arising by prescription, the remainder of the provisions of the Act relating to land attempt to define a starting point for the running of the period and to vary the period for persons suffering from a disability.

## (B) THE QUALITY OF POSSESSION

The earlier Statutes of Limitation distinguished between adverse possession and non-adverse possession. Thus, possession by one joint tenant was not considered as adverse vis-a-vis all other tenants. Similarly possession by an overholding tenant or a tenant at will was not adverse. However, the Act now does away with the distinction between adverse and non-adverse possession, subject to certain exceptions.<sup>13</sup> Thus, the possession by one co-owner is not now deemed to be possession by all co-owners.<sup>14</sup>

Accordingly, time begins to run from the time when the right of the true owner first arose regardless of the possession of the person dispossessing the owner. However, in one sense the quality of the possession must be adverse or the statute does not apply. For example possession by a person as licensee, fiduciary, agent or servant of the owner is in law possession of the owner.<sup>15</sup>

In order for a trespasser to establish possession that amounts to dispossession of the true owner and hence starts time running under the Act, the trespasser must show exclusive possession and animus possidendi, i.e., an intention to exclude the owner as well as others. <sup>16</sup>

It has often been said that possession necessary to extinguish the title of the true owner must be "actual, constant, open, visible and notorious occupation" which was known or might have been known to the true owner, to the exclusion of the true owner for the full Statutory period. <sup>17</sup>

Acts which do not interfere with the owner's enjoyment of the land for the purposes for which he intended to use it are not evidence of dispossession. Moreover, it should be remembered that when one has documentary title to land he is considered to be in possession of the whole by virtue of the doctrine of constructive possession unless another is in actual possession of some part to the exclusion of the true owner. <sup>18</sup>

Title by possession cannot be established by equivocal acts of possession referable to a limited right of user. Although user may give rise to a prescriptive right in order to acquire possessory title there must be occupation which involves actual and complete possession to the exclusion of all others. <sup>19</sup>

A person who is in exclusive possession of land, even when uncertain of his right to remain in possession, can acquire a possessory title. <sup>20</sup> Enclosure is not an indispensable <sup>21</sup> ingredient to the acquiring of possessory title, nor is it conclusive. <sup>22</sup> Rather, it is strong evidence of possession.

Before leaving the topic of the quality of possession two presumptions should be borne in mind. First, a holder of the paper title who is in possession of part of the lands is presumed to be in possession of all the lands. Thus, actual possession of a third party will be necessary to establish dispossession. <sup>23</sup>

In the same vein, in the absence of any paper title holder, simple actual possession may give rise to a presumption of ownership. If that presumption is rebutted, the quality of possession required by the Act and for the appropriate limitation period must be shown. <sup>24</sup>

Secondly, the concept of constructive possession is applicable to a person who takes possession with colour of title. It is not essential that the title be a valid one, for it is the possession which ultimately results in protection. However, it is necessary for the person to enter under a real, bona fide belief in title, a question of fact. <sup>25</sup>

In Chittick v. Gilmore,<sup>26</sup> a defendant obtained a tax deed which unknown to him was void. Although the Court concluded that there had not been continual actual possession of part of the land, the entry under the void tax deed might well be considered entry under a colour of title.

(C) THE SCOPE OF s. 4.

Section 4 bars an action to recover land or rents once the statutory period has run.

Under s. 1 "land" is defined as follows:

1. (c) "land" includes messuages and all other hereditaments, whether corporeal or incorporeal, chattels and other personal property transmissible to heirs, money to be laid out in the purchase of land, and any share of the same hereditaments and properties or any of them, any estate of inheritance, or estate for any life or lives, or other estate transmissible to heirs, any possibility, right or title of entry or action, and any other interest capable of being inherited, whether the same estates, possibilities, rights, titles and interest or any of them, are in possession, reversion, remainder or contingency; (27)

"Rent" is defined as follows:

- (d) "rent" includes all annuities and periodical sums of money charged upon or payable out of land. (28)

It should be noted that the Act uses "rent" both in the sense of rent charge and rent service.

(i) EASEMENTS

In spite of the broad definition of land, it has been held that the section does not apply to extinguish a right to an easement.<sup>29</sup>

(ii) LAND TITLES

When land is registered under The Land Titles Act<sup>30</sup> no length of possession will defeat the registered title.<sup>31</sup> However, if the statutory period has run before first registration under Land Titles, the person in possession will be protected as registration is not to prejudice any adverse claim as against any person<sup>32</sup> registered as a first owner with possessory title only.

It does appear to be the case that the possessor must have been in possession for the full statutory period even where lands are adjoining notwithstanding the provisions of s. 51 (1) 3, which provide that registered land is subject to "any title or lien that, by possession or improvements the owner or person interested in adjoining land has acquired to or in respect of the land." In essence the Courts have construed "has acquired" as meaning "has finally acquired" and not as meaning "in the process of acquiring".<sup>33</sup>

### (iii) CROWN LANDS

At common law, time under the various Statutes did not run against the Crown. The Nullum Tempus Act<sup>34</sup> provided a 60 year limitation period that did run against the Crown. The Act was repealed in 1902<sup>35</sup> and certain sections substituted therefor. These sections appear primarily now as s. 3 and s.16 of The Limitations Act.

s. 3 reads:

3. (1) No entry, distress, or action shall be made or brought on behalf of Her Majesty against any person for the recovery of or respecting any land or rent, or of land or for or concerning any revenues, rents, issues or profits, but within sixty years next after the right to make such entry or distress or to bring such action has first accrued to Her Majesty.
- (2) Subsections 1 to 3, 5 to 7 and 9 to 12 of Section 5 and sections 6, 8 to 11 and 13 to 15 apply to rights of entry, distress or action asserted by or on behalf of Her Majesty.

It has been held, prior to 1902 that the Nullum Tempus Act did not apply to unsurveyed or waste lands owned by the Crown.<sup>36</sup> Section 16 codifies this judicial conclusion and extends it to lands included in road allowances, subject to rights acquired before June 13th, 1922.<sup>37</sup>

### WHEN TIME BEGINS TO RUN

#### (i) GENERAL

In general time begins to run when the cause of action arose. However, some difficult questions arise. For example, when a life estate is followed by a contingent remainder and the life tenant is dispossessed, when does time begin to run against the remainderman?

Several possibilities present themselves. Does it begin to run when actual dispossession of the life tenant occurs or when the life estate is barred by the Act? Does it run only when the contingency is met or only when the remainderman's interest vests in possession? The Act attempts to meet these problems by deeming various starting points for the running of the time.

Section 5 (1) determines that the cause of action arises when a person has been dispossessed or has discontinued possession. Dispossession occurs when a person comes in and puts another out of possession. Discontinuance occurs where the person in possession goes out of possession and another person takes possession. 38 Mere non possession by the owner is insufficient to cause the running of the period.

Successive possessors may gain possession of land adversely to the true owner. If privity exists between successive occupants it is clear the statute operates for both periods of possession. 38A Indeed, it now appears that privity is not necessary. 37B However, what is essential is that there be no interruption of possession by the various persons in possession from time to time. If there is an interruption the person holding paper title is deemed to be back in possession because of the doctrine of constructive possession. 38C

Where an owner dies in possession and another person takes possession after the death, time begins to run from death. 39 It should be noted if dispossession or discontinuance occurred before death the period runs from the date of dispossession or discontinuance.

If a person grants land to another, and yet remains in possession the period begins to run when the latter person was first entitled to possession under the grant. 40

Where land in a state of nature after the Crown grant, the grantee of the Crown not having taken actual possession by residing on or cultivating some part, is possessed by another, the expiration of ten years is not a bar to the action unless the grantee had knowledge of the possession. The cause of action is deemed to accrue when knowledge was had and a maximum period of 20 years is established. 41

## (ii) TENANCIES

The time when the period begins to run varies according to whether the tenancy is under a lease in writing, a verbal lease or a tenancy at will.



In the case of a lease in writing the cause of action is deemed to first accrue at the time when rent was first received by the person wrongfully claiming. If the period is to continue to run no payment in respect to the rent reserved must be subsequently made to the true owner. <sup>42</sup> It should be noted that the landlord's right is not barred merely because of the non-payment of rent. Even though rent arrears may not be claimed after six years, <sup>43</sup> time runs against the landlord with respect to his reversion when he is entitled to possession, i.e., at the expiration of the lease. <sup>44</sup>

If the lease is verbal, whether the tenancy be periodic, the cause of action accrues at the determination of the first of such periods if the tenancy is periodic or when rent was last received whichever last happened. <sup>45</sup>

If the tenancy is a tenancy at will the cause of action arises either at the determination of the tenancy or at the expiration of one year after its commencement when the tenancy is deemed to have determined. <sup>46</sup>

### (iii) FORFEITURE OR BREACH OF CONDITION

Section 5 (9) of the Act provides:

Where the person claiming such land or rent, or the person through whom he claims, has become entitled by reason of any forfeiture or breach of condition, such right shall be deemed to have first accrued when the forfeiture was incurred or the condition broken.

It must be remembered that forfeitures and breaches of condition which confer a right of entry may be waived. The Act expressly preserves this right by virtue of s. 5 (10) which provides:

10. Where any right to make an entry or distress, or to bring an action to recover any land or rent, by reason of any forfeiture or breach of condition, has first accrued in respect of any estate or interest in reversion or remainder and the land or rent has not been recovered by virtue of such right, the right to make an entry or distress, or to bring an action to recover the land or rent, shall be deemed to have first accrued in respect of such estate or interest at the time when it became an estate or interest in possession as if no such forfeiture or breach of condition had happened.

Were it not for subsection (10) time would run under subsection (9) immediately upon forfeiture or breach.

There is some question whether s. 5(1) has any application to possibility of reverter following a conditional limitation which reverts the estate automatically in the grantor or remainderman. 47 In that case, no right of waiver is involved.

(iv) FUTURE INTERESTS

Subject to s. 6 of the Act, time does not run against the owner of a future estate or interest until he is entitled to his estate or interest in possession. 48 This is the case notwithstanding that at some time prior to the determination of the prior estate, the person entitled to the future estate was in actual possession of the property. 49

Section 6 of the Act provides:

6. (1) If the person last entitled to any particular estate on which any future estate or interest was expectant has not been in the possession or receipt of the profits of the land, or in receipt of the rent, at the time when his interest determined, no such entry or distress shall be made and no such action shall be brought by any person becoming entitled in possession to a future estate or interest but within ten years next after the time when the right to make an entry or distress, or to bring an action for the recovery of the land or rent, first accrued to the person whose interest has so determined, or within five years next after the time when the estate of the person becoming entitled in possession has become vested in possession, whichever of those two periods is the longer.

There is no difficulty if the owner of the prior estate was dispossessed but his claim was not statute barred during his life.

In that instance the remainderman may bring his action within ten years of the dispossession of the life tenant or within 5 years from his death, whichever is the longer period. Thus, if X grant to A for life, remainder to B, and A is dispossessed 6 years before his death, B could bring an action within 4 years of the death under the first alternative (4 years being the remainder of the 10 year period) or within 5 years of the death under the second alternative.

The more difficult question is what period is permitted the remainderman when the life tenant is dispossessed and the full ten years have run before his death. It has been suggested that in such a case s. 6 (1) has no application and the remainderman must then commence his action pursuant to s. 5 (11) within 10 years of the determination of the life estate, i.e., within 10 years of the time when the life estate became statute barred. 50

If the future estate is created after the right of entry arise under the prior estate, and the prior estate is statute barred, so too is the future estate. 51

(v) DOWER

The right to dower arises upon the death of the husband. 52

(vi) THE EFFECT OF ACKNOWLEDGEMENTS

Section 13 provides:

13. Where any acknowledgement in writing of the title of the person entitled to any land or rent has been given to him or to his agent, signed by the person in possession or in receipt of the profits of the land- or in the receipt of the rent, such possession or receipt of or by the person by whom the acknowledgement was given shall be deemed, according to the meaning of this Act, to have been the possession or receipt of or by the person to whom or to whose agent the acknowledgement was given at the time of giving it, and the right of the lastmentioned person, of of any person claiming through him, to make an entry or distress or bring an action to recover the land or rent, shall be deemed to have first accrued at and not before the time at which the acknowledgement, or the last of the acknowledgements, if more than one, was given.

It should be noted that the acknowledgement must be in writing, signed by the person making it and must be given to the owner or his agent. The acknowledgement need not be in any particular form. Its benefit accrues not only to the person to whom it was given but also to any person claiming through him. There are various requirements set out in the Act for acknowledgements depending upon the capacity or relationship between the parties. 52

(vii) THE EFFECT OF DISABILITIES

The Act recognizes infancy and some form of mental incapacity, including deficiency, incompetence or unsoundness of mind. 54

Section 36 provides:

36. If at the time at which the right of a person to make an entry or distress, or to bring an action to recover any land or rent, first accrues, as herein mentioned, such person is under the disability of infancy, mental deficiency, mental incompetency or unsoundness of mind, such person, or the person claiming through him, notwithstanding that the period of ten years or five years, as the case may be, hereinbefore limited as expires, may make an entry or distress, or bring an action, to recover the land or rent at any time within five years next after the time at which the person to whom the right first accrued ceased to be under any such disability or died, whichever of those two events first happened.

It should first be noted that before s. 36 is operative the person who is suffering the disability must not only be the person in whom the right to bring the action exists, but also that the person must be under the disability when the cause of action arose. Hence, a disability arising after the accrual of the cause of action will not extend the period. 54 Therefore, if A is dispossessed in 1970 and he becomes mentally incompetent in 1972 the period runs from 1970 and s. 36 is not applicable.

The allowance in the case of the disability is confined to the person to whom the right of entry, distress or action for recovery first accrued. Hence, if A, under no disability is dispossessed and then dies leaving the property to an infant B, no extension of the period because of the disability of B is permitted. 56

It should be stressed that the time to determine when the disability exists is when the cause of action arose which will not always be when dispossessed occurred. For example, if X dispossesses A, a life tenant, B, a remainderman will not have a cause of action either until A's death, or arguably until after 10 years of dispossession of X whichever comes first. It is at that time not the date of dispossession of A, that the determination of a disability must be made.

If a disability exists, then under s. 36 the ten year period may be extended. The period will end either at the end of 5 years after the disability ends or within 5 years of the death of the person disabled. However, in no case can the period be greater than 20 years in total. 57

Section 38 of the Act provides:

38. When a person is under any of the disabilities here-  
inbefore mentioned, at the time at which his right to  
make an entry or distress, or to bring an action to  
recover any land or rent first accrues, and dies  
without having ceased to be under any such disability,  
no time to make an entry or distress, or to bring an  
action to recover the land or rent beyond the period  
of ten years next after the right of such person to  
make an entry or distress, or to bring an action to  
recover the land or rent, first accrued or the  
period of five years next after the time at which  
such person died, shall be allowed by reason of any  
disability of any other person.

This section makes it clear that only the disability of the person to whom the cause of action accrues is to be considered. Thus, disability in any successor is not to be considered. This does not mean however, that successive disabilities in the same person will not be given effect. For example, if A is dispossessed as an infant, and during his infancy becomes mentally incompetent the period will be extended by five years from the date of his death or mental competency, up to the maximum of 20 years. It will not be limited simply to the disability relating to infancy. 58

The wording of s. 38 makes it clear that, in order to tack successive disabilities, there must be no hiatus between the disabilities for the section speaks of the person not ceasing to be under such disability.

In the case of infancy, one must scrutinize closely the possession taken for in many instances the person in actual possession will be considered to be in possession as bailiff of the infant and his possession will be possession by the infant.

The relevant law is set out in Quinton v. Firth 59

"Where any person enters upon the property of an infant, whether the infant has been actually in possession or not, such person will be fined with a fiduciary position as to the infants: 1, whenever he is the natural guardian of the infant; 2, when he is so connected by relationship or otherwise with the infant so as to impose upon him a duty to protect, or at least not to prejudice his rights, and 3, when he takes possession with knowledge in express notice of the infant's rights. Indeed the last ground is but an instance of the application of the general

trust property, with notice of the trust, constitutes himself a trustee, in which case, unless he enters as a purchaser for value, and continues in possession for twenty years from his purchase, or unless the trust be merely constructive, the statute will afford no defence."

### THE EFFECT OF RUNNING OF THE PERIOD

As mentioned previously, the Act bars both the remedy and the right of the true owner once the period has run. <sup>60</sup> However, the Act is silent as to the title of the dispossessor. Since the effect of the Act is negative, the Act leaves the dispossessor in possession with a little gained by the fact of possession and resting on the absence of the right of others to eject him. <sup>61</sup>

The negative aspect of the Act is illustrated in several ways. For example, an easement by necessity will not be implied to assist an adverse possessor where the easement has not been used for a time long enough to establish an easement by prescription. <sup>62</sup> On the reverse side of the coin, the "title" gained by possession remains subject to easements and other rights not extinguished. <sup>63</sup> Moreover, the "title" of the adverse possessor is no greater than the title that was extinguished. Thus, where a squatter extinguishes a tenant's leasehold interest the landlord's interest is not automatically affected.

However, the squatter's title, subject to the foregoing, is effective at law and in equity and can be forced upon an unwilling purchaser. <sup>64</sup>

Moreover, the squatter can regain by action possession lost to a subsequent adverse possessor even where the full period of limitation has not run under the first dispossession of the true owner. The subsequent adverse possessor is not entitled to plead the rights of the true owner, such a plea being an attempt to plead jus tertii as a defence, which is not permitted. <sup>65</sup>

The adverse possessor is entitled to convey his interest by deed or will and the interest will pass on his intestacy to his heirs. <sup>66</sup>

### OBTAINING PAPER TITLE

Despite some earlier authority to the contrary, it now seems clear that the possessor is entitled to apply to the Court for a declaration, not that he be declared the owner of the property, but rather for declaration that the title of the true owner is extinguished.

the nature of the declaration granted occurred in Brown v. Phillips et al. <sup>67</sup> This and earlier decisions were reviewed thoroughly by Jones, J. in Fraser v. Morrison et al., <sup>68</sup> in a case before the Nova Scotia Supreme Court.

However, there are ways in which the adverse possessor can have his possessory title raised to a paper title.

The first method is to apply for a certificate of title pursuant to s. 2 of The Quieting of Titles Act. <sup>69</sup>

If the judge is satisfied with the title and considers that the certificate can be safely granted, he may grant it. <sup>70</sup> The effect of the certificate is set out in s. 26 of the Act which reads:

26. The certificate of title, sealed, signed and registered as required by section 24, is conclusive, and the title therein mentioned shall be deemed absolute and indefeasible on and from the date of the certificate as regards the Crown and all persons whomsoever, subject only to any charges or encumbrances, exceptions or qualifications mentioned therein or in the schedule thereto, and is conclusive evidence that every application, notice, publication, proceeding, consent and act that ought to have been made, given and done before the granting of the certificate, has been made, given and done by the proper person.

The effect of the certificate is to create paper title in the adverse possessor. <sup>71</sup>

A second possible method requires an application to have the land registered under The Land Titles Act.<sup>72</sup> Section 40 of that Act contemplates the registration of a possessory title upon an application for first registration. As pointed out earlier it is not possible to acquire title by adverse possession after the property is registered under the Act. Subsection 2 of Section 40 permits the person registered with a possessory title, with the approval of the director of titles, to apply to be registered with an absolute title.

In areas where there are no Land Titles Offices an application may be made under The Certification of Titles Act. <sup>73</sup> By virtue of s. 16 of the Act an absolute paper title may be created.

Finally, it may be possible to create paper title by obtaining a quit claim deed from the true owner. The difficulty that arises is the effect of s. 15 of the Act which extinguishes the title of the true owner. However, it may be argued that although the true owner's estate is extinguished, he still retains paper title which he can pass on by deed,

It is however not possible to generate paper title from possessory title by originating notice of motion under Rule 610 of the Rules of Practice, for it has been decided that an application to have a question of title quieted under this rule did not extend to include a claim based on adverse possession. 74



## FOOTNOTES

1. R.S.O. 1970, c. 246
2. Megarry and Wade. *The Law of Real Property*. (3rd ed. 1966) 966.
3. Limitations Act (Ont.) ss. 30, 31.
4. 3-4 Wm. IV c. 27.
5. 37-8 Vict. s. 57.
6. Cheshire. *Modern Real Property*. (10th ed. 1966) 806.
7. Armour. *Law of Real Property*. (1st ed. 1901) 424.
8. *Supra*, fn. 1, s. 9.
9. For a discussion of these terms and their effect see Anger and Honsberger. *Canadian Law of Real Property* (1959) 773.
10. *Ibid.* s. 10.
11. *Ibid.* s. 8.
12. Ballentine, *Title by Adverse Possession*, (1918) 32 *Harv. L. Rev.* 135.
13. See *infra*; "The Scope of s. 4."
14. *Supra*, fn. 1, s. 11 Tolosnak v. Tolonsnak, (1957) O.W.N. 273, 10 D.L.R. (2d) 186.
15. See: Patterson v. Dart (1908) 10 O.W.R. 79, *aff'd* 11 O.W.R. 241; Heward v. O'Donohue (1890, 18 O.A.R. 529, *aff'd* (1891) 19 S.C.R. 341; Williams v. Pott (1871) L.R. 12 Eq. 149, Bertie v. Beaumont (1812) 104 E.R. 1001; National Trust v. Lowthian, (1943) O.W.N. 125 Lyell v. Kennedy (1889), 14 App. Cas. 437, Whitmarsh v. Whitmarsh (1972), 23 D.L.R. (3d) 520 (Co. Ct.).
16. Pflug and Pflug v. Collins, (1952) O.R. 419, (1952) 3 D.L.R. 681; *aff'd* (1953) O.W.N. 140, (1953) 1 D.L.R. 841. Re St. Clair Beach Estates Ltd. v. MacDonald (1975) 50 D.L.R. (3d) 650 (Ont. Div. Ct.)
17. See Anger and Honsberger fn. 9, p. 789 and cases therein cited.
18. Leigh v. Jack (1879), 5 Ex D. 264 (C.A.) Thus, in Earle v. Walker (1972), 22 D.L.R. (3d) 284 (Ont. C.A.)

A defendant who cut firewood, picked berries and tapped trees was held not to have dispossessed the true owner. On the other side of the coin, where the owner picked cherries from trees, the only agricultural use to which the land could be put, further acts of possession by the trespasser were held not to amount to dispossession. Re St. Clair Beach Estates Ltd. v. MacDonald (1975), 50 D.L.R. (3d) 650 (Ont. Div. Ct.).

19. Littledale v. Liverpool College, (1900) 1 Ch. 19.
20. Smaglinski v. Daly (1971), 20 D.L.R. (3d) 65 (Ont. C.A.)
21. Ibid; Seddon v. Smith (1877), 36 L.T. 168. This is true even in the case of uncultivated land. See Steers v. Shaw (1882), 1 O.R. 26
22. George Wimpey & Co. Ltd. v. John, (1966) 2 W.L.R. 414.
23. Homestakes Holding Corp. Ltd. v. Booth (1972), 24 D.L.R. (3d) 280 (Ont. C.A.)
24. Re F. G. Connolly Ltd. et al (1973), 33 D.L.R. (3d) 506 (N.S.), (1974), 44 D.L.R. (3d) (N.S.C.A.)
25. Anger and Honsberger. Canadian Law of Real Property, (1959) 790; Walker v. Russell (1965), 53 D.L.R. (2d) 509 (Ont. H.C.)
26. (1975) 50 D.L.R. (3d) 414.
27. Supra, fn. 1, s. 1 (c)
28. Supra, fn. 1, s. 1(d)
29. Midanic v. Cross (1957) O.W.N. (C.A.)
30. R.S.O. 1970, ch. 234
31. Ibid, s, 58 (1)
32. Ibid., s. 58 (2)
33. Gatz v. Kiziw (1957), 8 D.L.R. (2d) 292; Aluminum Goods Ltd. v. Federal Machinery Ltd. et al (1970), 10 D.L.R. (3d) 405 (Ont.H.C.)  
As the meaning of "improvements" see Gay v. Wierzbicki (1967) 2 O.R. 211 (Ont. C.A.); Mildenberger v. Prpic (1976), 67 D.L.R. (3d) 65 (Alta. S.C.) and infra at p.
34. 9 Geo. III c. 16 (1769).
35. Statute Law Revision Act. S.O. 1902 c.1, s. 2.
36. Regina v. McCormick (1859), 18 O.C.Q.B. 131.
37. Section 16 reads:

16. Nothing in sections 1 to 15 applies to any waste of vacant land of the Crown, whether surveyed or not, nor to lands included in any road allowance heretofore or hereafter surveyed and laid out or to any lands reserved or set apart or land laid out as a public highway where the freehold in any such road allowance or highway is vested in the Crown or in a municipal corporation, commission or other public body, but nothing in this section shall be deemed to affect or prejudice any right, title or interest acquired by any person before the 13th day of June, 1922.

For a discussion of the history and effect of s. 16, see Re Walker & A.G. Ont. (1974), 42 D.L.R. (3d) 630 (S.C.C.); (1972), 26 D.L.R. (3d) 162 (Ont. C.A.), 14 D.L.R. (3d) 644 (Ont. H.C.); DiCenzo Construction Co. Ltd. v. Glassco et al, 70 D.L.R. (Ont. H.C.)

38. Rains v. Buxton (1880), 14 Ch.D. 537.
- 38(a) Beaudoin v. Brown (1961), 28 D.L.R. (2d) 16.
  - (b) Fleet & Fleet v. Silverstein (1963), 36 D.L.R. (2d) 305.
  - (c) Handley v. Archibald (1899), 30 S.C.R. 130
39. *Supra*, fn. 1. s, 5 (2)
40. *Ibid*, s. 5(3)
41. *Ibid*, s. 5(4). The section speaks not only of the grantee but also his heirs or assigns. It has been suggested that only possession after the Crown Patent can be used by the person in possession: *Armour Law of Real Property*. (2nd ed.1916)482.
42. *Ibid.*, s. 5(5)
43. *Ibid.*, s. 17.
44. Chadwick v. Broadwood 49 E.R. 121.
45. *Op. cit.* s. 5(6)
46. *Ibid.*, S. 5(7). See Logan v. Campbell, (1956) O.W.N. 177 (C.A.)
47. See *Armour. Law of Real Property*. (2nd Ed. 1916) 494-6.
48. *Limitations Act*, R.S.O. 1970, c. 246, s. 5(11).
49. *Abid.*, s. 5 (12).
50. *Armour. Supra*, fn. 47 at p. 498.
51. *Supra*, fn. 49, s. 6(2).
52. *Ibid.*, s. 25, 26, 27.
53. *Ibid.* s. 17, 19, 20, 21.
54. For a definition of these terms see the *Interpretation Act* R.S.O. 1970, c. 225, s. 30. In Kirby v. Leather, (1965) Q.B. 367 (C.A.) it was held that a person is of unsound mind when he is incapable of handling his own affairs.
55. Garner v. Wingrove (1905) 2 Ch. 233.
56. *Ibid.* Murray v. Watkins (1890) 62 L.T. 796. See also *The Limitations Act* s. 38.

57. The Limitations Act. s. 37.
58. Burrows v. Ellison (1871), L.R. 6 Ex. 128.
59. Quinton v. Firth (1868), L.R. 2 Eq. 45. The position of a stranger who enters with notice of the infant's title is not without doubt. See: Re Taylor (1881), 23 Gr. 640; cf; Kent v. Kent (1891), 20 O.R. 158.
60. See s. 4 and s. 15 quoted *supra*.
61. Gahagan v. Sisson (1943) O.W.N. 619 (C.A.).
62. Wilkes v. Greenway(1890), 6 T.L.R. 449 (C.A.).
63. Re Nisbet & Pott's Contract (1906) 1 Ch. 386 (C.A.).
64. Lethbridge v. Kirkman (1855), 25 L.J.Q.B. 89.
65. Mergarry and Wade. Las of Real Property (3rd ed. 1966) 1000 and cases therein cited.
66. Asher v. Whithlock (1965), L.R. 1 Q.B. 1; Miller v. Robertson (1904), 25 S.C.R. 32.
67. (1968) 42 D.L.R. (3d) 38.
68. (1972) 23 D.L.R. (3d) 346.
69. R.S.O. 1970, c. 396
70. *Ibid.* s. 12.
71. For an example see Meredith v. A.G. of Nova Scotia et al (1969) 2 D.L.R. (3d) 486.
72. R.S.O. 1970, c. 234.
73. R.S.O. 1970, c. 59, s. 6.
74. Re Gordon and Muxlow, (1930) 38 O.W.N. 199 (Div.Ct.)