THE HISTORICAL DEVELOPMENT OF THE PRESCRIPTIVE ACQUISITION OF LAND TITLES

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The prescriptive acquisition of land titles, or adverse possession as it is called in common law jurisdictions, operates to create a new and original title in one whose possession of land has endured without interruption for a specified period of time.[1] Essentially, the underlying principle is one of the legal consequences which flow from the possession of land where the occupant does not have an accompanying legal title.[2] The process of title by possession is designed neither to punish a negligent land owner nor to reward an enterprising real estate poacher. Instead, it is simply a convenient method of securing land titles by extinguishing an old title and allowing a new one to arise in its place.

In this article the development of this legal principle in the Roman, Germanic, and common law legal systems is briefly described. The survey will indicate, it is believed, that the development of title by possession in each legal system followed a similar evolutionary pattern and that the civil law and common law were successively influenced by principles borrowed from the preceding legal systems; indeed, that many of the features of modern civil law and common law title by possession are remarkably similar to those which characterized ancient Roman law.

No attempt has been made to review substantive rules in detail except insofar as they are relevant to this historical survey. Rather, what has been undertaken is a comparative review of the development of similar legal principles in different legal systems and an evaluation of the extent to which the development of these principles in each case reflected advances which had theretofore been made in earlier legal systems.

I. THE ROMAN AND ROMAN-CANON SYSTEMS OF ACQUISITIVE PRESCRIPTION

Before a system of title by possession can arise it is necessary that two other concepts first come into existence: (1) Individual ownership of land titles and (2) a recognition that a possessory title may be held independently of a proprietary title.

In the earliest primitive societies it is doubtful if there was any conception of private ownership of real property.

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[1] The expression "adverse possession" is attributed to Lord Mansfield in Taylor D. Atkins v. Horde, 1 Burr. 60, 119, 97 Eng. Rep. 223 (1757): "Twenty years' adverse possession is a positive title to the defendant..."

[2] For a collection of definitions of "possession" see Pound, *Outline of Lectures on Jurisprudence*, 107 *et seq.* (4th ed. 1928).

There is, however, some evidence that ownership of land existed in ancient Greece,[3] but it was ownership in a religious rather than a proprietary sense.[4] In a society of this type it is unlikely that possession of land had any significance apart from ownership, and it would appear that the earliest separation of title and possession is found in Rome.

From at least the date of the XII Tables it was the Roman attitude that possession was something more than the mere occupancy of land;[5] that it included a mental intent or purpose.[6] Of course, the insistence that the possession of land involved a mental attitude was highly artificial, if not outright fictitious, because it could not possibly be determined except from an examination of the nature of the occupant's possessory activities on the land.[7] The fact that the Romans looked for an animus to accompany a physical occupation, however, is significant for two reasons: (1) The same approach reappears much later with striking force in the common law[8] and, more fundamentally, (2) it suggests that Roman law initially took the view that possession was something more than a mere fact; that it was a relationship between the occupant and the land which, with nothing more, was capable of producing legal consequences. It is important to examine the precise nature of these consequences.

In Roman law if A in possession held legal title and was evicted by B, A had recourse to legal process to regain possession. His right was a derivative incident of his title. In other words, title

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[3] 2 *Primitive and Ancient Legal Institutions* 365 (1915).

[4] "The individual has (the land) in trust only; it belongs to those who are dead, and to those who are yet to be born. It is part of the body of the family, and cannot be separated from it." *Id.* at 370. See Aristotle, *Politics* II, c. 7 (Welldon's transl. 1912). Plato restates the Athenian law in these terms: "Our first law ought to be this: Let no person touch the bounds which separate his field from that of his neighbor, for this ought to remain immovable." 2 *Primitive and Ancient Legal Institutions, supra,* at 369. See DeCoulanges, *The Ancient City* 81 *et seq.* (12th ed., Small, 1901).

[5] Sohm, *The Institutes,* 333 (3d ed., Lealie, 1907). Much later the Digest (41. 2.12.1) expressly stated that title and possession were two separate concepts and could be concurrently enjoyed by two different persons.

[6] The expression "body and soul" is frequently used to describe the notion that something more than accidental or unintended occupancy was required. Olivecrona, *Acquisition of Possession in Roman Law,* 5 (1938). "A mere physical possession was only a fact and resulted in no rights." *Id.*

[7] "The necessary animus is little more than intelligent consciousness of the fact." Buckland, *The Main Institutions of Roman Law,* 106 (1931).

[8] "Possession (at common law) consists in physical power, associated with consciousness, and therefore in every case of acquisition of possession two things are necessary, a corporeal relation and animus." Brown, *Law of Limitation as to Real Property* 72 (1869). See Pollock & Wright, *Possession* 26 *et seq.* (1888). It will be indicated below that as the concept of mental attitude has been carried into common law adverse possession, it is considerably more important that a definition of terms. It is universally held in the United States, for example, that an adverse possessor cannot qualify for a new title unless he can show that he formulated and maintained, during the entire statutory period, the proper intent.

carried with it a right to an undisturbed possession.[9] But suppose that A, although in possession, had no title whatsoever and was ousted by B. In this case does A have an action? That is, will his former possession, standing alone, support a right to regain possession? The Roman interdictal process was available to the possessor, and one whose possession was disturbed in any way whatsoever could petition for relief.[10] This was true even though the invasion of possession was only threatened.

The procedural steps were these: The praetor, without inquiry, would issue an interdict to the plaintiff upon application. The interdict alternatively ordered the defendant to quit the land or to abandon his threatened entry, but was operative only on the condition that the latter was without right.[11] If the defendant then conformed to the interdict and acknowledged the plaintiff's right to possession, the matter was concluded. However, if he disputed the right of the plaintiff to possession and simply refused to abide by the interdict, then the action proceeded as any other and was by no means a summary one.

In order to prevail the plaintiff was obliged to show (1) the previous *acquisition* of a legal possession; that is, a physical occupancy accompanied with the appropriate mental attitude except in the instance of a descent cast;[12] (2) the continuation of possession from the date of acquisition until the time of disturbance;[13] and (3) a disturbance completed, attempted, or threatened.

The judgment was surprisingly flexible. It not only restored the plaintiff to his possession but, in addition, could require the defendant to guarantee his future conduct.[14] Moreover, the plaintiff was entitled to damages if he had sustained a loss.

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[9] Vindication was the Roman real or proprietary action used to try the title and was the Roman equivalent of the common law writ of right.

[10] ". . . the right of Interdicts depends on grounds which have no reference whatever to property (i.e. title)." Savigny, *Possession* 298 (6th ed., Perry, 1848). "Thus, possessory Interdicts are suits which are founded on mere possession. . ." *Id.* at 300. There were, of course, numerous types of interdicts; the ones herein referred to are those issuing upon the disturbance of possession of land (*unde ve*).

[11] Buckland, *A Manual of Roman Private Law* 415 (1925).

[12] If A, the possessor, died leaving an heir, it is possible that the heir would be unable to show that he had acquired possession. In this case he could avail himself of the interdict quorum bonorum which would permit him to rely on the possession of the deceased. The similarity between this action and the common law mort d' ancestor which operated as an appendage to the assize of novel disseisin will be indicated below.

[13] Savigny, *op. cit. supra,* note 10 at 295. Under the Roman real action (vindication) it was, of course, only necessary for the petitioner to show title in himself at some prior time and this shifted the burden to the respondent to show a better right in himself at the date of the action.

[14] A bond was not required of the defendant but, instead, the formula or degree enjoined the defendant from future interference or threatened entries. If the defendant persisted, a new action followed in which the only issue was one of assessing damages against him. See Buckland, *op. cit. supra* note 11, at 416.

The foregoing briefly outlines the first legal consequence which resulted from the mere possession of land. It was a right which the possessor could successfully assert against one other than the owner of the title. The fact that damages were awarded to some extent gives the Roman action a tortious flavor. A personal wrong was thought to have been committed against the possessor despite the fact that his possession may not have been founded on right. Further, the injunctive nature of the decree might well suggest that continued peaceful and orderly conduct was held at a premium by the Romans.

There is some evidence that prior to the XII Tables a system of title by possession existed in Rome [15] whereby an original title accrued to the occupant of land after possession for one year.[16] However, little more than this is known, and the first conclusive indication of a process of "usucaption" appeared in the XII Tables where a two-year possessory limitation for immovables was established.[17] What information there is available indicates that usucaption under the XII Tables was a pure instance of title by possession.[18] Legal possession alone appears to have been the only requirement.[19]

However, the process was limited in its operation. Only Roman citizens could gain title by usucaption, and title to only non-provincial land could be acquired.[20] By the end of the second century an additional and supplementing system, "praescriptio longi temporis," was created by Edict.[21] Prescription applied to land in the provinces and established a ten-year limitation in ordinary cases and twenty years where the owner resided in a jurisdiction other than the one in which the land was located.

Usucaption and prescription continued to exist concurrently until the time of Justinian but were essentially different in theory if not in operation. Prescription was a statute of limitations. Whereas usucaption expressly "vests the property" [22] and raised a new title in the occupant, prescription did nothing more than bar the right of action.[23] The concept most fundamental to a system of

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[15] Maine, *Ancient Law* 284 (3d ed. 1866).

[16] Declareuil, *Rome The Lawgiver*, 178 (1926).

[17] ". . . possession for a period of two years in the case of land, or of one year in connection with other things, vests the property." Lib. VI, Tit. III. See Gaius, *Institutes* II, 42 (Muirhead's transl. 1904).

[18] Voet, *Modes of Acquiring Property, Possession, and Acquisitive Prescription* 168 *et seq.* (Krause's transl. 1892).

[19] Apparently good faith was not required of the possessor but was added later prior to Justinian. Buckland, *The Main Institutions of Roman Private Law* 121 (1931). However, the germ was at least present insofar as title to chattels was concerned. Personal property which had been stolen (res furtivae) was not subject to usucaption. *Id.*

[20] Radin, *Roman Law* 363 (1927).

[21] Buckland, *Principles of Roman Private Law* 92 (1912).

[22] *XII Tables*, Lib. VI, Tit. III.

[23] Buckland, *op. cit. supra* note 19, at Sec. 45.

title by possession is that the relationship between the occupant and the land in terms of possession is capable of producing legal consequences. In other words, it is the possessor who is the actor. Under a statute of limitations, however, one does not look to the act of the possessor but to the neglect of the owner. In the former the important feature is the claimant in possession, and in the latter it is the owner out of possession which controls. It is impossible to suggest with assurance a reason why a statute of limitations was adopted in this one instance when it would normally be expected that the already-established principles of usucaption would be applied. It is perhaps significant that this form of prescription dealt primarily with non-Roman land and non-citizens, and it may well be that a different conceptual approach was taken toward the possession of land in these instances than otherwise.[24]

Justinian combined the two methods into one and established one prescriptive system for all persons and all land. It was indeed a combination since the acquisitive nature of usucaption was united with the limitation periods of prescription: [25]

> "By the civil law it was provided that... a person who was not the owner... (could) acquire this thing by use if he held it... for two years, if it were an immoveable... the object of this provision being to prevent the ownership of things remaining in uncertainty... We have come to a much better decision, from a wish to prevent owners being despoiled of their property too quickly, and to prevent the benefit of this mode of acquisition being confined to any particular locality. We have accordingly published a constitution providing that... immoveables (shall be acquired) by the 'possession of a long time,' that is, ten years for persons present, and twenty for persons absent; and that by these means, provided a just cause of possession precede, the ownership of things may be acquired, not only in Italy, but in every country subject to our empire." [26]

Roman prescription under Justinian, then, was unquestionably a product of the social utility of securing land titles against assault by stale claims: [27]

> "...the object of this provision being to prevent the ownership of things remaining in uncertainty." [28]

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[24] The obvious theoretical problem as to whether or not a title accrued to one establishing a prescription does not appear to have provoked any difficulty. For example, there is nothing to indicate that the occupant could not convey the land or that it would not descend to his heir at law.

[25] Buckland, *Manual of Roman Private Law*, 132 (1925).

[26] Justinian, *Institute*, Lib. II, Tit. VI pr. (Sandars' transl. 1927). It is apparent that the limitation statute in the one American state which has adoped the civil law, Louisiana, finds its historical roots in this provision of the Institutes. "Immovables are prescribed for by ten years, when the possessor had been in good faith and held by a just title during that term." *La. Civil Code*, Sec. 3474 (Dart 1945).

[27] See generally Hammond, *Sandars' Justinian* 208 (1876).

[28] Justinian, *op. cit. supra* note 26, Lib. II, Tit. VI, pr. "(Prescription) was in effect a method utilized to cure defects of title." Donahue, *Elements of Roman Law* 48 (1930).

Good faith was required by Roman prescription whereby the occupant must have entertained an honest belief that the land was his. Any possession seized by force or violence was not in good faith regardless of the state of mind.[29] Good faith need only exist at the inception of the possession, however, and need not thereafter continue. For example, if the occupant assumed possession believing title to be in himself, a later discovery to the contrary would not defeat the prescriptive acquisition.[30]

A "just cause of possession" was, in effect, a possession pursuant to a transaction which, had it not been for a defect in the form of conveyance, was capable of transferring the rights of the donor or grantor. If, for example, an attempted mancipatio was void for want of formality, possession would ripen into title because the attempted conveyance, if otherwise valid, was capable of transferring the rights of the grantor.

Cases of possession induced by mistake are somewhat more difficult. For example, if A, believing himself indebted to B conveyed title to B in discharge of the obligation and, in fact, no debt existed, B's possession would not ripen into ownership because he does not occupy under a just title.[31] Further, if A, an infant-owner, made a purported conveyance to B who knows A to be a minor but who believes that infants are capable of a valid conveyance, B will not acquire title since, again, he cannot show a just title. But if B believes A to be an adult or sane when, in fact ,he was not, the Digest indicates that B's possession was pursuant to a just title.[32]

Roman law, then, took the position that possession, however gained, was good against all except the holder of a better right. There is nothing to indicate that A, after acquiring possession in bad faith and without a just title, could not obtain interdictal relief if ousted by a stranger, B. However, where A asserted a title in himself as against the title holder based on acquisitive prescription, Roman law attached importance to the way in which the possession began. In other words, possession alone was not enough; it must

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[29] Justinian, *op. cit. supra* note 26, Lib. II, Tit. VI, 3.

[30] *Digest,* 41.1.48.1; 41.3.4.18; 41.3.15.3. But suppose that A, the possessor, after learning that the title was in B, conveyed to C who thereafter re-conveyed to A. Prescription would not run in his favor because his new possession commenced in bad faith. A rather surprising qualification is the instance where A, the occupant, commenced his possession in bad faith but who then conveyed to C who took believing A to have title and capable of making a valid transfer. In this instance, C could acquire title. ". . . although his possession is *mala fide* . . . yet if he transfers it to a person who receives it *bona fide,* this person will acquire the property in it by long possession. . ." Justinian, *op. cit. supra* note 26, Lib. II, Tit. VI, 7.

[31] "But if a mistake is made as to the cause of possession, and it is wrongly supposed to be just, there is no usucaption . . ." Justinian, *op. cit. supra* note 26, Lib. II, Tit. VI, 11. However, this result is not entirely consistent with the Digest which seems to indicate that errors of this type will not destroy a just title. *Digest,* 41.4.11.

[32] *Digest,* 41.4.2.15. The different results might possibly be explained in terms of mistake of law and mistake of fact. There is nothing, however, to indicate that the Roman law clearly drew a distinction of this type in such cases.

have been possession commenced in good faith and pursuant to a just title. This might well contain the principle that whereas B, the encroaching stranger, can find no equities in his own behalf regardless of the source of A's possession, yet an owner should not forfeit his title as the result of trick or artifice. The general utility of secure land titles was not, under Roman law, divorced from the desirability of an ownership protected against wrongful activity.

The final element of Roman prescription was duration. The possession must have endured continuously and without interruption for the statutory period of ten or twenty years.[33] If the occupant ceased to possess the land for a time, however brief, the possessory relationship which he had established was disturbed and the prescriptive period commenced to run anew when he resumed possession. This general rule was subject to two exceptions:

(1) One who occupied in subordination of the interest of the original possessor furthered the occupancy of the latter. For example, if A, who occupied land owned by B placed X thereupon as his tenant, X's possession was that of A who acquired title by prescription. In other words, possession could be vicarious.

(2) Successive interests could be combined toward the requirement of duration. If A occupied's B's land for five years and died leaving issue (or conveyed to C), the possessory period of A's heir at law (or C) could be "tacked" to that of A.[34]

As might be suspected, surprising results are inevitable when the rule of successive interests is combined with the concept of good faith.[35]

A rather complex feature of Roman prescription was its multiple-limitation system. Different prescriptive periods were established for varying situations and the one which applied depended either on the location of the land or the quality of the possession. Whereas the limitation period was ten years [36] where the land was possessed in good faith under a just title, thirty years' possession [37] barred the owner's action [38] regardless of the source of the occu-

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[33] Donahue, *op. cit. supra*, note 28., at 48 *et seq.*

[34] "Long possession, which has begun to reckon in favor of the deceased, is continued in favor of the heir or bonorum possessor . . ." Justinian, *op. cit. supra* note 26. Lib. II, Tit. VI, 12. "Between the buyer and seller, too . . . their several times of possession shall be reckoned together." *Id.* 13.

[35] If A occupied B's land for five years thinking it to be his and then died leaving issue, the heir could add his possession to that of A even though he knew at the inception of his occupancy that title was in B.

[36] A twenty-year period applied where the owner resided elsewhere than within the jurisdiction of the land.

[37] "*Longissimi temporis praescriptii*" or extraordinary prescription.

[38] It is noteworthy that nowhere in the Institutes can reference be found to extraordinary prescription, and it is likely that it existed as a statute of limitations rather than as a method of title by possession even after usucaption and ordinary prescription were combined.

pant's claim,[39] and a just title and good faith were unnecessary.[40] Somewhat later, the thirty-year period was reduced to sixteen.[41] Finally, a separate limitation of forty years applied where ecclesiastical property was involved.[42]

Not all titles were subject to the effect of prescription. Protection was extended in some cases in terms of disability immunity. For example, property owned by minors, and probably the insane, was not subject to title by possession.[43] Also, one who was prevented from or unable to represent his interests was entitled to claim disability: [44]

> "(If the owner is) absent, or deprived, on some legitimate ground, of the power of attending to his affairs; and during this time the usucaption might have been completed against him... (then his action can) be brought within a year, commencing from the time when it first became possible to bring the action." [45]

With the introduction of immunity for disability reasons, a new concept is injected into a real property principle. There are, of course, two conflicting issues involved—that of securing land titles by permitting title to arise from possession, and that of extending protection against potential hardship to those considered to be unable to represent their own affairs.[46] This same consciousness is evi-

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[39] The corresponding Louisiana statute, *La. Civil Code*, Sec. 3474 (Dart 1945), creates a title after ten years' occupancy in good faith and under a just title, and Sec. 3475 provides that, "Immovables are prescribed for by thirty years *without any title* on the part of the possessor . . ." (Italics added).

[40] Justinian, *op. cit. supra*, note 26, at 146. But see Voet, *op. cit. supra*, note 18, at 169 where it is suggested that although good faith was presumed after thirty years' possession, a showing to the contrary would disqualify the possessor.

[41] Martin, *Adverse Possession, Prescription and Limitation of Actions* 3 (1944).

[42] It is interesting to note that in the United States neither charitable nor religious property is immune to adverse possession unless otherwise provided by statute. This has been done in only three states: Illinois (*Ill. Rev. Stat.*, Sec. 83-8 [Smith-Hurd 1949]); Missouri (*Mo. Rev. Stat. Ann*, Sec. 1011 [1942]); and Vermont (*Pub. Laws of Vt.*, Sec. 1715 [1933]). The latter two provisions use the expression "pious or charitable use," and the Illinois statute refers to land held by "religious societies."

[43] "Males arrived at the age of puberty, and females of a marriageable age, receive curators, until they have completed their twenty-fifth year; for, although they have attained the age of puberty, they are still of an age which makes them unfit to protect their owner interests." Justinian, *op. cit. supra* note 26, Lib. I, Tit. XXIII, pr.; *Digest* 44.1.48.

[44] See Justinian, *op. cit. supra* note 26, Lib. IV, Tit. VI, 5.

[45] Hammond, *op. cit. supra* note 27, at 515.

[46] It should not be supposed, however, that minors or the insane were without a remedy during the existence of the disability. The XII Tables provided for the appointment of a guardian for the mentally defective (Hammond, *supra*, at 138), and the Institutes permitted general and special guardianship for minors prohibiting, however, testamentary wardship. (Justinian, *op. cit. supra* note 26, Lib. I, Tit. XXIII,

denced today in the United States by the existence of disability statutes in all states, and occasionally the desire to protect is carried to unusual extremes.[47]

The one significant feature of the effect of a disability at Roman law was that it did not toll the operation of the limitation period. Once possession began, the prescriptive period commenced to run against the owner whether he was subject to disability immunity or not. The saving feature was not that the limitation tolled but that the action could be brought within a brief period after the disability was removed even though the prescriptive period had expired.[48]

One wonders why it was that the Roman law seized on this unusual method of giving effect to disabilities when it would be expected that the existence of the disability would simply toll the time of the prescription which would then commence again when the disability was removed. It is only possible to speculate as to the answer. The Roman law placed a tremendous premium on mere possession and the entire prescriptive system functioned under the basic formula that possession was capable of culminating in a new title. It would have been entirely foreign to this concept to suggest that two identical possessions would produce different results depending on the ability or inability of the owner to defend his title. The relationship between the possessor and the land is identical in both instances. It is perhaps likely, therefore, that the Roman method of disability immunity was selected since it more closely approximated the traditional basis of acquisitive prescription. It protected the disabled and yet theoretically preserved the effect of a possession.

The transition of Roman prescription to the Roman-Canon system of title by possession resulted in no substantive changes with one exception.[49] The Roman law required only that the possession find its inception in good faith and a later discovery by the occupant that title was in another would not defeat the resulting title. Canon law, however, injected the element of a continuing good faith which had to endure throughout the entire limitation period.[50]

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1 *et seq.*) In the common law it is universally held that one laboring under a disability, with the possible exception of alienage, may bring an action if he chooses, but he is not obliged to do so.

[47] For example, in Delaware and Pennsylvania land owned by a married woman is not subject to adverse possession. (*Rev. Code of Del.*, Sec. 5122 [1935]; *Pa. Stat. Ann.*, Sec. 12-73 [Purdon, 1930]). This is true in Connecticut only if the woman was married prior to April 20, 1877! (*Gen. Stat. of Conn.*, Sec. 8314 [1949]). The Pennsylvania section is an interesting relic since it creates a disability for one driven from his land by wild Indians.

[48] This precise feature is found in the present statutes of twenty-six American states. The time available (*utilis annus*) to the disabled to commence his action in Roman law was four years.

[49] The influence of canonical forms of action, however, was of vital significance. See *infra*.

[50] Martin, *op. cit. supra* note 41, at 35 *et seq.* See Crump & Jacob, *Legacy of the Middle Ages* 363 *et seq.*, (1926).

II. MEDIEVAL GERMANIC LAW AND THE RECEPTION

All interests in land must stem from a property system which is either allodial or feudal in nature.[51] Roman land law was based on a system of individual land ownership whereby the entire title could be held by one person. The Medievel Germanic land system represented the precise converse—a pure feudal structure of land tenures.

Feudalism was not, however, traditional in continental Europe.[52] The agrarian communities in ancient Germanic civilization were characterized by the alod or at least by community title.[53] The resulting transition to feudalism was unquestionably the product of both economic and political factors. The decline of Frankish clans and tribal organizations in the seventh century, for example, was unaccompanied by the rise of an effective state. The result was personal and economic dependence on individuals rather than on a centralized government. Population increase and population stability enlarged the numbers of those dependent on the land for income. Poverty made even feudal tenure seem attractive, and the accumulation of land wealth in fewer and fewer hands made possible the parceling out of servitudes. In addition, war in continental Europe had reached a professional level by the eighth century and individuals were not unwilling to exchange the title to an alod for the protection of a tenure.[54] Under the pressure of the ninth century invasions, huge French fiefs began to appear as the only effective centers of local resistance, and feudalism took root.

In Europe feudal government resulted from a feudal land system and for that reason the relation of an individual to the land reflects, with some accuracy, his political position. The European tenant was not a proprietor in any sense of the word. His interest in land and his position in the feudal chain was not an indication of freedom but, instead, a mark of obligation and a token of service. His social and governmental duties were defined in terms of feudal incidents and servitudes; voluntary unity was replaced by an artificial bond of fealty and homage.

It should not be supposed, however, that feudal government means a strong, centralized government. The most significant feature of a feudal government is that each individual is obligated by

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[51] See Maitland, *Domesday Book and Beyond* 152 *et seq.* (1897).

[52] See I Stubbs, *Constitutional History of England,* 53 *et seq.* (1897).

[53] The allodial land system in Anglo-Saxon England was established following the mass migrations from Europe and, no doubt, might well have continued had not the Normans recognized the administrative advantages of feudalism.

[54] In any feudal system it is, of course, necessary that all land be held either immediately or remotely under a sovereign. The force of feudalism is found in the pyramidal structure of land titles. Any feudal incident, however, slight, running to the sovereign is sufficient, but it must exist. In France, for example, the crown could enforce on the tenants in capite only the servitude of escheat. The fact that the allodial system of land titles in ancient Germany was able to resist longer the move toward feudalism is probably explained by this principle. Germany traditionally consisted of a series of separate and independent states and national unification under a common sovereign was delayed.

fealty to the landlord under whom he immediately holds, even as against the superior of his overlord. The ever changing balance of national power lies divided between the crown and its immediate tenants, and nationalism never thoroughly prevails. Local, feudal justice is never quite replaced by national justice.

Under Germanic feudalism an individual was not politically capable of holding an entire land title. Instead, portions of ownership were parceled out in "splinters" and shared by more than one. Seisin was the prevailing concept. Each owned whatever his interest might be, and jointly, all held the entire title.[55] For example, if A by subinfeudation placed B on a portion of land, both were seised of the same area and together they held the entire title less the interest of A's overlords. B's seisin arose from his occupancy and A's seisin from the feudal services owed him by B. Seisin, then, was something more than possession, yet something less than title, and possession was, in itself, unimportant except insofar as it might indicate a seisin.[56] A distinction between possession and title was therefore unknown. This is abundantly illustrated by the absence of any pure possessory action. Mere occupancy was not such a relationship between the possessor and the land as would create a right to its legal protection,[57] and the possessor's only remedy was to use force to repel an attempted disseisin or self-help to regain one completed.[58] If, under Roman law, a contest arose under a possessory interdict, he would prevail who could show the most recent possession. Germanic feudal law by its very nature favored the most ancient seisin.

Further, it would have been the antithesis of feudalism to suggest that a prolonged and uninterrupted possession was capable of giving rise to an absolute title. Germanic feudalism required a division rather than a concentration of title incidents, and title by possession was unknown.[59] However, possession was capable of producing seisin if the disseised possessor did not make use of timely self-help. For example, if A, whose seisin was in occupancy was disseised by B, the latter, of course, did not have seisin, or at least his seisin is defective at best. Yet it could be perfected by a con-

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[55] Philbrick, *Changing Conceptions of Property in Law*, 86 U. of Pa. L. Rev. 691, 701 (1938).

[56] See Noyes, *The Institution of Property* 268 (1936). "Possession (was) worth a good deal in France, at least, so long as there is a right of ownership mingled with it." 2 Loysel, *Institutes* 132 (1846) (in French).

[57] Possessory actions were unknown in Germany until almost the end of the Middle Ages. Huebner, *History of Germanic Private Law* 196 (Cont. Legal Hist. Series 1918). ". . . possessory actions do not appear in the Frankish Law." Brissaud, *History of French Private Law* 321 (Cont. Legal Hist. Series 1912). Germanic actions were all *ex delicto* in nature. However, possession was not entirely unimportant and, in fact, carried with it a tremendous mechanical advantages. The rigid formality accompanying actions required the plaintiff to follow very precisely the stringent formalities of the proceeding.

[58] Brissaud, *op. cit. supra*, at 322.

[59] Huebner, *op. cit. supra* note 57, at 254.

tinued, undisturbed possession [60] at the end of which time, B would assume A's position in the chain of feudal tenures.[61]

This was the state of Germanic land law at the time of the Reception.

The separate concepts of possessory actions and of prescriptive acquisition appear to have been received into Germanic law from different sources and for entirely different reasons. The social utility of protecting one in possession of land soon made itself felt. In France by the tenth century basic notions of public order commenced to prevail over unrestricted disseisin. Germanic feudal law was, of course, unable to provide a remedy since it was not recognized that possession alone carried with it a right to continued possession. It was for the pure canon law to produce the beginnings of possessory protection. The actio spolii was originally a process of ecclesiastical discipline,[62] but was moulded into a civil action designed to test the right to occupancy and was no doubt patterned after the Roman possessory interdicts.[63]

Although possession became entitled to a legal remedy when disturbed, it required something additional to inject a system of title by possession into Germanic law. It was necessary for feudalism to wither to the point where individuals became capable of holding a complete title. The decline of feudalism commenced in France as early as the thirteenth century. The Hundred Years' War was perhaps the final blow,[64] and by the fourteenth century, France was ready for the reception of Roman acquisition prescription.

Possession, as defined by the French Civil Code, is a somewhat different concept than Roman possession. "Possession means.... the detention or the enjoyment of a thing... by a person who actually has or enjoys the same personally..." [65] That is, the requirement of an animus is not made an element of posession but, instead, the controlling feature is actual occupation and control. This seems to represent an attempt to abandon the fiction which existed in the Roman law and to grant, for example, to the insane and others incapable of forming an intention the right to be possessors. However, this definition of possession is applicable only in the ordinary case and is not appropriate in instances of prescription. In such

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[60] A year and a day was the customary period, but this varied somewhat according to local usage.

[61] Brissaud, *op. cit. supra* note 57, at 327 *et seq.*

[62] *Id.* at 318.

[63] For the relationship among Roman possessory interdicts, *actio spolii*, and the common law possessory actions, see *infra*.

[64] In 1445 the first army was recruited in France otherwise than on a feudal military tenure basis.

[65] *French Civil Code*, Sec. 2228 (Wright's transl. 1908). The German Code is to the same effect: "Possession of a thing is acquired by the attainment of actual power over the thing." *German Civil Code*, Sec. 854 (Wang's transl. 1907). "An intention on the part of the acquirer to attain actual power over the thing is not necessary." *Id.* note c.

cases the element of intent retains its force although in a somewhat different form:

> "In order to gain a title by prescription, the possession must be... as owner." [66]

The possessor must, therefore, occupy the land under a claim of ownership. The possession must be of an aggravated character, hostile and adverse to the title of the owner and designed to put him on notice.[67] Accordingly, the element of intent in the French law consists of an attitude imputed to the occupant, and measured by the nature of his possessory activity upon the land, whereby he claims to occupy in his own behalf and not in subordination of the owner's title.[68]

The multiple prescriptive periods in the French law clearly reflect, both in operation and result, the influence of Roman prescription. Ten years' continued possession raises a new title in the occupant rather than merely barring the action of the owner through a statute of limitations.[69] A twenty-year period was likewise adopted by the French law and, in general, applies where the owner does not reside in the jurisdiction in which the land is located.[70]

As in Roman law, however, one is not entitled to avail himself of the ordinary prescriptive limitations unless he occupies in good faith and under a just title.[71] It has been indicated that the one substantive difference between Roman and Roman-Canon title by possession was the element of good faith, the latter system requiring the lack of knowledge of outside title to endure throughout the statutory period. The French law adopted the former rule: "It is sufficient if good faith existed at the time the property was acquired." [72]

Possession pursuant to a just title is one "under an instrument which is on the face of it capable of giving a title," [73] and an instrument void on its face cannot form the basis of ordinary prescription [74] despite the existence of good faith.[75] An instrument merely

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[66] *French Civil Code, supra,* Sec. 2229.

[67] *Id.* Sec. 2229, speaks of occupancy which is "continuous, uninterrupted, peaceful, public and unequivocal . . ."

[68] "Acts which are only done by permission or merely tolerated cannot form the basis of . . . prescription." *Id.* Sec. 2232.

[69] "A person . . . obtains a title by prescription to the land in ten years . . ." *Id.* Sec. 2265.

[70] *Id.* Where the owner divides his time between the two districts, the time spent outside the jurisdiction of the land is doubled. This makes it possible for the prescriptive period to be any length of time longer than ten and less than twenty years. *Id.* Sec. 2266.

[71] *Id.* Sec. 2265.

[72] *Id.* Sec. 2269.

[73] *Id.* Sec. 2265.

[74] *Id.* Sec. 2267. A will void for lack of witnesses, for example, will not create a just title. Sec. 2267, note o.

[75] *Id.* Sec. 2265, note m.

voidable, however, such as an infant's contract probably will create a just title.[76]

Finally, the possession of the occupant, once established, must endure continuously and without interruption for the statutory period. This rule, as was true at Roman law, is subject to two exceptions:

(1) One occupying in subordination of the claimant's possessory title, a tenant, for example, furthers the latter's claim even though he who later gains title not only cannot show a continuous possession in himself, but can show no possession at all, except as it is vicarously established by his lessee or termor.[77]

(2) The occupant may combine the term of his predecessor with that of his own whether acquired by gift, descent, devise, or purchase.[78]

One feature of the Roman multiple limitation system is not found in the French law. In Roman law ecclesiastical property was subject to prescription after forty years' possession. The French Civil Code, however, grants immunity to all public and church land.[79]

Extraordinary prescription was received into the civil law and, as such, has retained its two principle characteristics:

(1) Thirty years' possession bars the owner's right to a possessory action. That is, extraordinary prescription in the French law is a statute of limitations rather than a process of acquisitive prescription:

> "All rights of action whether in rem or in personam are extinguished by prescription after thirty years." [80]

There would appear to be none except historical reasons why two entirely different methods of giving force to a mere possession should function concurrently in modern civil law, one expressly raising a title after ten years' occupancy and the other barring stale claims after thirty years as a statute of limitations. There were, of course, understandable justifications why these two unlike systems should exist in Roman law and this anomaly of modern French law is a striking example of the force of the Reception.[81]

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[76] *Id.* Sec. 2267, note o.

[77] Cassation, Aug. 25, 1835 (Sirey 1836, 1st pt., 742); Dallez, *Repertoire Pratique* Vo. Prescription Civile, No. 588 (1922) (in French).

[78] *Id.* Sec. 2235.

[79] *Id.* Sec. 2226. "Such, for example, as . . . churches." Sec. 2226, note 1.

[80] *Id.* Sec. 2262.

[81] By way of further explanation, it should be added that evidence of the precise nature of *longissimi temporis praescriptio* in the Roman Law both before and after Justinian is meager at best. Extraordinary prescription was the product of Justinian in 528 A.D. (Voet, *Modes of Acquiring Property, Possession, and Acquisitive Prescription* 168 [Drause's transl. 1892]). This date is significant because it lies between the Edict creating ordinary prescription in the form of a statute of limitations and the Institutes which combined usucaption and prescription into one system based on title by possession. Therefore the term *praescriptio,* in 528 A.D. very likely involved the concept of barring rights since this meaning had long been attached to it.

(2) Good faith and a claim based on a just title are unnecessary.[82]

Personal disability is extended to "minors and interdicted persons" by the French Civil Code, and the immunity has equal application to both ordinary and extraordinary prescription.[83] The distinguishing feature of Roman disability immunity was the fact that possession was not deprived of its force despite the owner's disability. This element was not received into the French law and the existence of a disability tolls the running of the prescription period whether it arises before or after the possession has begun.[84] Virtually identical provisions have been incorporated into the present Louisiana Civil Code.[85]

That a tolling provision appears in the French law is perhaps consistent with the conception of possession at the time of the Reception. Whereas in the Roman law possession was held at a premium, Germanic feudalism did not attach any independent significance to mere occupancy. Therefore, the French law would find nothing surprising in the suggestion that possession, regardless of its quality, will not work against the interests of the disabled.[86]

Throughout the Middle Ages, Germany experienced the development of a real property technique which was eventually to qualify the reception of title by possession in that country. By 1100 it had become the practice in Germany to make a public, written record of legal transactions involving land. For example, when A succeeded to an interest in land as the heir at law of B, this event was entered in a local register. The purpose was to preserve enough official evidence to make the settlement of property disputes a matter of some accuracy. Registration eventually became the validating act itself.[87] This system of land registration in Germany weakened the influence of the Reception of Roman-Canon prescription. The re-

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[82] *French Civil Code, supra* note 65, Sec. 2262.

[83] *Id.* Sec. 2252. This provision seems more inclusive than the Roman law and extends protection to all persons eligible for guardians and to those legally incapable of free access to the courts; prisoners, for example.

[84] "The period of prescription *does not run* against minors . . ." *Id.* (Italics added).

[85] "Minors and persons under interdiction cannot be prescribed against . . ." *La. Civil Code,* Sec. 3522 (Dart 1945). Another point of comparison is found in Sec. 3523 (*Id.*) and Sec. 2253 of the French Civil Code both of which provide that prescription does not run as between husband and wife. This principle is peculiar to Louisiana and is found in no other American state either by statute or decision.

[86] The difference between tolling and non-tolling disability provisions is of more than academic significance since the results are entirely different. For example, if A disseises B, an infant of 11, in 1940 in a jurisdiction with a ten-year limitation period provision which tolls the limitation, B may bring his action anytime prior to 1960 because he has the entire statutory period after the expiration of the disability in which to act. However, in a jurisdiction with a ten-year limitation which is not tolled by the existence of a disability and in which the action must be brought within one year after the disability is removed, B must commence hs action not later than 1951.

[87] Huebner, *op. cit. supra* note 57, at 221.

gistration technique was a scientific and orderly method appealing to scientific and orderly local administrators. The practice of describing land interests in terms of a nebulous seisin was replaced by recorded descriptions, and all legal transactions involving land were made a matter of public record. By the fifteenth century it was well established in Germany, on a local basis, that land titles could be alienated only by such a recorded conveyance. Acquisition of title by possession was impossible.[88] The Reception brought with it a modifying factor, however, which permitted Roman-Canon prescription to gain a foothold. The Roman principle that land could be conveyed as a private act between grantor and grantee in some areas caused conveyance by registration to be abandoned.

In parts of Germany, then, the Roman-Canonical method of acquisitive prescription, along with its ten, twenty, and thirty-year limitations, prevailed, subject to some local variation.[89] It was, however, nothing more than a temporary innovation and was subsequently repealed by legislation in favor of a return to the more workable system of land registration.[90]

The present German civil law does not permit the acquisitive prescription of land except in one instance and this represents the only remaining feature of the Reception. The owner of unregistered land may be deprived of any rights in the land if the land has been in the continued and undisturbed possession of another for thirty years.[91] Registered land, however, may be prescribed by thirty years' possession only in the event of the death or disappearance of the owner, but not otherwise.[92]

Therefore, while Roman-Canonical prescription was received with but few variations in France, it met with the resistance of a locally-established process in Germany which would yield but temporarily, if at all.

III. ADVERSE POSSESSION IN THE COMMON LAW [93]

The growth of title by possession in the common law must be viewed against a feudal background quite different than that in

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[88] A number of American states have adopted a modern equivalent in the Torrens System or Registration of Land Acts whereby land is registered with the state and conveyed only by means of a certificate much the same as the transfer of title to an automobile, for example. See Witkin, *Summary of California Law* 281 *et seq.* 304 (5th ed. 1938); Hogg, *Registration of Title to Land,* 28 Yale L.J., 54 (1918). The Massachusetts statute provides that, "No title to registered land . . . in derogation of the title of the registered owner, shall be acquired by prescription or adverse possession..." *Gen. Laws of Mass.,* Sec. 185-53 (1932).

[89] In Saxony, for example, the limitation period was 31 years, 6 weeks, and 3 days. Huebner, *op. cit. supra* note 57, at 255.

[90] *Id.* 22 *et seq.*

[91] *German Civil Code, supra* note 65, Secs. 927, 937 *et seq.*

[92] *Id.* Sec. 927. Schuster, *Principles of German Civil Law* 394 (1907).

[93] "Our (English common law) is so un-Roman, our minds are so unaccustomed to the concepts of Roman law, that we can with difficulty distinguish varying shades and gradations in the extent of the Reception which the different countries of Western

Europe. Although it was necessary for Medieval Germanic feudalism to give way before a process of acquisitive prescription could develop, common law feudalism and title by possession arose simultaneously in a system of feudal economy but non-feudal government.

At the time of the Conquest allodial ownership as brought from the continent during the migrations existed and England's first experience with any type of feudalism commenced with William who was quite as interested in avoiding the independence of intermediate feudal landlords as he was in the fiscal advantages of land tenures.[94] The product was a curious blend of both feudal and non-feudal ingredients with the result that individual landholders became something substantially more than necessary but otherwise insignificant links in the chain of feudal tenures.

The two principle characteristics of German feudalism, limited fealty and "splintered" ownership, appear to be lacking in the common law system. The European feudal structure was quite as much a political and governmental arrangement as an economic one. Each tenant pledged his fealty to his immediate overlord but never to a sovereign, and all rights and obligations were defined in these terms. One could never hold an entire title because he was politically incapable of any act which might disturb the feudal structure. He was never a citizen but always a feudatory. The aggregate national authority was divided among the overlords just as was land wealth. William was anxious to avoid the Germanic experience and in 1085 required an oath of fealty not only from his tenants in capite but also those holding mediately or immediately under them. Moreover, he enforced strict forfeiture and escheat, and fiefs which fell in were redistributed in small quantities, and to more dependable constituents. National taxes replaced local duties; national justice outdistanced feudal justice; common law prevailed over local, feudal law; and many Anglo-Saxon institutions were not only retained but were, in some instances, strengthened [95]—all designed to concentrate political authority.

The striking feature of Germanic feudalism as an economic system was the distribution of the incidents of land titles. To ask who "owned" land in feudal England is to propose a difficult and perhaps impractical question. It is perfectly true that land would escheat for felony; that descent to an infant would entitle the lord to a wardship, that refusal of a female tenant to accept a suitable spouse called for the incident of marriage; that homage, fealty and investiture were required. However, the feudal incidents, although oppressive, do not appear to have been restrictions on ownership any more than eminent domain or liability for property taxes makes

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Europe experienced." 4 Holdsworth, *History of English Law* 250 (1924). To the same effect see Maitland, *English Law and the Renaissance* 35 (1901).

[94] It is, of course, true that the Domesday Book indicated that most land was occupied in manors at the time of the Conquest. However, it was not feudally-held in any sense.

[95] The Anglo-Saxon Hundred and Shire courts were retained and functioned with some vigor.

one any the less an "owner" of land today. A tenant in fee appears to have shared his title with no one. He could maintain trespass for damages and an assize for possession.[96] He could alienate without restriction and, in fact, predetermine the course of ownership indefinitely by creating a complex series of estates. He could waste the land with impunity. All these were unknown in Medieval Germanic feudalism, and while "seisin" was the prevailing English expression, it meant nothing more than possession.[97]

Within one century following the Conquest appears the initial evidence that a mere possession, however wrongfully gained, created a right which could be protected by legal process.[98] The assize of novel disseisin in 1166 provided a method of regaining a disturbed possession and would lie even against the owner of the title. It seems probable that the common law possessory assize was the product of the canonical actio spolii which in turn was the Medieval Germanic counterpart of the Roman possessory interdict (unde vi).[99] There is, of course, no conclusive evidence in support of this suggestion, but circumstances accompanying the rise of the assize indicate this to be the case.

Anglo-Saxon law had no possessory action of any kind.[100] Self-help as a means of redressing a disseisin was replaced in England for the first time in 1166. Therefore, the possibility of discovering in England an existing possessory action can be eliminated. One additional suggestive circumstance is the fact that the original common law jurists were ecclesiastics who might normally be expected

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[96] A tenant could maintain an action at law against his landlord for unauthorized entry.

[97] Maitland suggests that a student, after reading Coke on Littleton, would view English property law with this remark: "Evidently the main clue to this labyrinth is the notion of seisin. But what precisely this seisin is I cannot tell. Ownership I know and possession I know, but this *tertium quid* this *seisin* eludes me." Maitland, *The Mystery of Seisin*, 2 L. Q. Rev. 481 (1886). As has been indicated, seisin in Germanic Medieval law was used to define an interest in land in feudal terms; it described one's place in the feudal chain. Seisin was always less than title and always more than possession. In England, common law seisin meant something entirely different—it meant possession and nothing more, *usually*. If A owned a life estate and leased to B for a term and B was ejected by X, B could not bring an assize because he was not seised. A held the seisin even though B was in possession. More accurately, then, seisin meant possession of a freehold. If A was a life tenant holding under B, his overlord, and B ejected A, the latter had a possessory action because he and not B was seised. One might properly wonder why, if seisin did not mean seisin as used in Germanic law, the expression was used, and the answer seems to be that it was simply a convenient term. The Roman "*possessio*" had not yet come into English usage. 2 Pollock and Maitland, *History of English Law* 31 (1895).

[98] "(The common law) protects possession, untitled and even vicious . . ." Maitland, *The Beatitude of Seisin*, 4 L. Q. Rev. 286 (1888).

[99] Woodbine, *The Origins of the Action for Trespass*, 33 Yale L.J. 799, 812 (1924); see Woodbine, *The Roman Element in Bracton's De Adquirendo Rerum Dominio*, 31 Yale L.J. 827, 840 *et seq.* (1922); Vinogradoff, *The Roman Elements in Bracton's Treatise*, 32 Yale L.J. 751 (1923).

[100] Maitland, *op. cit. supra* note 98 (part 1), at 26.

to draw from that which they knew best—the Canon law of Europe. Bracton's frequent use of "spoliato" and "spoliations" in connection with the assize of noval disseisin is unquestionably more than coincidental.[101]

An examination of the features of the common law assize on one side and the Roman and Canon actions on the other reveals surprising substantive, if not procedural, similarities. All three actions were designed to test the right to possession and nothing else. In no case was title in issue and in none was it a defense.[102] One point of departure appears in regard to the subject matter of the action. Whereas the interdict (unde vi) and the assize of novel disseisin applied exclusively to the disseisin of real property,[103] the actio spolii would issue for the disseisin of chattels as well as real interests. This is possibly explained by the fact that the Roman law used a species of interdict for this purpose and the common law had its separate actions of replevin and detinue for recovery of chattels and trover, trespass, and general assumpsit for damages. However, there is nothing to indicate that the canon law developed a separate action dealing with chattels, and actio spolii seems to have served as a catch-all for both purposes.

All three actions could be maintained against the purchaser or assignee of the disseisor, and the interdict and the assize provided a remedy for the case of a descent cast where the heir at law would be unable to show a prior possession in himself but only that of his ancestor: [104]

> "When, therefore, any one dies seised of a Freehold in his Desmesne as of Fee, the Heir may justly claim the seisin of his Ancestor..." [105]

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[101] *Bracton,* fol. 161b. (Twiss' transl. 1883). He also speaks of the purpose of the Roman interdict *unde vi* "according to what will be stated below in the assise of noval disseysine." *Id.* fol. 103b. For the form of the writ of novel disseisin see *Glanville,* Bk. 13, Ch. 33 (Beames' transl. 1900).

[102] The suggestion by Holmes that, "In the assize of novel disseisin, which was a true possessory action, the defendant could always rely on his title," (Holmes, *Common Law* 210 [1881]) is questionable, at least with respect to the first several centuries. Bracton states that "if (the owner) by chance contemns an assise, and should presume to usurp his possession, using force and not a judgment, the spoiler is entitled to an assise on account of the usurpation . . ." 3 *Bracton, supra,* at 31.

[103] *Bracton, supra,* fol. 168; *Digest,* 43.16.1.7.

[104] The assize mort d'ancestor which was some ten years junior to the assize of novel disseisin finds its counterpart in the interdict quorum bonorum. In each instance the plaintiff was obliged to show not merely that he had a better right of possession than the occupant but that he was the closest of all to the title in terms of descent. It is of interest to note that the assize mort d'ancestor was probably the product of a political event. By 1188 the Crusades were well under way and this assize issued to the "heir" if the "ancestor" had left for the Holy Land, there being no evidence showing that he remained alive. *Bracton, supra,* fol. 252b. For the form of the writ see Glanville, *supra* note 101, Bk. 13, Chap. 3 *et seq.*

[105] *Glanville, supra,* Bk. 13, Ch. 2.

However, the common law ecclesiastical jurists did not adopt, without change, every feature of the actio spolii and the Roman interdict. Amendments, procedural in form, were made to accommodate the requirements of the English feudal system. For example, the common law assize was in design and effect a summary action, and the writs of novel disseisin and mort d'ancestor commanded the peace officer to restore immediately the possession of the complainant pending the hearing.[106] This innovation was designed to allow immediate possession to a tenant who had been disseised just prior to a harvest.[107]

Although much of the formalism which characterized the common law proprietary action, the writ of right, was abandoned under the assizes in favor of expedition, both jurisdiction and venue were crucial issues.[108] Moreover, because an assize would issue only for the disseisin of a freehold, intricate questions involving the definition of a feudal freehold and one's standing as a freemen were necessarily important.[109] In addition, the matter of proof at common law was somewhat different. It has been indicated that the petitioner under the Roman interdictal process was obliged to show the prior establishment of a possession and its continuation to the time of the ouster. Under a common law possessory writ the plaintiff had only to demonstrate the disseisin.[110]

Perhaps the most fundamental difference between the assize of novel disseisin and the Roman unde vi was the fact that the latter permitted damages to be awarded to the plaintiff. This was not true of the assize where the only possible judgment was one for the restoration of possession and the imposition of criminal sanctions if the defendant had used force. It is only possible to speculate why the assize was so sterile in this regard. It may well have been that it was considered inconceivable that a brief deprivation of possession was capable of producing damage.[111] The result has been that the various species of trespass actions have traditionally been the common law actions for damages. Even after the fifteenth century the action of ejectment yielded but nominal damages, if any at all.

The initial function, then, of the common law possessory assizes was to afford possession of land an unqualified and unrestricted protection. However, their fundamental importance extended much further since these actions formed the basis for the common law method of adverse possession and thereby provide an historical example of common law ingenuity not often equaled. In any econ-

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[106] *Glanville, supra* note 101, Bk. 13, Ch. 3, 33.

[107] Replevin operated the same way as to chattels and prevented a harmful destraint by the landlord or his tenant's farm equipment at the time it was needed.

[108] *Bracton, supra* note 101, fol. 188.

[109] *Id.* fol. 198 *et seq.*

[110] This appears to have been the case with *actio spolii.* Brissaud, *History of French Private Law* 318 *et seq.* (Cont. Legal Hist. Series 1912).

[111] See Woodbine, *The Origins of the Action for Trespass,* 34 Yale L.J. 343, note 1 (1925).

omy which looks to real property as the residue of national wealth, the security of land titles is a matter of vital concern. Roman law founded its system of acquisitive prescription on legislation in the form of the XII Tables. Medieval Europe had the advantage of the Reception. However, twelfth-century England had no significant legislation and the Reception on the continent was as yet to occur. To achieve the result of title by possession, both the assize of novel disseisin and mort d'ancestor were so limited as to issue only when the disseisin was a "novel" one, as defined by the writ [112] and by royal proclamation.[113] In other words, one disseised of his freehold was obliged to act promptly or forfeit his right to an assize.[114]

From very early in the common law, therefore, a possession once established created an indefeasible right in the occupant if it continued undisturbed for a period of time.

In 1275 a limitation on the right to bring an action was reduced to legislation for the first time in the Statute of Westminster I [115] which fixed a date back of which the plaintiff could not go in demonstrating his seisin in either a real or possessory action:

> "...it is provided that... none shall presume to declare (his) seisin.... beyond the time(s) (herein set forth)." [116]

The dates established were 1242 for the assize of novel disseisin, 1216 for mort d'ancestor, and 1189 for the writ of right.[117] In operation the statute was, at best, extremely unworkable because the effect of a fixed date was, of course, to permit the time to gradually move away from the date, thus making it more and more difficult to bar the right of the plaintiff. By 1500, for example, the writ of right, the common law proprietary writ, was not barred unless the defendant and his successors have been in possession for more than three hundred years. The principle incorporated into the Statute of Westminster I whereby the plaintiff, in order to prevail, must demonstrate a recent seisin in himself has been adopted by statute in sixteen American states.[118]

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[112] The writ of novel disseisin in Glanville's time provided that ". . . N. complains to me, that R. has, unjustly and without a Judgment, disseised him . . . since my last voyage to Normandy . . ." *Glanville, supra* note 101, Bk. 5, Ch. 32. The writ of mort d'ancestor spoke of the death of the ancestor, he having died "after my first Coronation." *Id.* Ch. 3.

[113] Pollock & Maitland, *History of English Law* 50 (1895).

[114] Originally, a disseised owner had one year or less within which to commence his action for the recovery of possession.

[115] 3 Edw. I, c. 39 (1275).

[116] *Id.*

[117] Walsh, *Title by Adverse Possession,* 16 N.Y.U.L.Q. Rev. 532 (1939).

[118] California (C.C.P. Sec. 318 [1949]); Florida (*Fla. Stat.,* Sec. 95.12 [1941]); Idaho (*Ida. Code,* Sec. 5-203 [1947]); Minnesota (*Minn. Stat.,* Sec. 541.02 [1945]); Missouri (*Mo. Rev. Stat. Ann.,* Sec. 1002); Montana (*Rev. Code of Mont.,* Sec. 9015 [1935]); Nevada (*Nev. Comp. Laws,* Sec. 8510 [1929]); New York (C.P.A., Sec. 34 Clevenger [1949]); North Carolina (*Gen. Stat. of N. C.,* Sec. 1-39 [1943]); North Dakota (*N.D. Rev. Code,* Sec. 28-0104 [1943]); Oregon (*Ore. Comp. Laws Ann.,*

By statute in 1540,[119] a feature present in all modern statutes was enacted. A gross period was established whereby the plaintiff no longer had to show seisin more recent than a fixed year but merely within a specified number of years last past prior to the disseisin. The period was thirty years for mort d'ancestor, fifty years for the other possessory actions, and sixty years for the writ of right.[120]

In 1623 a method of limitation different than that in Westminster I was adopted:

> "...no such person or persons... shall have or maintain any such writ.... (unless brought) within twenty years next after the title and cause of action first descended..." [121]

This statute phrases the limitation so as to disqualify the owner, not because he is unable to show a recent seisin and disseisin, but because he failed to institute a timely action and is unquestionably the source of the statutory provisions found in twenty-five American states.[122] The different approach employed by this statute is not

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Sec. 1-202 [1940]); South Carolina (*Code of S.C.*, Sec. 374 [1] [1942]); South Dakota (*S.D. Code*, Sec. 33.0217 [1939]); Utah (*Utah Code Ann.*, Sec. 104-2-5 [1943]); Washington (*Per. Code of Wash.*, Sec. 73-3 [1] [Pierce 1943]); and Wisconsin (*Wisc. Stat.*, Sec. 330.02 [1947]). The New York provision is typical: "An action to recover real property or the possession thereof cannot be maintained . . . unless the plaintiff . . . was seised . . . within fifteen years before the commencement of the action . . ."

[119] 32 HEN. VIII, c. 2 (1540).

[120] Ballantine, *Title by Adverse Possession*, 32 Harv. L. Rev. 135, 138 (1918).

[121] 21 JAC. I, c. 16 (1623).

[122] Alabama (*Code of Ala.*, Sec. 7-18 [1940]); Arizona (*Ariz. Code Ann.*, Sec. 29-101 [1939]); Arkansas (*Ark. Stat.*, Sec. 37-101 [1947]); Colorado (*Colo. Stat. Ann.*, Sec. 40-136 [1935]); Connecticut (*Gen. Stat. of Conn.*, Sec. 8314 [1949]); Delaware (*Rev. Code of Del.*, Sec. 5120 [1935]); Indiana (*Ind. Stat. Ann.*, Sec. 2-602 [Burns 1933]); Iowa (*Code of Ia.*, Sec. 614.1 [1946]); Kansas (*Gen. Stat. of Kan. Anno.*, Sec. 60-304 [1935]); Kentucky (*Ky. Rev. Stat.*, Sec. 413.101 [1948]); Maryland (see note 127, *infra*); Michigan (*Mich. Stat. Ann.*, Sec. 27-593 [1935]); Mississippi (*Miss. Code Ann.*, Sec. 709 [1942]); Nebraska (*Rev. Stat. of Neb.*, Sec. 27-202 [1943]); New Hampshire (*Rev. Laws of N.H.*, Sec. 385-1 [1942]); New Jersey (*N.J. Stat. Ann.*, Sec. 2:24-12 [1939]); Ohio (*Ohio Gen. Code.*, Sec. 11219 [Page 1938]); Oklahoma (*Okla. Stat. Ann.*, Sec. 12-93 [1937]); Pennsylvania (*Pa. Stat. Ann.*, Sec. 12-72 [Purdon 1930]); Tennessee (*Tenn. Code Ann.*, Sec. 8584 [Williams 1934]); Texas (*Civ. Stat. of Tex.*, Sec. 5507 [Vernon 1941]); Vermont (*Pub. Laws of Vt.*, Sec. 1682 [1933]); Virginia (*Va. Code Ann.*, Sec. 5805 [1942]); West Virginia (*W. Va. Code Ann.*, Sec. 5393 [1943]); and Wyoming (*Wyo. Comp. Stat. Ann.*, Sec. 3.501 [1945]). Illinois, Maine, and Massachusetts have, perhaps more by accident than design, adopted statutes which contain the ingredients of both the former groups. *Ill. Rev. Stat.*, Sec. 83-1 (Smith-Hurd 1949); *Rev. Stat. of Me.*, Sec. 160-1 (1944); *Gen. Laws of Mass.*, Sec. 260-21 (1932). The Louisiana section is unique insofar as it limits the action in terms of the acquisitive prescription of corporeal interests rather than a statute of limitations. *La. Civil Code*, Sec. 3474 (Dart 1945). The final three states, Georgia, New Mexico, and Rhode Island, have statutes more closely approximating the Louisiana type than the other

important in the sense that it occasioned any significant change in the substantive law of adverse possession because, for all practical purposes, it did not. However, it seems curious that after almost four hundred years an entirely different method of limitations was adopted. Both the possessory assizes and the legislation preceding 21 Jac. I disqualified a plaintiff who had been out of possession. It was the owner's lack of possession which was controlling. The statute of 1623, however, although expressed in terms of a statute of limitations, looked to the possession of the occupant who would prevail providing his possession had remained undisturbed. The premium, then, was placed on the possession of the claimant rather than on lack of possession in the owner.

This conclusion is supported by the way in which 21 Jac. I provided for disability immunity. It was indicated above that the striking feature of Roman disability protection was the fact that the possessory period was not tolled by the disability of the owner but continued to expire, reflecting, it was submitted, the importance which Roman law attached to possession. 21 Jac. I provided that if the owner suffered a disability at the time the action accrued, he might nevertheless bring his action within ten years after the removal of the disability "notwithstanding the said twenty years be expired." [123]

The final common law statutory developments occurred in 1833 when 21 Jac. I was substantially re-enacted and all actions, both real and possessory, were made subject to a twenty-year limitation,[124] and in 1874 when the Real Property Limitation Act adopted a more realistic limitation period of twelve years in place of the former twenty-year provision, abolished the disability of absence beyond the seas, and reduced the disability extension to six years.[125]

IV. ADVERSE POSSESSION IN THE UNITED STATES [126]

Adverse possession in the United States is generally a matter of statute patterned after either one of two English acts.[127] Despite the fact that most American statutes take the form of a statute of limitation, it is universally held that if the claimant can show

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groups. *Code of Ga. Ann.*, Secs. 85-406, 85-407 (1933); N.M. Laws of '47, c. 145, sec. 1; *Gen. Laws of R.I.*, Sec. 438-2 (1938).

[123] 21 JAC. I, c. 16, Sec. 2. The specific disabilities enumerated were minority, marriage of a woman, insanity, and imprisonment. An innovation was made in regard to absence from the jurisdiction. In both Roman and Roman-Canon law absence invoked an entirely different limitation period of twenty years. The English statute provided immunity for one "beyond the seas" which operated no differently than other disabilities.

[124] 3 & 4 WM. IV, c. 27 (1833).

[125] 37 & 38 VICT., c. 57 (1874).

[126] Statutory references contained in this chapter are the same as those cited in notes 118 and 122, *supra*, unless otherwise indicated.

[127] In Maryland, however, there is very little legislation, but the provisions of 21 JAC. I, c. 16 (1623) have been held applicable. Waltemeyer v. Baughman, 63 Md. 200 (1884).

strict compliance with the elements of an adverse possession he obtains a new and original title.[128]

In American statutory law as well as in Roman law it has been recognized that the necessary result of an adverse occupancy of land is the creation of a new title. To merely carry over the old title to the new occupant would, of course, perpetuate the defects of title.[129] In basic purpose and design, therefore, American and Roman law share this joint feature.

Possession, once established, must be prolonged, without interruption, for the statutory period. Time limitations in the United States are, with one exception, prescribed by statute and run from five to twenty-one years with some allowance for states with multiple limitations. The various statutes have established the following periods:

Five Years

California, Idaho and Nevada except that in the latter state there is a two-year limitation which applies exclusively to mineral claims.[130]

Seven Years

Florida, Tennessee, and Utah.[131]

Ten Years

Alabama, Iowa, Mississippi, Missouri, Montana, Nebraska, New Mexico, Oregon, Rhode Island, South Carolina, West Virginia, and Wyoming.[132]

Fifteen Years

Connecticut, Kansas, Kentucky, Michigan, Minnesota, New York, Oklahoma and Vermont.[133]

Twenty Years

Delaware, Indiana, Maine, Massachusetts, New Hampshire, and Wisconsin.[134] Maryland is the only state in which there is no statutory limitation, however, 21 Jac. I, c. 16 applies.[135]

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[128] Dean Ames has characterized the anomalous form of American statutes in rather caustic terms. "An immortal right to bring an eternally prohibited action is a metaphysical subtlety that the present writer cannot pretend to understand." Ames, *Disseisin of Chattels*, 3 Harv. L. Rev. 313, 319 (1890).

[129] See Ballantine *Title by Adverse Possession*, 32 Harv. L. Rev. 135 (1938).

[130] Calif. Sec. 318; Idaho Sec. 5-203; Nev. Secs. 8510, 8508.

[131] Fla. Sec. 95-12; Tenn. Sec. 8584; Utah Sec. 104-2-5.

[132] Ala. Sec. 7-20; Ia. Sec. 114-1(6); Miss. Sec. 709; Mo. Sec. 1002; Mont. Sec. 9015; Neb. Sec. 202; N.M. Laws of 1947, c. 145, sec. 1; Ore. Sec. 1-202; R.I. Sec. 438-2; S.C. Sec. 374(1); W. Va. Sec. 5393; Wyo. Sec. 3-501.

[133] Conn. Sec. 8314; Kan. Sec. 60-304; Ky. Sec. 413-010; Mich. Sec. 27-593(3); Minn. Sec. 541.02; N.Y. Sec. 34; Okla. Laws of 1945, p. 27. sec. 1 (4); Vt. Sec. 1642.

[134] Del. Sec. 5120; Ind. Sec. 2-602; Me. Sec. 160-1; Mass. Sec. 260-21; N.H. Sec. 385-1; Wisc. Sec. 330-02. It is significant to observe how frequently the twenty-year limitation period appears in American statutes, suggesting the influence of the English statute of 1623.

[135] Waltemeyer v. Baughman, 63 Md. 200 (1884).

Twenty-One Years

Ohio.[136]

The fourteen remaining states have multiple limitations whereby the principal time restriction is usually shortened if the possession is pursuant to a written instrument, judgment, or decree, or in good faith.[137] The most unique limitation is the Virginia statute whereby land east of the Allegheny Mountains is subject to a fifteen-year period while land to the west may be claimed after only ten years' possession.[138] As one might suspect this statute is the product of curious human and geographical factors.[139]

It is of interest to reflect briefly on time limitations in general. Roman law, Medieval European law, and the assize of novel disseisin at common law all initially established exceptionally brief limitation periods, never longer than one or two years. Very short time restrictions were no doubt suitable in an age where there was little or no absence from the land, where individuals were aware of their property interests, and where boundaries were marked with natural monuments.[140] The purpose of an enduring possession is, of course, to allow time for the owner to discover and interrupt the hostile claim, and in each of the three legal systems the increasing need for greater protection for unwitting or absent owners is evidenced by the fact that the limitation periods were gradually lengthened.[141]

In the United States a possession acquired by the combined use of force, fraud, and deceit is capable of raising a new title,[142] subject to statutory qualification in eight states. In New Mexico and Georgia good faith is required in all instances,[143] and Colorado, Illi-

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[136] Sec. 11219.

[137] Ariz. (Sec. 29-101, 29-102, 29-104, 29-103) three, five, and ten years; Ark. (Secs. 34-1419, 37-101) two and seven years; Colo. (Sec. 40-143, 40-136) seven and eighteen years; Ga. (Secs. 84-507, 85-406) seven and twenty years; Ill. (Sec. 83-4, 83-6, 83-1) seven and twenty years; La. (Secs. 3474, 3475) ten and thirty years; N.J. (Secs. 2:24-12, 2:25-1, 2:25-2) twenty, thirty, and sixty years; N.C. (Secs. 1-38, 1-40, 1-39) seven and twenty years; N.D. (Secs. 47-0603, 28-0104) ten and twenty years; Pa. (Secs. 12-71, 12-72) seven and twenty-one years; S.D. (Secs. 33-0228, 33-0221) ten and twenty years; Texas (Secs. 5507, 5509, 5510, 5519) three, five, ten, and twenty-five years; Wash. (Secs. 24-45, 73-3 (1).

[138] Sec. 5808.

[139] The writer has been advised by the Attorney-General of Virginia that originally a fifteen-year limitation prevailed throughout the state. However, legislators from the western part of the state wanted a ten-year period to reduce the time of occupancy in order to clear the titles of squatters. The eastern delegates resisted and the resulting compromise was effected.

[140] Jolowicz, *Historical Introduction to Roman Law* 155 (1939).

[141] In general, the limitation periods in this country are shortest in the Western states. This reflects an attempt to quickly "find an owner" and unravel the chaotic condition of land titles which accompanied early colonization.

[142] See Foster, *Nebraska Law of Adverse Possession*, 11 Neb. L. Bull. 378 (1933). For a striking example of possession acquired for the sole purpose of gain, see Fitzgerald v. Brewster, 31 Neb. 51, 47 N.W. 475 (1890).

[143] N.M. Sec. 27-121; Ga. Sec. 85-402.

nois, South Dakota, and Washington are multiple-limitation states where, in order to take advantage of the shorter period of occupancy, the claimant must have possessed in good faith.[144] Finally, in Arizona and Texas the occupant who possesses pursuant to a written instrument comes within the terms of the short statute providing his claim does "not extend to or include the want of intrinsic fairness and honesty." [145]

It seems surprising that except as qualified by statute, the issue of good faith is immaterial in modern adverse possession. Yet there would appear to be a reasonable explanation for the absence of such a requirement in English and American adverse possession. Adverse possession commenced in the common law in terms of the assize of novel disseisin in 1166. At that time the Roman-Canon method of title by possession had as yet to be received in Europe. Since the assize would not issue in the absence of a disseisin and because disseisins were customarily made without right, the presence or absence of good faith was simply not germane to the process.

The element of good faith has not received significant support in American common law because it has been generally felt that a possession originating in force or fraud is none the less a possession than one commenced honestly. It is, of course, a question of balancing the social utility of an efficient process of securing land titles with the desirability of a continued title undisturbed by wrongful activity. The civil law has continued the Roman principle that title will not spring from a wrong, whereas the common law looks alone to quality of the possession.

It has been indicated that Roman and Germanic possession was a "body and soul" concept; that it consisted of both mental and physical ingredients. This identical feature appears in American adverse possession in the disguised form of "claim of title," "claim of right," or "claim of ownership." [146] That a "claim" must accompany the actual possession is now and always has been a vital requirement in order to give rise to a new title.[147] This element has been incorporated into the statutes of California, Florida, Idaho, Montana, Nevada, New York, North Dakota, South Carolina, South Dakota, Utah, and Wisconsin.[148] Whereas good faith involves the notion that the possessor is unaware that title is in another, claim of right deals with his motives or purpose—he must seek to make himself owner of the land.

It is clear that the American "claim" and the Roman and Germanic "intent" are largely fictitious because an occupant of land customarily forms no mental attitude whatsoever except as it may be

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[144] Colo. Sec. 40-143; Ill. Sec. 83-6; S.D. Sec. 33-0228; Wash. Sec. 73-3(1).

[145] Ariz. Sec. 29-101; Texas Sec. 5508.

[146] The terms are interchangeable. 2 *C.J.S.*, Adverse Possession, Sec. 55. Goulding v. Shonquish, 159 Ia. 647, 650, 141 N.W. 24 (1913).

[147] Bond v. O'Gara, 177 Mass. 139, 143, 58 N.E. 275 (1900).

[148] Calif. Sec. 324; Fla. Sec. 95-18; Idaho Sec. 5-209; Mont. Sec. 93-2510; Nev. Sec. 8515; N.Y. Sec. 39; N.D. Sec. 28-0110; S.C. Sec. 380; S.D. Sec. 33-0223; Utah Sec. 104-2-10; Wisc. Sec. 330-08.

inferred from the quality of his possessory activity.[149] From ancient Rome until the present time possession of land has been viewed as a relationship capable of producing legal consequences; that it is something more than a mere physical holding. The universal requirement that a mental purpose accompany an occupancy is not only consistent with this principle but perhaps necessary in order to support it.

Disability statutes have been adopted in all American states and take one of two forms:

(1) Those patterned after 21 Jac. I, c. 16 whereby the limitation period is permitted to expire despite the existence of the disability, and which provide for a disability extension allowing an action on the removal of the immunity even though the limitation period has, in the meantime, elapsed. Twenty-nine states have statutes of this type which essentially look to the possession alone and see no difference between two identical occupancies although the owner in one instance labors under a disability.[150] As indicated above, this feature was present in the Roman law.

(2) Those which permit the existence of a disability to toll the limitation period which commences to run only on the removal of the disability. Provisions of this type are found in fifteen states and correspond to the civil law attitude that an adverse possession is deprived of all its force when it is sought to be imposed against one unable to protect his paper title.[151]

The statutes of all but four states describe the specific disabilities. In Colorado, Kansas, Indiana, and Oklahoma, however, the provisions merely speak of "legal disabilities," without enumeration.[152] In all other states minority and insanity are, by statute, disabilities,[153] and in all states except Arkansas, Connecticut, Delaware, Iowa, Mississippi, New Hampshire, New Jersey, Tennessee, Virginia,

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[149] Walsh, *Title by Adverse Possession,* 16 N.Y.U.L.Q. Rev. 532, 550 (1939). 2 Tiffany, *Real Property* Sec. 504 (2d ed. 1920).

[150] Ala. Sec. 7-36; Ark. Sec. 37-101; Colo. Sec. 40-145; Conn. Sec. 8314; Del. Sec. 5122; Ill. Sec. 83-9; Ind. Sec. 2-605; Ia. Sec. 614-8; Kan. Sec. 60-305; Ky Sec. 413-020, Me. Sec. 160-7; Md. 21 Jac. I, c. 16 Sec. 2; Mass. Sec. 260-25; Mich. Sec. 27-597; Miss. Sec. 709; Mo. Sec. 1004; Nev. Sec. 8523; N.H. Sec. 385-2; N.M.L. '45, c. 145, s. 1; N.C. Sec. 1-38; Ohio Sec. 11219; Okla. Sec. 12-94; Ore. Sec. 1-215; Pa. Sec. 12-73; S.D. Sec. 33-0204; Tenn. Sec. 8574; Utah Sec. 104-2-19; Wash. Sec. 24-49; W. Va. Sec. 5395.

[151] Ariz. Sec. 29-109; Calif. Sec. 328; Fla. Sec. 95-20; Ga. Sec. 85-411; Idaho Sec. 5-213; La. Sec. 3522; Mont. Sec. 9026; Neb. Sec. 25-213; N.J. Sec. 2:24-12; R.I. Sec. 438-3; S.C. Sec. 384; Tex. Sec. 5518; Vt. Sec. 1659; Va. Sec. 5805; Wyo. Sec. 3-502. In Minnesota (Sec. 541-15), New York (Sec. 43), North Dakota (Sec. 28-0114), and Winconsin (Sec. 330-33) a variation exists whereby the statute of limitations is tolled. However, on the removal of the disability the action must be brought within an extension which is shorter than the principal limitation period.

[152] Colo. Sec. 40-145; Kan. Sec. 60-305; Ind. Sec. 2-605; Okla. Sec. 12-94. The Louisiana section speaks of "minors and persons under interdiction." Sec. 3522.

[153] Unless otherwise indicated, the citations in notes 150 and 151, *supra,* are applicable to subsequent references.

West Virginia, and Wyoming, imprisonment or, in most cases, imprisonment for a term less than life, is a disability. In Delaware and Pennsylvania land owned by a married woman is not subject to adverse possession, and an owner absent from the United States is entitled to immunity in Illinois, Maine, Massachusetts and Rhode Island. In Texas and Vermont military service is a disability, and in most states, by statute, and in the remainder by court decision, alienage provides protection.

All disabilities, except alienage, must exist when the cause of action arises except that the Georgia statute permits a subsequent disability to interrupt the limitation period.

V. CONCLUSION

The development of the principle of title by possession followed a common evolutionary pattern in each of the three legal systems described. Possession initially had no importance apart from ownership, and one who was ejected was obliged to recover possession on the strength of his title or not at all. This was followed by the gradual recognition that possession itself was entitled to protection and was good against all except those with a better right. And finally, possession, if undisturbed, vested an indefeasible title in the occupant.

There is every reason to believe that as each successive legal system refined its law of title by possession it borrowed from the preceding system.[154] Of course, this is not to suggest that Medieval Europe peremptorily adopted every feature of Roman law, and common law every feature of Germanic law. Each legal system fashioned the process so as to make it conform to its own political and economic conditions. Procedure is peculiar to each system.[155]

No one would deny that both common law and civil law would have independently developed a system of title by possession in the absence of any pre-existing source from which to draw. Likewise, it seems to be equally undeniable that modern title by possession received considerable stimulation from the development of a similar legal principle in an earlier legal system.

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[154] Common law vanity does not admit to such plagiarism of legal principles: "The mode of acquisition of corporeal hereditaments (by adverse possession is) highly characteristic of the practical character of English law." Digby, *Law of Real Property* 393, note 4 (2d ed. 1886).

[155] It is of interest to note that the features of adverse possession in the United States, after having been patterned after English law, have remained static while English law has changed in a number of particulars. In sixteen American states the action of the land owner is limited in terms of a novel seisin, yet the English limitation now speaks of the accrual of the cause of action. The twenty-year limitation which appears with frequency in American statutes, having been taken, of course, from the English statute of 1623, was recently changed to twelve years in England after two hundred fifty years. 37 & 38 VICT., c. 57 (1874). Finally, a number of states still retain disability for absence even though immunity for this reason has long since been repealed in England. *Id.*