# ADVERSE POSSESSION: A QUESTION OF QUALITY

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The Land Transfer Amendment Act 1963 sets out in considerable detail the procedural aspects of the law relating to applications made under that statute on the grounds of possession of land subject to the Land Transfer Act 1952. The matters which an applicant must prove in order to establish his claim are not the subject of precise definition; but for s. 3 which (*inter alia*) contains a direction to apply in "Form U" prescribed in the schedule, the statute is itself silent. Section 3 (1) (b) states that the possession of the applicant must be "such that he [the applicant] would have been entitled to apply for a title to the land on the ground of possession if the land had not been subject to the principal Act." In this context s. 19 and s. 20 of the Land Transfer Act 1952 are relevant and a little more explicit. Section 20 (1) (a) directs the Registrar to receive applications made "by any person (claiming to be the person) in whom the fee simple of the land is vested in possession either at law or in equity." The connection between s. 3 and s. 19 is further established by s. 15 of the Amendment Act which directs the Registrar to issue a certificate of title if he and the Examiner of Titles are satisfied that the applicant would have been entitled in terms of s. 19.

The substance of this discussion is the standard of proof required of a person claiming to be entitled on the grounds of possession adverse to that of the true owner: i.e. occupation which in terms of the Limitation Act 1950 would bar the right of the documentary owner to resume possession. It would be well at this stage to draw a distinction between the character and effect of possession within the meaning of the Limitation Act and the 1963 Land Transfer statute. The former determines periods at the end of which unasserted rights may no longer be asserted by an action at law.

> It seems to me that prima facie any statute which imposes a limitation of time upon an existing right of action is properly called a statute of limitations. It is necessary, therefore, in each case, to look at the particular statute and see what its effect is[1].

In the same case[2] Lush J. said

> . . . any statute of which one of the main objects is to limit the time within which actions of a particular class can be brought is a statute of limitations.

The Limitation Act 1950 in its application to land not subject to the Land Transfer Act confers title indirectly by depriving an adverse claimant who has failed within the prescribed period to assert his right from using the only legal procedure (an action for ejectment) available to him to establish that right. If the dispossessed owner does not recover possession within the period allowed him after his right of action to assert his ownership first accrues (i.e. when he is dispossessed or has discontinued his possession) he is denied further opportunity and title matures in the person now lawfully in possession. The report of

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the Privy Council in *Perry* v. *Clissold*[3] affirming *Asher* v. *Whitelock*[4] was delivered by Lord Macnaughten who said

> It cannot be disputed that a person in possession of land in the assumed character of owner and exercising peaceably the ordinary rights of ownership has a perfectly good title against all the world but the rightful owner. And if the rightful owner does not come forward and assert his title by process of law within the period prescribed by the provisions of the Statute of Limitations applicable to the case, his right is forever extinguished and the possessory owner acquires an absolute title.

The Limitation Act recognises and is in fact part of a system based on possession which unless otherwise explained is evidence of seisin in fee simple: *In re Atkinson and Horsell's Contract*[5] "Titles [of land not subject to the Land Transfer Act] are not absolute but relative; ownership as between two rival claimants is the better right to possession": Megarry and Wade, *The Law of Real Property*[6].

The Land Transfer Amendment Act 1963 contrasts sharply; it is not a statute of limitations. The principle of indefeasibility has taken a rebuff but has been substantially preserved. An adverse occupier, no matter how long he has been in possession until a certificate of title is issued in his favour which in terms of s. 15 (1) (c) is " . . . freed of all registered encumbrances liens, and interests previously affecting the land except those to which the title is to be subject pursuant to an agreement by the applicant . . . " is in no better position as against the registered proprietor than a mere trespasser. This statute does not prescribe periods which run against the documentary owner. Rather, even after an application is made it enables not only the registered proprietor but "any person claiming an estate or interest, whether legal or equitable or beneficial" (s. 8 (1)) to initiate caveat procedures, which if substantiated will prevent the adverse occupier from obtaining title. The claimant is put by s. 3 to the standard of proof that a person in adverse possession of land not subject to the Act would be obliged to establish; his claim though well founded on principles of possession is of no avail if the registered proprietor or some person with a valid though not registrable interest (s. 8 (1)) asserts his ownership or superior right.

The nature of the Land Transfer estate was described by Skerrett C.J. in *Public Trustee* v. *Registrar-General of Land*[7] in these terms:

> an estate conferred by registration under the Torrens system is neither the common law legal estate or seisin nor the statutory seisin of the Statute of Uses but a new statutory estate—a registered estate.

A successful applicant does not by his possession extinguish the title of the documentary owner; the true owner's estate or interest in the land ceases when his certificate of title is cancelled and this is an act done by the Registrar: s. 18. The applicant is himself issued with a fresh certificate of title. He does not acquire a statutory possessory title conferred by the extinction of the former owner's rights but takes on the unique character of a person who acquires a registered estate other than by process of registration. To reconcile a doctrine recognising possessory rights which by lapse of time makes the title of the possessor an absolute one, with a system which requires an equivalent standard of proof but which confers no rights other than the capacity to make an application requires a delicate selection of authority.

## POSSESSION

Section 3 of the Land Transfer Amendment Act sets a qualifying period of twenty years continuous occupation as a prerequisite to the lodging of an application. However, if the applicant is unable to prove that the registered proprietor, or any person shown by the register to be entitled to an estate or interest, is dead or is not under a disability at the expiration of twenty years after the date on which possession by the applicant or the person through whom he claims commenced the period which must be established is thirty years: s. 4. Possession of land is deemed to be possession by the applicant: s. 3 (2).

Since the passing of the Limitation Act 1833 (U.K.) which applied in New Zealand up until 1950 and which together with the later English precedents of 1874 and 1939 was the forerunner of the legislation which is at present in force here, the quality of possession required of an adverse occupier has received not infrequent judicial interpretation. Possibly the clearest New Zealand pronouncement is that of Cooper J. in *McDonell* v. *Giblin*[8].

> In order to constitute a title by adverse possession, the possession relied on must be for the full period of twenty years, actual, open and manifest, exclusive and continuous; and the onus of proof in such an action as this rests upon the plaintiff . . . In order to dispossess the rightful owner the possession which is claimed to be adverse to his rights must be sufficiently obvious to give such owner the means of knowledge that some person has entered into possession adversely to his title, and with the intention of making a title against him; it must be sufficiently open and manifest that a man reasonably careful of his own interest would, if living in the locality, and passing the allotment from time to time, by his observation have reasonably discovered that some person had taken possession of the land. No doubt, in applying this rule, regard must be had to the character and position of the land.

Standards are not absolute and matters requiring proof depend on both the locality and character of the land. This is a proposition supported by modern authority affirming long standing precedent.[9]

A Canadian case on point tells us that

> A successful claim of possessory title . . . must be founded on satisfactory evidence by the claimant as to the quality and duration of the possession relied upon. As to quality his possession must be such as to give the rightful owners a right of action for recovery of their land as distinct from a mere right of action for trespass; and as to duration, it must be shown that such right of action was allowed to go unenforced continuously for the statutory . . . period. A right of action for recovery of land does not accrue on mere wrongful entry by way of trespass but only when the conduct of the wrongdoer is such as to prevent the owner from enjoying that measure of physical possession of which the land in question is capable. The owner, in effect must be excluded from his land and any degree of possession by the wrongdoer short of this (in the sense that the owner is not prevented from enjoying some use) will not extinguish the owners title even if such possession is continued for the statutory period. The right of action for recovery of land will terminate when the wrongful possession of the necessary quality is interrupted or the exclusion of the owner ceases . . . [10]

The Limitation Act 1950 says that land is in "adverse possession" when "the land is in the possession of some person in whose favour the period of limitation can run" (See s. 13 (1)).

Section 8 (1) states

> Where the person bringing an action to recover land, or some person through whom he claims, has been in possession thereof and has while entitled thereto been dispossessed or discontinued his possession, the right of action shall be deemed to have accrued on the date of the dispossession or discontinuance.

The statute contemplates two things: dispossession and discontinuance of possession. Dispossession is where a person comes in and puts another out of possession; discontinuance is where a person abandons possession and another takes possession.[11]

There must be both absence of possession by the person who has the right and also actual possession by another adverse to the true owner; *Smith* v. *Lloyd*.[12] The principle was adopted by the Privy Council in *Trustees Executors and Agency Co. Limited* v. *Short*.[13]

> Possession in order to be "adverse" must be such as will be sufficient to entitle the person in occupation during the twenty years to maintain his right against any person but the rightful owner . . . It is not necessary that the person claiming a possessory title should be in actual physical possession for every hour or day of the statutory period, but the possession must have reasonable continuity[14].

To these requirements of actual continuous and exclusive possession a third, the *animus possidendi,* must be added. This latter essential involves occupation with an intention of excluding the true owner as well as all other persons. *Littledale* v. *Liverpool College*[15] is an illustration where gates erected to protect a right of way were held to have been put there with the intention of keeping the public off the land rather than excluding the owner. *George Wimpey & Son Limited* v. *Sohn*[16] is to much the same effect. On the facts in *Whatatiri* v. *The King*[17] Reed J. relied on an absence of an intention to exclude the true owner. Adams J. in *Robinson* v. *Attorney General*[18] as authority for the proposition that a block of land may be occupied by its user in part only, providing the partial user sufficiently evidences an *animus possidendi* in relation to the whole, cites *Lord Advocate* v. *Blantyre*[19] where Lord Blackburn said

> . . . and all that tends to prove possession as owners of parts of the tract tends to prove ownership of the whole tract; provided there is such a common character of locality as would raise a reasonable inference that if [they] . . . possessed one part as owners they possessed the whole . . .

The intention with which a person goes upon the land must be ascertained by acts done on and in relation to the land. Enclosure is the strongest possible evidence of adverse possession but it is not indispensible nor necessarily conclusive: *Seddon* v. *Smith*.[20]

> We have to consider the title to a sandy waste, useless for all ordinary purposes for which land is used. We should not in such a case expect to find such acts of ownership as are relied on in ordinary cases, as, for example, exclusive possession by means of enclosure and so forth . . . whenever the question of ownership became material as for example whenever someone desired to place an erection of any sort on the land the right of the plaintiffs or their predecessors, was asserted, and their claim acquiesced in, and there is no trace of any assertion of adverse rights by any other person or body[21].

Fencing must be sufficient to exclude the owner and all other persons and be at least of a standard consistent with the purpose for which the adverse occupier uses the land in relation to its character and the surrounding land. Ordinarily it must be sufficient to prevent these persons from making instrusions except by extraordinary means. Halsbury L.J. in *Marshall* v. *Taylor*[22] comments in this style.

> The true nature of this particular strip of land is that it is inclosed. It cannot be denied that the person who now says he owns it would not get to it in any ordinary way. I do not deny that he could have crept through the hedge,

or, if it had been a brick wall that he could have climbed over the wall; but that was not the ordinary and usual mode of access. That is the exclusion—the dispossession—which seems to me to be so important in this case.

As to land which is occupied by grazing stock thereon fencing in most cases is essential; *Martin* v. *Brown.*[23] Adams J. in *Robinson* v. *Attorney General* says that certain lands could be occupied by the grazing of animals where the state of the property is such that the stock will not be disposed to wander. " . . . little was ever required in the way of fencing; what little was done was sufficient to meet the need . . . ". An Australian authority gives us useful guidance on the tests to be applied to the acts of the claimant. Where the land in dispute is waste land it is not sufficient evidence of the defendants adverse possession that he used to go there once a week and walk over the land and warn people off it and forbid them cutting timber there. As to land which is uncultivated, there can be no more conspicuous way of taking possession than by surveying it and marking the boundaries. Where the land is fenced and a person goes upon it and puts horses or cattle there or cultivates it, though he does not reside there such acts would be evidence of possession: *Harnet* v. *Green No. 2.*[24]

There must be clear evidence of why the nature of the land and its use obviate the need for enclosure, or, alternatively the evidence of fencing must be clear. These are matters for the most positive assertion.

Sections 8-12 of the Amendment Act establish inferentially that no true dispute in the sense of argument based upon law or on fact as between adverse occupier and registered proprietor or a person validly entitled to a lesser estate or interest will eventuate within the framework of the statute. The sections contemplate protection for such persons; the mode of safeguarding an estate or interest is to lodge a caveat. An absolute right of objection is established by s. 9 in favour of the registered proprietor of an estate in fee simple or an estate for life or in remainder, contingent or otherwise or an estate by way of executory limitation that has not lapsed. The beneficial or equitable owner of similar estates (not of course evidenced by the register) has a right to bar the issue of a certificate of title in the applicant's favour provided he establishes his claim in law and obtains registration of his interest within a period to be prescribed by the Registrar, or, if that estate or interest is of such a nature that it is not capable of being converted into a registered estate or interest, satisfies the Registrar of its validity: s. 10. The registered proprietor of a mortgage, lease, profit a prendre, etc. or person with the benefit of an easement or other interest shown by the register is protected, providing a caveat is lodged, by s. 11 which directs the Registrar, providing he is otherwise satisfied with the application, to give the applicant notice that he will proceed with the application providing the latter will accept a certificate of title subject to the same extent as the existing title as to the interest protected by the caveat. The certificate of title may not be issued until the applicant so agrees or until the estate or interest of the caveator is discharged, surrendered or otherwise extinguished. Section 12 deals with caveats lodged by persons claiming a beneficial or equitable estate less than the fee simple. (For a detailed exposition on the provisions of the Act the reader is directed to an article by E. K. Phillips.[25])

The adverse occupier may therefore never test the quality of his possession by asserting an infirmity in the title of the documentary owner. The registered proprietor or other person lawfully entitled will be divested of his ownership only by one final demonstration of inactivity; i.e. failure to respond to the notice served on him by the Registrar and published in the press. A unique problem therefore arises for as Adams J. points out in *Robinson* v. *Attorney General*[26] much of the precedent available is important for guidance only where the facts are equivocal but has no bearing when they lead to a clear inference. A survey of the authorities establishes that "a clear inference" is a variable and somewhat elusive thing indeed. Lord O'Hagan in *Lord Advocate* v. *Lord Lovat* said[27]

> As to possession, it must be considered in every case with reference to the peculiar circumstances. The acts implying possession in one case, may be wholly inadequate to prove it in another. The character and value of the property, the suitable and natural mode of using it, the course of conduct which the proprietor might reasonably be expected to follow with due regard to his own interests—all these things greatly varying as they must, under various circumstances, are to be taken into account in determining the sufficiency of possession.

An application to bring land which is not subject to the Land Transfer Act under that statute must show that the title of the documentary owner is completely barred: *Boyd* v. *Macfarlane*.[28] That is what an applicant applying under the 1963 Amendment must assume to do; it is as though he must for the purpose of proof of possession make believe that a Land Transfer title does not exist. He cannot make out a case which is on the face of it unimpeachable and hope for the silence of those persons with capacity to object; he must support his application with a declaration to the effect that "I am not in possession of any information not disclosed in my application which would be adverse to the granting thereof."[29]

*Re Tanner*[30] is authority for the proposition that despite the declaration in Form A of the second schedule to (now) the Land Transfer Act 1952 (the form of application to bring land under the Act) the applicant is not obliged to specify every claim which might by any possibility be set up in opposition to his title. Richmond J. says

> According to the form the applicant declares that he is unaware "of any mortgage encumbrance or claim affecting the said land, or that any person has any estate or interest in the said land at law or in equity, in possession, or in expectancy other than is set forth and stated as follows that is to say" . . . But the requirement of the Act cannot be that the applicant shall specify every demand, honest or dishonest, well founded or ill founded, which may by possibility at any time be set up in opposition to his title. Such an interpretation would be ridiculous.

The import of this decision would appear to be that the applicant need not state a claim the existence of which is only rumoured and in respect of which no claim has ever been made on him and no action commenced. That the principle applies to the new form of declaration may logically be inferred. However, the obligation of open and honest disclosure of relevant events which have taken place in relation to the land within the knowledge of the applicant, is a serious one.

The most minor acts of user by the owner of the paper title have been held to stop time running. The facts in *Allen* v. *Smellie*[31] were these: A mill owner had on subdividing a block of land reserved a strip ten feet wide on the bank of a river downstream from his mill

with the intention of maintaining control on both sides in order that he might keep the stream clear of debris, branches and the like. The mill was sold to the plaintiff who made a personal inspection which did not however constitute a sufficient entry to interrupt the possession of the defendant. The statute (s. 10 of the Limitation of Actions Act 1833 (U.K.)—then in force—cf. s. 17 Limitation Act 1950 (N.Z.)) provides that mere entry on land or continual claim made on or near it shall not keep alive a right of entry which would otherwise be barred. "The making of an entry amounts to nothing unless something is done to divest the possession out of the tenant and revest it in fact in the owners" *Doe d. Baker* v. *Coombes*.[32]

The act of entry held to be inconsistent with the occupation of the defendant was of a different character. A workman was engaged by the plaintiff to cut and burn the willows on the disputed land. This same workman returned five years later for the same purpose. Denniston J. makes this comment:

> The fact of only one assertion of ownership within the twenty years of alleged adverse possession is easily explainable. The circumstances did not call for any active assertion by the owner. The use made by the defendants of this narrow strip was unostentatious and did not interfere with the use by the owner for the only purpose for which by itself it had any value.

His Honour referred with approval to *Searly* v. *Tottenham Railway Company*[33] where Wood V.C., points out the difference between cattle wandering over unfenced land, and suchlike acts, and the case of land on which there is a building or some tangible sign of occupation. The former are described in *Neill* v. *The Duke of Devonshire*[34] as "Acts which are frequently done by sufferance only of the owner of the paper title, or overlooked out of mere charity of neighbourliness on his part."

The leading authority on equivocal facts, *Leigh* v. *Jack*[35] received express approval in the comparatively recent English Court of Appeal decision in *Williams Brothers Direct Supply Stores* v. *Raftery* (*supra*). In the latter case the owners of a vacant piece of land acquired in 1937 intended in due course to develop it. They made minor acts of user over the period 1937-1957 such as the dumping of rubbish, and a representative of the company entered and measured the land *with the knowledge of the defendant*, as part of a plan for future development. The land was cultivated as part of the "dig for victory" campaign by a third party between 1940 and 1943 and by the defendant from 1943 to 1948. The latter subsequently erected a shed but did nothing to keep the owners out. It was held that by their minor acts of user the owners showed that they had never discontinued possession and that the acts of the defendant did not amount to dispossession of the owners. Hodson L.J. quoted with approval the dictum of Bramwell L.J. in *Leigh* v. *Jack* (*supra*) where his Lordship said

> I think that the arbitrator was right, and the circumstances that J. S. Leigh within twenty years before suit repaired the fence separating Grundy St. from Regent Road is strong to show that there was no discontinuance. I do not think that there was any dispossession of the plaintiff by the acts of the defendant; acts of user are not enough to take the soil out of the plaintiff and her predecessors in title and vest it in the defendant; in order to defeat a title by dispossessing the former owner, acts must be done which are inconsistent with his enjoyment of the soil for the purposes for which he intended to use it: that is not the case here, where the intention of the plaintiff and her predecessors in title was not either to build upon or to cultivate the land, but to devote it at some future time for public purposes.

This was a case where the defendant had obtained title to the land on both sides of a strip which the plaintiff intended for future use as a highway. The defendant had spread junk and refuse from his foundry over it making the passage of carts and horses impossible. There was in no sense any real exclusive possession. Cotton L.J. in his judgment made this comment[36]

> In deciding whether there has been discontinuance of possession the nature of the property must be looked at. I am of the opinion that there can be no discontinuance by absence of use and enjoyment when the land itself is not capable of use and enjoyment.

The pattern of authority which emerges from these three cases which are representative of other decisions to the same effect[37] is that to interrupt the possession of the squatter the documentary owner need only do some positive act, however slight, in keeping with his intention for the use of the land. The squatter must prove his intentions by acts done on the land; the intention of the documentary owner is not so easily ascertainable and it is submitted not relevant from the applicant's point of view. What the latter must disclose and explain is any purposeful intrusion evidenced by an act done in relation to the land. The act of another stranger to the title may well disturb the continuity of his possession; the act of a person lawfully entitled might jeopardise his claim. They are nevertheless matters for full disclosure for they are incidents of the law relating to possession which are independent of the rights of objection established by s. 8 to s. 12 of the Land Transfer statute. An applicant must establish that his possession is visible and notorious. The need for corroboration is clear; supporting evidence should be furnished by the statutory declarations of neighbours of long standing. The crux of the matter is that an applicant must make out a good prima facie title—he must establish a clear inference in his own favour before the Registrar will give notice of his application. In the case of *Re Eaton*[38] the duty of a Registrar in investigating the applicant's title is stated by the court in this way.

> According to our view, the duty cast upon the Registrar is analogous to that which ought to be performed by a conveyancing Counsel. The title set forth by the applicant should be narrowly scrutinized, and any apparent flaw in it should be clearly and plainly pointed out as a ground for the refusal to issue a certificate. If no such flaw be apparent and a good prima facie title be established such as a Court would compel a purchaser to take a certificate of title might with advantage be issued.

It is not the function of the Registrar and Examiner to decide doubtful questions of law: *Deacon* v. *Auckland District Land Registrar*.[39] Only where an application appears regular and well founded on its face should the Registrar proceed; he should not entertain questionable claims; he must of course have regard to the peculiar circumstances and the suitable and natural use for which the land is fitted, as is disclosed by the application and from information obtained from any other reliable source. For example, there has been aerial photograph coverage of most of the country for upwards of the past twenty years and at intervals "re-shooting" of each area takes place. Successive photographs present an authentic picture of progressive use over a period of years and may usefully corroborate the evidence of the applicant or perhaps throw some doubts upon his assertions. If the Registrar is not satisfied with the original information furnished he has a right under s. 5 (3) to call for further evidence. He also has a right of initial

refusal established by s. 6. Evidence from any trustworthy source may give grounds for the Registrar to decline to issue a certificate of title. Even though the prescribed notices have expired and no caveat has been lodged the Registar may suspend the issue of a certificate: s. 15 (1) (c) and *Re Nelson Bros*[40], *Manning* v. *Commissioner of Titles*[41]. The rights of appeal from the decision of the Registrar and Examiner or from the Registrar acting alone established by s. 216-s. 221 of the principal Act are available to an applicant should he be aggrieved by decisions of first instance.

## SOME SPECIAL ASPECTS OF POSSESSION

### (a) *The Imperfect Title*

An equitable owner rightfully in possession may avail himself of the machinery of the Land Transfer statute to perfect his title. The Land Transfer Acts[42] have always acknowledged the right of the equitable owner in possession of land not subject to the Act to apply for a certificate of title.

In a recent English case on an uncompleted contract for sale, Hayman J. in commenting on the law as amended by the statute of 1939 (U.K.) said that he was in agreement with the following statement made on the new provisions by the editors of *Underhill's Law of Trusts and Trustees*.[43]

> . . . it is apprehended that any other trustee, including a constructive trustee (as for example, a vendor under an uncompleted contract), is liable to be divested of the legal estate by possession of a person entitled in equity in exactly the same way as if the latter were a stranger.

His Honour continued[44]

> No very precise authority is given for that proposition but I think it is right. It is fair to say that s. 7 (3) and (5) of the Act of 1939 [See s. 10 Limitation Act 1950 (N.Z)] are far from clear and this result is at the best, implicit in them.

He went on to discuss the difficulties formerly posed by the proviso to s. 7 of the 1833 enactment which reads

> When any person shall be in possession or in receipt of the profits of any land, or in receipt of any rent, as tenant at will, the right of the person entitled subject thereto, or of the person through whom he claims, to make an entry or distress or bring an action to recover such land or rent, shall be deemed to have first accrued either at the determination of such tenancy or at the expiration of one year next after the commencement of such tenancy, at which time such tenancy shall be deemed to have determined:
>
> Provided always that no mortgagor or *cestui que trust* shall be deemed to be a tenant at will, within the meaning of this clause, to his mortgagee or trustee.

In his view its effect was to prevent the *cestui que trust* (in the context of the case he was considering he accepted that a purchaser with an incomplete title was such) from obtaining title against the trustee. The proviso does not appear in the corresponding section of the Limitation Act 1939 (U.K.): s. 9 (1) and is also omitted from the equivalent section in the New Zealand statute: s. 12 (1). This opinion on the old law would appear to be at variance with the decision of the New Zealand Court of Appeal in *Glenny* v. *Rathbone*[45] which established that a purchaser let into possession under an agreement to purchase an estate in fee simple is not a *cestui que trust* of the vendor within

the meaning of the statute (s. 7, 1833 (U.K.) then in force here) and being a tenant at will of the vendor comes within that section for the purpose of acquiring title under the statute. The facts in this case were complicated by a sub-purchase but the principle appears clear and received subsequent judicial recognition.

In 1910 in the case of *Re Chrystal*[46] Chapman J. in dealing with a sale proved to the satisfaction of the Court by the production of a sale note, there being possession for upwards of twenty years, considered the *Glenny* v. *Rathbone* decision a conclusive statement of the law. He said

> Here [the purchaser] became the equitable owner when the sale was effected, and twenty years afterwards he was beyond doubt the legal owner by limitation. [*Glenny* v. *Rathbone* cited.] His title then became perfect and I have no doubt that an application to bring the land under the provisions of the Land Tranfer Act 1908 would be successful on the grounds of limitation if these documents were only used to prove possession.

Whatever was the case in England it appears that in New Zealand a person entitled in equity on an uncompleted sale of land not subject to the Land Transfer Act could always apply for a certificate of title in his favour. Now under s. 10 (4) of the Limitation Act 1950 time will not run against a trustee in favour of a beneficiary (including a purchaser on sale) except where the beneficiary is solely and absolutely entitled. Therefore under an uncompleted contract for sale time will run against the vendor if the purchaser having paid the purchase price is let into possession. *Bridges* v. *Mees* decided on the English equivalent of the New Zealand legislation now in force is good authority for this last proposition. The evidence of possession must be indisputable. The combined effect of s. 10 and s. 12 (1) of the statute (N.Z.) is to destroy the *cestui que trust*—tenant at will controversy and the position is now beyond doubt. The equitable owner may make his application in the same way as a trespasser of the title. He must furnish similar proof of possession for the whole of the statutory period but naturally should have the added advantage of documents of an age which verify the authenticity of his claim.

(b) *The Statutory Implied Right of Way*

The register, in respect of private land, with few exceptions does not disclose the registered proprietor's intention for the future use of his property. Plans of subdivision deposited prior to 1900 (before the Public Works legislation required documentary dedication of new roads or streets) often included land set apart by the owner for road or street; formal dedication to the public use was not undertaken; documentary title in the absence of public use and local authority acceptance remains in the subdivider. Many of these early subdivisions did not come to full fruition and it is not uncommon to find a situation where all or parts of such roads are occupied along with adjoining land as one parcel. The right of way is implied by s. 168 of the Land Transfer Act 1952 over all roads shown on the plan in respect of every portion of the land in the subdivision unless expressly excepted. The question is a simple one. Can the right of way stand when all of the other ingredients of successful adverse possession are present? It may be added that this is a problem which in practice arises with surprising frequency.

At common law mere non user does not extinguish an easement.

> Non user is not by itself conclusive evidence that a private right of easement is abandoned. The non user must be considered with, and may be explained by the surrounding circumstances. If those circumstances clearly indicate an intention of not resuming the user then a presumption of a release of the easement will in general, be implied and the easement will be lost . . . The non user, therefore, must be the consequence of something which is adverse to the user[47].

Authority on possession appears to lean in favour of a presumption to continue the easement status of the servient tenement despite enclosure by the persons with the benefit of the right: *Littledale* v. *Liverpool College*[48] and *George Wimpey & Son Limited* v. *Sohn*[49]. These were cases where an intention to exclude the true owner as well as all other persons was not convincingly established. The purpose of the respective occupier was in each case held to be to exclude only the public from access rather than all persons lawfully entitled. It does not necessarily follow that because the land is in an applicant's possession by fences that a right of way is extinguished—user may have continued by means of a gate.

The Land Transfer Amendment contemplates the extinguishment of easements if the persons with the benefit thereof do not object: s. 8 and s. 11. This is a further departure from the principles of possessory law for the Statutes of Limitation do not provide for the destruction of easements or restrictive covenants. This is held to be an independent question and an implied release will not be effected unless the adverse user of the land is such that the easement is lost.[50] Unless the circumstances have been such as to put the person who is to be barred by the lapse of time upon the assertion of his easement time does not run against him: In *Re Nisbet & Potts' Contract*[51]. In contrast the Amendment Act procedure is in harmony with that statute's general principle of loss of interest only by final inaction. This is a departure too from the accepted norm that a Land Transfer easement may only be released by memorandum of transfer.

Section 8 (1) speaks of "any person claiming any estate or interest whether legal or equitable or beneficial" and directs that caveats may be lodged by these persons; the scope of the section is unqualified. Section 11 which deals (*inter alia*) with easements requires that the Registrar be satisfied that the caveator is either "a registered proprietor of or a person *shown* by the register to be entitled." It may be argued that the right of way implied by s. 168 is not formally embodied in the register. Section 38 (2) of the principal Act says that "so soon as registered every instrument . . . shall for the purposes of this Act be deemed and be taken to be embodied in the register as part and parcel thereof".

Instrument is defined by s. 2 as " . . . any printed or written document map or plan relating to the transfer or other dealing with land, or evidencing title thereto."

The right is implied; registration does not take place but it is nevertheless a legal right by force of the statute and as such a legal interest within the meaning of s. 8 (1). It is only on the separate disposition of part of the land in the subdivision that the implied right arises. As long as all of the land in the plan is owned by the subdivider the rights of way cannot come into being. The time tested principle of the inability of a person to maintain an easement over and appurtenant to his own land must apply. As Chapman J. points out in *Bank of*

*New Zealand* v. *Auckland District Land Registrar*[52]. "Way is a species of property which is in some owner". Without an owner there cannot be an easement. The right therefore arises and must attach only on the sale and disposition of an allotment. Registration of the transfer gives formal birth to the implied right and the register therefore discloses its existence. It is certainly at least "shown" by the register.

On the basis of these considerations the implied right of way is within the scope of the nullifying force of the statute if steps are not taken for its preservation. The right is appurtenant to a registered proprietor's land; it is an interest in terms of s. 8 (1) in respect of which a caveat is required to be lodged to ensure its continuance. The machinery of s. 11 briefly discussed previously, must then apply.

Independently of the procedures laid down by the Amendment an easement is destroyed only by user completely adverse to the right. In every instance where a positive easement which requires active assertion is involved the adverse user must be more than a mere distortion of the right. To have the necessary *animus* to sufficiently occupy the implied right of way the applicant must evidence his intentions with acts done on the ground which are inconsistent with the purpose for which the documentary owner had set aside the land. *Leigh* v. *Jack* (*supra*). His occupation must be such as to completely exclude the owner of the paper title, those with the benefit of the right and the public. However, in view of s. 8 and s. 11 it is not the absence of user which will destroy the easement; it is the failure of those with capacity to object to caveat the application. Persons with the benefit of the right should receive notice from the Registrar under s. 7 (1) (b).

An alternative is provided by s. 13 of the Land Transfer Amendment Act 1966 which permits the registered proprietors of land with the benefit of the implied right to execute an instrument of disclaimer which will liquidate the easement. An applicant could after a period of courtship "without prejudice" with the owners of other parcels in the plan obtain the disclaimer and present the Registrar with an application free of this quite troublesome encumbrance. The disclaimer has the obvious advantage of placing the matter beyond doubt.

## THE CONTENTS OF THE APPLICATION

The first matter for assertion in the particulars of possession prescribed by "Form U" is the time when personal possession commenced. The applicant may verify this aspect of his application in a number of ways. He can relate commencement to the time when he acquired the legal estate in adjoining land; he can produce a rate certificate detailing when he began payments; he can supply proof by the statement of neighbours as to the time when he erected fences and enclosed the property. He might be able to submit the declaration of a local resident who is able to relate the beginning of possession to some specific event[53].

The applicant may claim periods of prior possession which may be derived " . . . through or under any person . . . ": s. 3 (2). A right to continue the occupation of another person acquired by conveyance (transfer) or devise poses no difficulties. Successive trespassers of this type are quite clearly contemplated by the section and old and recognised authority confirms that

> The right given by possession adverse to the true owner, however short such possesion be, is good against all the world except the true owner, and the right can be conveyed and devised[54].

Authentic documents or corroborative evidence are generally available to furnish an acceptable standard of proof of connection.

Section 3 (2) gives no further explanation as to the meaning of the phrase and to ascertain its scope reference must be made to s. 2 (4) of the Limitation Act 1950 whereby

> A person shall be deemed to claim through another person if he became entitled by, through, under or by the *act* of that other person to the right claimed . . .

Adverse occupiers when possession is made over to another person are often not concerned with formality—there may be nothing written to evidence that the right to occupy has changed hands. An occupier who comes into possession other than by the consent of the person who for the time being has the superior right commences a new and independent possession. This consent cannot be in the nature of a mere tacit acquiescence; there must be some assignment of the trespassers rights—a definite expression of intention by the outgoing occupier—to maintain the link. The best evidence is a declaration from the person formerly in possession if that is obtainable. It must be made clear that the applicant's possession is not adverse to that of the former occupier but has been obtained through and by the act of the latter. What a person claiming through another must in effect assert is that both he and the previous occupier have had throughout the period the best right to eject another stranger to the title.

Promises of persons (who are invariably deceased) are occasionally tendered as evidence to unite the applicant's possession with that of the former occupier. They may be as vague as "after I go you can have the land" and should be treated with some reserve. However with some convincing surrounding circumstances or corroboration supplied by some person who was aware of the arrangement such assertions may be acceptable.

In every such case the applicant must prove the possession of his predecessor; this can best be done along the lines of the proof required for his own personal possession[55].

The manner of occupation is a matter for sensible disclosure[56]. Proof must be furnished that the occupation is visible and notorious. While the applicant is not bound to disclose mere rumours in respect of the property he must reveal any purposeful intrusion by any other person evidenced by an act done in relation to the land. He is a trespasser and must be presumed to be actively mindful of matters affecting his interest as a person on the land without colour of right. He must be supposed to be more sensitive to the acts of other persons than would be a true owner. He must establish a clear inference that having regard to the character and actual use made of the land, his possession including that of persons through whom he claims, for the whole of the period has been exclusive and continuous and that there has always been an intention to exclude everyone including the registered proprietor. The following is an illustration of facts held to be insufficient.

> Intermittent grazing and tethering of a cow upon a corner town section, occasional grubbing of gorse and thistles from the section, and occasional repairing of fences dividing it from adjoining sections (gaps being, however, left in the fences dividing it from the streets, so that it was sometimes walked across as a short cut, and there was nothing to prevent stray cattle and horses from going upon it), held not to constitute sufficient adverse possession.

Those were the facts of *McDonell* v. *Giblin* (*supra*).[57]

If the applicant's occupation has at any time been disputed and he presently has full possession he must state how the dispute was concluded. Did the person attempting to set up another adverse claim recognise his better right and abandon his attempts at interference? Perhaps by force of the applicant's superior use of the land the usurper was excluded. It is vital to establish that whatever the dispute the applicant did not abandon his intention to keep the land for himself. Should the intruder have obtained and kept possession for a considerable period—the applicant as the trespasser with the superior right can obtain an order for ejectment—the breach in continuity might destroy the foundation of the claim. To preserve his occupation he is obliged to assert at law within a reasonable time of the intrusion the full measure of his rights.

If another person has been let into possession of all or part of the land in an application the applicant should obtain an acknowledgment from his licensee. The Registrar has no power to entertain an application where the person applying is unable to give clear proof of present possession in his own right. If an acknowledgment is not forthcoming the applicant should first pursue his remedies at law.

Clause 1 (4) of "Form U" poses the question "Is the land fenced?" Enclosure of some sort is required in most instances to establish an intention of excluding all other persons. To this intent the standard must be adequate in relation to the use made of the land and of the surrounding land. The age of the fences may in some cases be corroborative of the time when occupation commenced. Accordingly the person who erected the fences assumes some importance for he may have been responsible for the first overt act of enclosure. He may have been the registered proprietor who discontinued possession; he may be the person through whom the applicant claims; he may be the applicant himself. The type of fence erected and who paid for it, its age, repair and effectiveness are all matters for forthright presentation.

The "payments by way of rent or otherwise" referred to in clause 1 (5) of "Form U" imply the application of the principles of the Limitation statute to adverse occupation following the determination of a lease or tenancy[58].

Evidence to support the claim of possession[59] may be drawn from as wide a field as is available to an applicant. Generally this evidence takes the form of separate writings and is furnished by the statutory declarations of residents of the locality who from their own knowledge are competent to make statements on the external manifestations of occupancy. These declarations should assist in establishing that occupation is visible, notorious, continuous and exclusive. A long standing resident may be able to give evidence of the manner of the registered proprietors discontinuance and might be able to tell of the state of the land before the applicant commenced his user. Local evidence may also help to prove that possession is undisputed.

A certificate from the clerk of the local authority detailing rate payments on a yearly basis over the period claimed should be appended. Rate payments are strong evidence of possession but do not necessarily give rise to a conclusive presumption in favour of the person who has rendered tribute to the local authority: *Martin* v. *Brown*[60]. The fact that no rates have been claimed or paid cannot negative a *de facto* posses-

sion. The rate certificate is nevertheless evidence of paramount importance.

An equitable owner should produce every item of documentary evidence that he possesses; yet he is not barred from making an application should he be unable to do so. If the documents or receipts are lost he may have to go to greater pains to prove the origin of his possession; this he would do by bare assertion of the facts of his purchase complemented by corroboration and a standard of proof equivalent to that required of a true adverse occupier. The documents give him the advantage of a sound argument for entering into and continuing possession; if he tenders paper evidence in support, apart from some detail which "Form U" makes obvious is required, he merely has to establish that his possession for the period was indisputable.

Evidence of the use made of the land and any improvements made thereon is required to be furnished[61]. In order to establish any peculiar circumstances use must be related to that made of land in the vicinity. All of the surrounding circumstances must be taken into account and should possession not be in harmony with that enjoyed by other land owners in the neighbourhood additional information and explanation is a necessity.

Clause 5 of "Form U" deals with acknowledgment and the explanatory note indicates a wide range of matters for potential admission:

> . . . applicant to state whether or not he or any of his predecessors in possession or their agents ever acknowledged the title of the registered proprietor of the land, and, if so, when and in what form.

Upjohn L.J. in his judgment in *Edginton* v. *Clark*[62] in discussing *Doe d. Curzon* v. *Edmonds*[63] says that this authority

> is a very useful illustration of the fact that it is not possible to lay down any general rule on what constitutes an acknowledgment. The question whether a particular writing amounts to an acknowledgment must depend on the true construction of the document in all the surrounding circumstances . . .

His Lordship referred to "writing" and that is what the Limitation statutes[64] require to constitute an acknowledgment. An oral or unsigned acknowledgment is not an effective bar to stop time running under these statutes. An acknowledgment of any sort might be an interesting facet of the applicant's behaviour but of itself to constitute a bar to his claim it must have been made in writing.

The remainder of the scheduled statutory information requires no comment. Section 5 (2) enables the Registrar and Examiner to dispense with any of the information required to be supplied if they are satisfied that it cannot reasonably be ascertained.

## CONCLUSION

There are two prerequisites to any application; a minimum of twenty years adverse possession and a certificate of title or a crown grant registered under the Land Transfer Act[65]. All that the Amendment confers on the occupier is a capacity to apply; the Act does not by its own operation extinguish obsolete titles. Until time has run on the advertised notices there is no " . . . cloud on the title of the rightful owner or any secret process at work . . . ". *Trustees and Agency Co.*

v. *Short*[66]. In the writer's experience the most common ground upon which applications yet encountered under the statute has been founded is the discontinuance long ago by the registered proprietor and the taking of possession at some subsequent time (often remote from the possession of the latter) by the adverse occupier or the person through whom he claims. There has been no violence done to the principles of registration—the registered proprietor retains an indefeasible title which is his to keep if he acts in his own interest. The statute preserves indefeasibility for those who so obviously do not want or deserve the benefits of a Land Transfer title.

1 *Gregory* v. *Torquay Corporation* [1911] 2 K.B. 556 at 559, per Pickford J.
2 *supra* 561.
3 [1907] A.C. 73, 79.
4 (1865) L.R. 1 Q.B. 1.
5 [1912] 2 Ch. 1.
6 3rd ed. at 999.
7 [1927] N.Z.L.R. 839, 841.
8 (1904) 23 N.Z.L.R. 660, 662.
9 *Martin* v. *Brown* (1912) 31 N.Z.L.R. 1084; *Robinson* v. *Attorney General* [1955] N.Z.L.R. 1230; *Williams Brothers Direct Supply Stores* v. *Raftery* [1957] 3 All E.R. 593 C.A.
10 *Brown* v. *Phillips* (1964) 10.R. 292; 42 D.L.R. (2d) 38 as cited in The English and Empire Digest Continuation Volume B 1964—1966 at 499.
11 24 *Halsbury's Laws of England* 3rd ed. at 251.
12 9 Ex.D. 562, 572.
13 13 App.Cas. 793. The principle was further applied in *Carr* v. *Thomas* (1892) 10 N.Z.L.R. 641, 644 C.A.: *In re Peacocke's Application* (1901) 3 G.L.R. 473, same case *Peacocke* v. *Auckland District Land Registrar* 20 N.Z.L.R. 81; *Moffett* v. *Squires* (1913) 32 N.Z.L.R. 607 and referred to by Denning L.J. in his dissenting judgment in *Haywood and anor.* v. *Challoner* [1967] 3 All E.R. 122. Note also s. 13 of the Limitation Act 1950.
14 *McDonell* v. *Giblin, supra* at 663, per Cooper J.
15 [1900] 1 Ch. 19.
16 [1966] 1 All E.R. 232.
17 [1938] N.Z.L.R. 676.
18 *supra* 1234.
19 (1879) 4 App.Cas. 770 at 791.
20 (1877) 36 L.T. 168.
21 *Nesbit* v. *Mablethorpe Urban District Council* [1918] 2 K.B. 1, 20, per Warrington L.J.
22 [1895] 1 Ch. 641 at 645.
23 *supra.*
24 (1883) 4 C.L.R. 292.
25 E. K. Phillips, sometime Registrar-General of Land, *The 1963 Amendments to the Land Transfer and Property Law Acts* (1964) N.Z.L.J. 110.
26 *supra* 1235.
27 (1880) 5 App. Cas. 273 at 288.
28 (1883) 1 N.Z.L.R. S.C. 347.
29 Clause 3 of the declaration in support of the application in the scheduled form U; Land Transfer Amendment Act 1963.
30 (1886) 5 N.Z.L.R. (S.C.) 102, 110.
31 (1912) 31 N.Z.L.R. 305.
32 1 C.B. 714. But note the opinion of the Privy Council in *Solling* v. *Broughton* [1893] A.C. 556 P.C. where a visit by the true owner to vacant land was held not to be a mere formal entry and prevented time from running.
33 L.R. 3 Eq. 409.
34 8 App. Cas. 135.
35 (1879) 5 Ex. D. 272.
36 *ibid* 274.

37 The authorities are conveniently collected in 32 English and Empire Digest 503-508.
38 (1879) 1 Q.L.J. Supp. 9—See also *Smith* v. *Auckland District Land Registrar* (1905) 24 N.Z.L.R. 862 at 867.
39 (1910) 30 N.Z.L.R. 369 at 377.
40 (1886) 5 N.Z.L.R. 111.
41 (1890) 15 App. Cas. 195.
42 Land Transfer Acts 1870, s. 21; 1885, s. 18; 1908, s. 20; 1915, s. 20; 1952, s. 20.
43 10th ed. at 232.
44 *Bridges* v. *Mees* [1957] 2 All E. R. 577 at 581.
45 (1902) 20 N.Z.L.R. 1; *Drummond* v. *Sant* L.R. 6 Q.B. 713 and *Warren* v. *Murray* (1894) 2 Q.B. 648 dissented from and a great many authorities discussed.
46 (1910) 13 G.L.R. 118.
47 *Swan* v. *Sinclair* [1924] 1 Ch. 254 at 266 per Pollock M.R.
48 *supra.*
49 *supra.*
50 *R.* v. *Chorley* (1848) 12 Q.B. 515.
51 [1906] 1 Ch. 386 C.A.
52 (1907) 10 G.L.R. 337.
53 Form U Clause 1 (1): the judgment of Richmond J. in *Tong* v. *Car Reconditioners Limited* (unreported) published at p. 189 of the 1967 supplement to Adams's "Land Transfer Act" places appropriate emphasis on proof of commencement.
54 *Asher* v. *Whitlock, supra.*
55 Form U Clause 1 (2).
56 Form U Clause 1 (3).
57 From the Headnote.
58 Reference may be made to s. 12 Limitation Act 1950; *Moses* v. *Lovegrove* [1952] 1 All E. R. 1279; *Haywood and anor.* v. *Challoner* [1967] 3 All E.R. 122 C.A. (tenant at will); 24 *Halsbury* 3rd ed. 243-249; Megarry and Wade, *Law of Real Property* 1021-1023.
59 Form U Clause 2.
60 *supra* at 1091-4.
61 Form U Clauses 3 and 4.
62 [1963] 3 All E.R. at 468 at 471.
63 (1840) 6 M. & W. 295.
64 s. 23 (1) (a) and s. 24 (1) (2) Limitation Act 1939 (England), s. 25 (1) (a) and s. 26 Limitation Act 1950 (N.Z.).
65 The Land Transfer Amendment Act 1963 can not apply to an unregistered Crown Grant. Under the Limitation Act 1950 time runs against the grant from the date of its issue, *Mudway* v. *Davey* N.Z.L.R. 4 C.A. 192: see also *Kelly* v. *Bentinck* [1902] N.Z.L.R. 254. One of the statutes must take precedence and as the Limitation Act (s. 18) actually extinguishes the title of the documentary owner it must come first.

If a cerificate of title has been issued under part XII of the Land Transfer Act 1952, providing the exception under s. 199 (3) does not apply occupation prior to the issue of the certificate may be included in the total period.
66 (1888) 13 App. Cas. 793 at 799. The words are taken out of context but well express the meaning of occupation in terms of the amendment.