of his judgment, quoted a *dictum* of Reading, L.C.J.'s in *R.* v. *Barron* [67] to the effect that, under the Criminal Appeal Act (Eng.),[67a] if an appeal against conviction is allowed, the court *must* direct a judgment and verdict of acquittal to be entered,[68] which acquittal is to be treated as an acquittal by the jury.[69] Dovey, J. then pointed out that under the Criminal Appeal Act (N.S.W.), the court is empowered to "order a new trial in such manner as it thinks fit, if it thinks that a miscarriage of justice has occurred. . .".[70] As was submitted earlier, it seems that the High Court has the power, on a criminal appeal, to order a new trial if it thinks fit. If this is so, the High Court's failure to order a new trial, taken with its order that a verdict of acquittal be entered, may be taken as a confirmation of the jury's verdict of not guilty of murder and of the effect of that verdict *in law*. This submission, of course, supports the decision reached by the High Court on this appeal.

B. A. McKILLOP, Case Editor—Fourth Year Student.

PROOF OF TITLE IN EJECTMENT AND THE ROLE OF SEISIN IN THE MODERN LAND LAW

ALLEN v. *ROUGHLEY*

The expansion of the Torrens system, which prevents the acquisition of land by prescription in New South Wales,[1] has tended to divert judicial interest from problems arising in connection with land under the common law system of titles, which are still governed by the conflicting and confusing statements of law laid down by English courts in the Victorian era.[2] Recently the High Court in *Allen* v. *Roughley*[3] had an opportunity to settle difficult questions of property law.

The facts before the High Court were as follow: Plunkett's land had been obtained by one, J.T., in 1823 by Crown Grant, and there was no record of any dealings with the land till 1877 when Plunkett mortgaged it to Hyland. In 1880, the mortgagor and mortgagee conveyed the land to Henry Cusbert, who occupied the land till his death in 1895. In his will under the residuary clause the land was devised to trustees to the use of his son William for life and the remainder to the use of all the other children of the testator. William was in possession of the land from 1895 till 1900, although he lived on a homestead adjoining the property. In 1898 Edmund Allen (the appellant), the brother-in-law of William, also went to live on the homestead and lived there until he built a hut on Plunkett's land itself. Between 1900 and 1915 William was continuously in New Zealand and after his return until his death in 1942 he lived either on the homestead or in the hut built by Allen. Allen was in possession of the land, and had used it for his own benefit since 1898. He fenced the property, cleared several acres and planted lemon trees, sold soil and timber to various persons and alone worked and took the profits of the land. By deed in 1937 the trustees of the will of Henry Cusbert retired and appointed Allen and Roughley (the respondent) trustees of the will. In this suit the trustee (Roughley) and the representatives of William sought a declaration that Plunkett's land was an asset in the estate of the testator, Cusbert. The defendant raised two defences before Roper, C.J. in Equity, in

[67] *R.* v. *Barron* (1914) 10 C.A.R. 81.
[67a] Cited *supra* n.38.
[68] S.4(2).
[69] *R.* v. *Barron* (1914) 10 C.A.R. 81, 83.
[70] S.8(1).

[1] *Jobson* v. *Nankervis* (1944) 44 S.R. (N.S.W.) 277.
[2] The fusion of law and equity in England in 1873 introduced difficulties, since it was uncertain how far the changes affected the substantive law. The tumultuous case law and the struggle with ancient doctrines caused errors, such as the persistent oversight of the decision of the Privy Council in *Trustees, etc.* v. *Short* (1888) 13 A.C. 793 (P.C.).
[3] (1955) 94 C.L.R. 98.

the Supreme Court of New South Wales: (1) that he retained possession of the land since 1898 and the claims of the beneficiaries were barred; (2) that there was no proof of the documentary title of Henry Cusbert and the plaintiffs could not prove a title good against all the world, therefore they could not eject the defendant who was not a trespasser. Roper, C.J. in Eq. rejected the first defence on the ground that Allen did not hold the land adversely to William but went into possession with his consent, and even if he could establish twenty years' possession adversely to William, his interest was still subject to the interests of the remaindermen which only fell into possession in 1942 (prescriptive title against them was not established at the commencement of the action). His Honour rejected the second defence on the ground that the onus of proof was on Allen to establish his own title which he failed to discharge. Allen appealed to the High Court against the rejection of his second defence.

The appeal was dismissed on several grounds: (1) It is unnecessary in most cases for a plaintiff in ejectment proceedings in absence of proof of documentary title to prove twenty years possession, any period of possession being sufficient. (2) Cusbert had a right to pass by will his possessory title and Allen, to defeat the rights of the beneficiaries, had to prove that prior to his becoming a trustee in 1937, he had acquired a possessory title to the land. In this he must fail, the onus of proving adverse possession to William being on him. (3) Upon the whole evidence it seemed that Cusbert possessed the fee simple in the land (*per* Kitto[4] and Taylor, JJ.[5]). (4) Since Allen entered into possession with knowledge of the outstanding beneficial interests created by the will, he was bound to hold subject to these equitable interests even if he could have proved twenty years adverse possession (*per* Taylor, J).[6]

For the purpose of this Note an examination of the statements of the High Court is proposed concerning the onus of proof in ejectment, the duration of possession required by the plaintiff to succeed in ejectment, proof of possession as evidence of seisin in fee, *ius tertii* as a defence to ejectment, principles of estoppel raised in this case and the *dictum* of Fullagar, J. on the importance of seisin in modern property law.

A. Onus of Proof in Ejectment.

In ejectment proceedings the plaintiff must recover possession on the strength of his own title and not on the weakness of the defendant's title.[7] Previously the onus of proof was thought always to be on the plaintiff in ejectment proceedings, although against a trespasser the plaintiff was entitled to recover possession on mere proof of prior possession. Under the N.S.W. Supreme Court Rules where an action of ejectment is commenced at law and the defendant has no defence at law, the judge may upon application by the plaintiff strike out an equitable defence[8] unless he is satisfied that the defendant has a good defence to the claim on the merits, or that he discloses such facts as the judge deems sufficient to entitle him to defend the action.[9] This seems to refer back to the Common Law Procedure Act, 1899 (N.S.W.),[10] which provides that in an action at law the defendant may plead facts which entitle him to relief by way of defence on equitable grounds[11] but only if a court of equity would grant an absolute, unconditional and perpetual injunction against the enforcement of the judgment at law.[12] Thus the defendant in ejectment

---

[4] *Id.* at 140-41.
[5] *Id.* at 145.
[6] *Id.* at 146.
[7] *Goodtitle d. Parker* v. *Baldwin* (1809) 11 East 488.
[8] Order XXI of the Supreme Court Rules (N.S.W.) (1952), Rule 26.
[9] *Id.* at Rule 31(b). This provision was enacted to prevent the entry of frivolous defences.
[10] Act No. 21, 1899—Act No. 44, 1940.
[11] *Id.* at ss.95-98.
[12] *Mercantile Bank of Sydney* v. *Wilson* (1889) 5 W.N. (N.S.W.) 94.

proceedings need only plead his possession, unless his defence depends on an equitable estate or right, in which case he must give particulars of his title.[13] An equitable owner also has the onus on him of establishing his title and cannot rely on the defects in the title of the defendant, but he may recover possession without having to show a good legal title in his trustees (the trustees' prior possession being sufficient) unless the trust is executory, in which case the trustees must be joined in the action and their legal title established.[14] The High Court in this case established an important exception to the general rule (i.e. that onus of proof in ejectment is on the plaintiff), stating that "a trustee who insists that an interest which otherwise would devolve upon the trustee and enure for the benefit of the beneficiaries is overridden by, or must give way to, his own private rights, cannot throw the burden of proof upon the beneficiaries."[15] Their Honours agreed that if Allen had acquired a possessory title before he became trustee the position might have been different, but here he was relying on his bare possession of the land both at the time of accepting the trust and afterwards as proof of his title. As Dixon, C.J. says: "The principles of Equity do not allow a trustee to place the burden on the beneficiaries to establish the title of the trust."[16] Williams, J. comes to the same conclusion when he says[17] that the onus was on Allen to prove that his possession was adverse to William and not under his authority. The court recognised that Allen never discharged the onus of proof, since he could only rely on the possible defects in title of the beneficiaries (i.e. the testator himself) and could not establish a prescriptive title against them. However, the court examined the cases where both the plaintiff and the defendant in ejectment proceedings rely on possession for less than twenty years to see whether it would have made any difference if Allen had established a prescriptive title prior to becoming a trustee.

B. The Length of Possession Required to Succeed in Ejectment.

The ancient rule is that mere possession of land raises a presumption that the person peaceably exercising all the incidents of ownership is its owner. Possession of twenty years duration (sixty years in the case of possession as against the Crown) makes this presumption conclusive. The question raised by this appeal was whether a plaintiff who has no documentary title is obliged to show a prescriptive title of twenty years duration to succeed in ejectment.

The plaintiffs relied on the possession of the testator Cusbert which lasted for fifteen years. The defendant in support of his case cited a passage from Holdsworth[18] stating that a plaintiff who relies *solely* on his own possession must show a possession of at least twenty years duration to succeed in ejectment proceedings. Holdsworth himself enumerates two exceptions to this alleged rule (with which exceptions the High Court expressed its agreement):[19]

(1) where ejectment is commenced against a trespasser, in which case the plaintiff may recover possession on proof of his prior possession (for any length of time) and its disturbance by the trespasser;
(2) where the possession of the defendant is not adverse to the possession of the plaintiff, but is on the plaintiff's behalf, e.g. a bailee is deemed in law to be in possession on behalf of the bailor.

Williams, J. said[20] that in view of these exceptions the passage only covers the case where the prior possessor abandoned possession and the succeeding intruder did not disturb an existing possession in anyone (in which case the

[13] Order XXI of the Supreme Court Rules (N.S.W.) (1952), Rule 20.
[14] *Allen* v. *Wood* (1893) 68 L.T. 143 (C.A.).
[15] (1955) 94 C.L.R. 98, 107.
[16] *Ibid.*
[17] *Id.* at 116.
[18] 7 *A History of English Law* (2 ed. 1937) 64-65.
[19] (1955) 94 C.L.R. 98, (*per* Williams, J. at 115; *per* Fullagar, J. at 128).
[20] *Id.* at 115.

passage is undoubtedly correct).[21] Dixon, C.J. and Kitto, J. agree that the passage is literally correct, since if the plaintiff relies "solely" on his possession without being able to give an account of its origin or termination and without explaining the defendant's possession, then both the plaintiff and defendant have presumptions of ownership in fee in their favour (provided that the defendant does not fall within the exceptions enumerated by Holdsworth) and the later presumption on behalf of the defendant is decisive, since the plaintiff failed to rebut the presumption. But their Honours say that in practical affairs proof of possession in complete isolation is not to be expected.[22]

The court specified circumstances in which the plaintiff must prove twenty years possession to succeed (in absence of documentary title). This was said to be necessary where the inference of title from a shorter period would presuppose that the plaintiff derived his title from one who could not alienate land. Thus in *Goodtitle d.Parker* v. *Baldwin*[23] the Crown possessed land for fifty-five years and then the plaintiff's father encroached on it and possessed it for nineteen years. A title in the plaintiff could not be presumed from his possession for less than twenty years, since the Crown was prohibited by statute from alienating the land. Secondly, where the defendant to an action of trespass *quare clausum fregit* pleaded *liberum tenementum*, he confessed his trespass, but agreed to show his own title, and to do this he had to show possession for twenty years. Thirdly, where the plaintiff's title depended on a feoffment with livery of seisin, and there was no proof of livery of seisin, that would only have been presumed from twenty years' possession. The fourth and most important of these situations occurs where, according to the example of Fullagar, J.,[24] A is the legal owner of land, B enters and abandons possession two years later, and after a short period C enters, not being a trespasser. In that case B, to succeed against C, must prove twenty years possession (a prescriptive title) since on abandoning his possession B lost all his rights and A was replaced in the same position as before B entered.[25] On Williams, J.'s view[26] this is the case to which Holdsworth was referring in his general rule, and his Honour proceeded to examine what constituted abandonment of possession (also referred to as discontinuance). Authority is cited[27] for the proposition that the fact that one does not use his land does not mean that he abandoned possession of it, neither is that so where the land is not improved, especially if it is only bush land. The smallest act done by the possessor shows that there was no abandonment of possession.

Dixon, C.J., Williams, Fullagar and Kitto, JJ. held that if the plaintiff in ejectment can show possession and give an explanation of his acquisition and loss of possession, and that explanation does not show that he was within the few cases where he must prove an absolute right to possession, then proof of possession for less than twenty years will allow him to succeed, and the onus will be on the defendant to prove a title better than that of the plaintiff. Fullagar, J. illustrates[28] the correctness of the rule by the example of two successive possessors following an owner in fee simple whose title was extinguished by the Statutes of Limitation. If the earlier possessor was required to prove an absolute title and could not do so, the defendant (the later possessor) on the ground of his possession for however short a period would be able to retain his possession.

C. Proof of Possession as Evidence of Seisin in Fee.

Possession for any length of time of realty or the receipt of rents and

[21] *Trustees, etc.* v. *Short* (1888) 13 A.C. 793 (P.C.).
[22] (1955) 94 C.L.R. 98 (*per* Dixon, C.J. at 111; *per* Kitto, J. at 137).
[23] (1809) 11 East 488.
[24] (1955) 94 C.L.R. 98, 131-32.
[25] *Trustees, etc.* v. *Short* (1888) 13 A.C. 793 (P.C.).
[26] *Id.* at 115.
[27] *Rains* v. *Buxton* (1880) 14 Ch. D. 537, 539-40.
[28] (1955) 94 C.L.R. 98, 131.

profits from the person in possession is *prima facie* evidence of seisin in fee. If there are two successive possessions without an explanation of their origin and character or determination then the presumption in favour of the defendant is stronger than the presumption arising from the earlier possession of the plaintiff in ejectment. But the explanation of his possession by the plaintiff may be such that it prevents the operation of the presumption in favour of the defendant, thus, Kitto, J. says[29] that "when the proved circumstances add such weight to the presumption which the possession raises that the evidence in favour of the defendant is on the whole case outweighed", then the plaintiff may succeed on proving possession of less than twenty years. The origin, character and duration of the possession is to be examined. The nature and extent of acts of ownership accompanying the possession, the existence of facts suggesting something other than ownership to account for the plaintiff's possession, and the plaintiff's unexplained abandonment of possession may aid in determining whether there should be a presumption of ownership in fee raised in favour of the plaintiff.[30] In *Harnett* v. *Green (No. 2)*[31] it was held that in ejectment the defendant must give such proof of possession that it raises a presumption that he exercised dominium in such a way that everybody coming into the neighbourhood could see what he was claiming. In the case of uncultivated land, to survey it and mark boundaries is the best evidence of possession. Taylor, J. admits[32] that the evidence in the present case would not be sufficient to force a title on an unwilling purchaser from the testator, but it did make out a *prima facie* case of seisin in fee in the testator. Actual but not tortious possession by the plaintiff will raise this *prima facie* presumption. As Dixon, C.J. says:[33] "proof of the plaintiff's title in ejectment will be made out according to such admissible evidence as tends to prove that at the issue of the writ the plaintiff was entitled as against the defendant to possession of the land."

D. Ius Tertii in Ejectment.

Three of the judges of the High Court[34] refer with approval in the course of their judgments to the statements made by Jordan, C.J. on behalf of the Full Supreme Court of New South Wales in *N.R.M.A. Insurance Ltd.* v. *B. & B. Shipping Marine Co.*[35] where *inter alia* his Honour said:[36]

> The plaintiff (in ejectment) could make out a *prima facie*, although rebuttable, case by proving possession at a date earlier than the defendant's possession, because *de facto* possession is *prima facie* evidence of seisin in fee and right to possession. . . . The plaintiff's evidence may, of course, be rebutted; and it may be effectively rebutted by evidence given or elicited in his own case, as where his own case shows that he has parted with his right to possession to a third party.

Kitto, J. remarked[37] that since the plaintiffs had not proved that the testator acquired a possessory title, two questions had to be answered before they might succeed in ejectment: firstly, whether the possession which the testator had prior to his death affords evidence from which it is legitimate to conclude that he had the fee simple, and if the answer is in the affirmative, whether on the whole of the evidence it is more probable than not that the testator was at the time of his death seised of the fee simple. His Honour then stated[38] that there was nothing in the evidence to throw doubt on the presumption in the plaintiffs'

[29] *Id.* at 138.
[30] *Hawdon* v. *Khan* (1920) 20 S.R. (N.S.W.) 703, 712, 713.
[31] (1883) 4 L.R. (N.S.W.) 292.
[32] (1955) 94 C.L.R. 98, 144.
[33] *Id.* at 110.
[34] *Id.*, *per* Williams, J. at 114, *per* Fullagar, J. at 130, *per* Kitto, J. at 140.
[35] (1947) 47 S.R. (N.S.W.) 273.
[36] *Id.* at 279.
[37] (1955) 94 C.L.R. 98, 140.
[38] *Id.* at 141.

favour, and they were entitled to recover possession. These remarks are directly concerned with the question whether a defendant in ejectment proceedings can raise *ius tertii*[39] as a defence to the plaintiff's claim that he himself is entitled to possession. It is clear that the defendant in raising *ius tertii* must not only prove that the plaintiff has no title to the land, but must show that the title is in an identified third person. Estoppel prevents this defence from being raised in two sets of circumstances. Firstly, where the defendant acquires possession through the plaintiff or a predecessor in title of the plaintiff (e.g. lessor and lessee relationship) he cannot allege the plaintiff's want of title, though he may show that since he (the defendant) obtained possession, the plaintiff's title has determined.[40] There is an analogous situation where a person acquires possession through a deed or will and he recognises the validity of the deed or will or the title of the maker of the instrument, he cannot deny the validity of these titles. Secondly, where the defendant's possession is wrongful as against the plaintiff, then the defendant, being a trespasser as against the plaintiff, is estopped from disputing the plaintiff's title.

Doe d.Carter v. *Barnard*[41] attempted to lay down the rule that in general *ius tertii* was a good defence to ejectment. In that case one Carter occupied land for eighteen years without being its legal owner, and was followed in possession by his widow for thirteen years, who in turn was ousted by a trespasser. Had the widow been content to allege her own possession, she would have succeeded against the trespasser, but she also recited her husband's possession, and the court held that by her own showing the widow disentitled herself from relief. This decision was followed in *Nagle* v. *Shea*[42] and was regarded by some textwriters[43] and also by Jordan, C.J.[44] as the basis for a rule that the defendant can rely on *ius tertii* only if the plaintiff himself shows the weakness in his title.

A line of cases thought to be contrary to *Doe d.Carter* v. *Barnard* commences with *Davidson* v. *Gent*,[45] where premises were let for twenty-one years to Sherwood and, without a surrender being obtained, the same premises were let during the running of the prior term to Wood, who was in possession till his death, and who was followed by Davidson (who obtained a sub-lease from Wood's executors). Davidson was ousted by Gent, a trespasser, and he was held entitled to recover his possession, though on his own showing he proved the title to the land to be in a third person (Sherwood). But the case may be distinguished on the ground that the defendant, being a trespasser, could not attack the plaintiff's title, and the plaintiff, having obtained his possession from Wood, was estopped from denying the title of his lessor, and any evidence having that effect was not admissible even as against himself. In *Asher* v. *Whitlock*,[46] Cockburn, C.J. held that a plaintiff in ejectment was entitled to succeed on the principle that possession is good against all the world, except the true owner, and this case was approved in *Perry* v. *Clissold*[47] by the Privy Council, where *Doe d.Carter* v. *Barnard* was disapproved. However, it is to be noted that in neither of these cases was *ius tertii* raised, nor would it have been appropriate. The Privy Council's statement was not the result of a full examination of *Doe d.Carter* v. *Barnard*, and in any event was *obiter*. In New South Wales, Sir William Cullen, C.J. in *Hawdon* v. *Khan*[48] disapproved

[39] *Ius tertii* means the right of a third person (not a party to the litigation) to ownership of the land which is the subject of the litigation.
[40] *Claridge* v. *Mackenzie* (1842) 4 M. & G. 142.
[41] (1849) 13 Q.B. 945.
[42] (1894) Ir. R. 8 C.L. 224.
[43] S.A. Wiren, "The Plea of the *Ius Tertii* in Ejectment" (1925) 41 L.Q.R. 139; F. C. Pollock, *Law of Torts* (10th ed. 1916) 387, 388.
[44] (1947) 47 S.R. (N.S.W.) 273, 279.
[45] (1857) 1 H. & N. 744.
[46] (1865) L.R. 1 Q.B. 1.
[47] (1907) A.C. 73 (P.C.).
[48] (1920) 20 S.R. (N.S.W.) 703, 707.

of *Doe d.Carter* v. *Barnard*, but one of the leading principles stated by his Honour was that in the case of a series of successive occupiers without title, the earlier occupier could recover possession against a later one, even if the earlier one abandoned his possession, and there was a hiatus between the two possessions. But, with respect, it is suggested that this view is wholly incorrect and opposed to the decision of the Privy Council in *The Trustees, Executors and Agency Co.* v. *Short*,[49] where it was held that "the possession of the the intruder, ineffectual for the purpose of transferring title, ceases upon its abandonment to be effectual for any purpose" (*per* Lord Macnaghten). If Cullen, C.J.'s view were correct, it would be one reason for suggesting that *ius tertii* is no defence in ejectment, but an abandonment of possession destroys whatever right the possessor obtained (provided that he had not obtained a prescriptive title) and if there is no hiatus in possession, presumptions of ownership in fee simple arise in favour of both of the successive possessors, one of which must be capable of being rebutted. In *Allen* v. *Roughley* the High Court held[50] that in ejectment between two possessors who do not give an explanation of the character and origin of their respective possessions (where neither is a trespasser) the later possessor is entitled to possession. The plaintiff will only succeed if, by showing the character of his possession, he rebuts the presumption of fee simple in favour of the defendant, and thereby shows that he was entitled as against the defendant to possession. In *Perks* v. *Thurlow*[51] it was held that where a plaintiff in ejectment proves a possessory title and also attempts to prove a documentary title, then it is by inconsistency and not by multiplicity of proof that the title of the plaintiff is tested. Thus, the court will look at proof of possession and of title, and if it is shown that title is in a third person, the plaintiff will not be accorded possession. This clearly points to the acceptance of *ius tertii*, and it is submitted that *Perks* v. *Thurlow*[52] was present to the mind of Taylor, J. when[53] he stated that in the present case the presumption of fee simple in favour of the plaintiffs stands, since the fact that there was no evidence of dealings with the land between 1823 and 1878 was not inconsistent with the testator having a good documentary title and his possession was evidence of that fact.

From direct statements by Kitto and Taylor, JJ.,[54] from the treatment given by Dixon, C.J., Kitto and Taylor, JJ.[55] to questions of proof of title in ejectment, and from the acceptance of Fullagar, J. of the statements by Jordan, C.J.,[56] it seems that the acceptance of *ius tertii* as a defence to ejectment proceedings is implicit in the decision of the High Court. It may be argued that Williams, J. took the contrary view when he stated[57] that "Proof that he is in possession (i.e. the plaintiff) confers on him a good title against the whole world, except those who show a better title". But it may also be argued that the "better title" referred to in this passage may be not only that of the defendant, but of a third person, in which case the view of Williams, J. would be in accord with the view which is advanced in this Note.

E. Principles of Estoppel.

An alternate ground for dismissing the defendant's submissions is found in the principle that where any person (even a trespasser) at the time of

[49] (1888) 13 A.C. 793 (P.C.).
[50] (1955) 94 C.L.R. 98, (*per* Dixon, C.J. at 110; *per* Kitto, J. at 138).
[51] (1864) 1 W.W. & A.'B. 142 (F.C. N.S.W.).
[52] *Ibid.*
[53] (1955) 94 C.L.R. 98, 145.
[54] *Id.* (*per* Taylor, J. at 145; *per* Kitto, J. at 138).
[55] *Id.* at 111 (*per* Dixon, C.J.): "The *prima facie* presumption arising from possession may form part of the proofs. Doubtless if it stood alone in a literal sense it would not suffice to displace the presumption arising from the defendant's possession at the very time of the issue of the writ."
[56] (1955) 94 C.L.R. 98, 130, 131.
[57] *Id.* at 115.

acquiring possession of land has notice of outstanding beneficial interests, and the title of the legal owners is divested by the operation of the Statutes of Limitation, the possessory title is subject to the beneficial interests. This was thought to be the ratio of *Scott* v. *Scott*,[58] and it was the main basis for the decision of Taylor, J. who states:[59]

> In those circumstances the defendant would not, of course, have acquired his legal title from the testator or his executors; he would have acquired it adversely to them, but having acquired title with notice of the outstanding beneficial interests, he would, in equity, be bound by them. But, assuming the testator to have had a lesser interest, but yet one both devisable and assignable, why should the same principle not apply?

In *Scott* v. *Scott*[60] one obtained under a settlement an equitable life estate by conveyance and subsequently claimed the legal title through the operation of the Statutes of Limitation. Lord Cranworth, L.C. said[61] that the mere fact that the legal estate was acquired by a disseisor did not result in the defeat of the equitable interests of which the disseisor had notice at the time of acquiring possession (since he obtained an equitable interest under the same deed as those beneficiaries whose interests he sought to defeat). *In re Nisbet and Potts' Contract*[62] decided that a trespasser with a prescriptive title was bound by restrictive covenants even if at the time of acquiring possession he had no notice of the covenants. The whole court, Collins, M.R., Romer and Cozens-Hardy, L.JJ. agreed that if the equitable interests became interests in possession, their owners were not under disability, and the possessor committed acts indicating that he held adversely to them, the Statutes of Limitation would, in due course, extinguish the title of the equitable owners. Halsbury[63] draws a distinction between the acquisition of possession by the trespasser with or without notice of equitable interests. It is claimed that where a trespasser enters into possession without notice of equitable interests and the trustee's title is barred, the title of the beneficiaries out of possession is also barred. This is said, however, in the face of a strong dictum of the Privy Council in *Williams* v. *Papworth*,[64] where Lord Macnaghten stated[65] that: "The circumstance that the trustees are barred by limitation is no ground for holding that the beneficiaries are barred too."

It is submitted, with respect, that the formulation of a principle in the terms expressed in the judgment of Taylor, J. would lead to misunderstanding. Kitto, J. does not seem to think that *Scott* v. *Scott* leads to the principle that it is thought to establish,[66] and Fullagar and Williams, JJ. did not examine the correctness of Taylor, J.'s thesis. However, these three judges deal with a doctrine of estoppel most clearly stated in *Dalton* v. *Fitzgerald* by Lopes, L.J.:[67]

> Not only is a person who enters under a will or a deed estopped from setting up a title adverse to the will or deed, but anyone who gains possession through a person interested in the land under the will or deed is bound by the same principle of estoppel.

This principle has been frequently applied.[68] In the case under review Allen

---

[58] (1854) 4 H.L.C. 1065.
[59] (1955) 94 C.L.R. 98, 146.
[60] (1854) 4 H.L.C. 1065.
[61] *Id.* at 1082.
[62] (1906) 1 Ch. 386.
[63] 20 *Laws of England* (2 ed. 1937) 722.
[64] (1900) A.C. 563 (P.C.).
[65] *Id.* at 568.
[66] (1955) 94 C.L.R. 98, 133.
[67] (1897) 2 Ch. 86, 94.
[68] In *Board* v. *Board* (1873) L.R. 9 Q.B. 48, where a tenant of premises devised his rights to trustees upon trust for his daughter for life, etc., and the daughter, having entered into possession, conveyed the fee simple to the defendant after possession for twenty years, it was held in ejectment proceedings between the remaindermen and the defendant that the defendant was estopped from denying the validity of the will as

obtained possession through William, who entered into possession under the will; since William would be estopped from denying the validity of the title of the testator and of the beneficiaries under the will, Allen would be similarly estopped. The application of this principle could dispose of the present case. It is submitted, further, that *Scott* v. *Scott*[69] is merely an application of the provisions of the Real Property Limitation Act, 1833,[70] which *inter alia* provides[71] that the limitation period only runs against equitable interests from the time when those interests fall into possession. Since an adverse possessor does not himself gain a title by the operation of the Statute (only the rights and title of legal and equitable owners are extinguished), Allen could not have defeated the rights of the remaindermen whose interests only fell into possession in 1942. It makes no difference whether the possessor moves into possession with or without notice of outstanding beneficial interests (provided that he is not a *bona fide* purchaser for value without notice) since at the expiration of twenty years after the earliest manifestation of a continuous adverse possession against the equitable interests which already fell into possession, the right and title of the equitable owners will be extinguished (unless, as in *Dalton* v. *Fitzgerald*[72] and as in the case under review, the adverse possessor is prevented by estoppel from denying these interests) and the adverse possessor will gain the equivalent of an indefeasible title at law.

F. The Status of Seisin in the Modern Law.

Instead of developing a theory of absolute ownership, English law evolved a theory of seisin, the title being in the person with the oldest and best seisin. Seisin thus became a root of title. Seisin meant the possession of the freeholder who was entitled to possession: heirs, remaindermen and reversioners when they became entitled to estates in possession but who have not yet entered into possession, became clothed with "seisin in law" (provided no one had entered) and they only obtained actual seisin when they entered. In about the year 1200 seisin was the most essential quality in the ownership of land, even if it was wrongful, the disseisor becoming seised, unless the rightful owner made an entry within four days after the disseisin (the period was a year and a day where the disseisee was not on the land at the time of disseisin) and the intruder thereafter could only be forced off the land by actual proof of title under the Writ of Right. By 1500 the rightful owner was allowed to enter and the Possessory Assizes could only be raised against the owner if there was a descent cast, discontinuance (of possession) or the right of entry was tolled (destroyed). Law then only protected rightful disseisin. After leaseholders gained an effective remedy for regaining the land, the freeholder was regarded as having seisin, leaseholders only having possession. In 1535 the Statute of Uses created a statutory seisin by vesting seisin by shifting or springing uses without the necessity of possession. Undoubtedly seisin under the Statute is not the same as under the common law, since trespass could not be maintained in the case of the Statute unless there was an actual entry,[73] but this is explicable since trespass is a wrong against possession and here possession was not interfered with. After the Statute the doctrine of disseisin at election, whereby a disseised freeholder could treat the disseisor as disseisor or as his tenant. lessened the importance of seisin.

It is against this background that Fullagar, J.'s opinion must be examined.[74] His Honour dismissed the appeal of counsel to ancient cases by stating that in

against the remaindermen, since the testator's daughter (who went into possession under the will) was similarly estopped.

[69] (1854) 4 H.L.C. 1065.

[70] Adopted in N.S.W. by 8 Wm. 4, No. 3 (N.S.W.).

[71] *Id.* at s.4.

[72] (1897) 2 Ch. 86.

[73] *Geary* v. *Beacroft* (1680) Carter 57, 66.

[74] (1955) 94 C.L.R. 98, 127. A useful account of the meaning of seisin may be found in Cheshire, *Real Property* (8 ed. 1949) 33, 34.

discussing the problems apparent in this case we do not have to examine the doctrines of seisin, disseisin or remitter, and that the Real Property Limitation Act, 1833, by abolishing real actions[75] and making everything depend on the accrual of a right to make an entry or distress or the bringing of an action for the recovery of land in effect abolished the doctrines of seisin, disseisin and remitter, although the Act was not enacted for that purpose. It is proposed to examine the correctness of this view by examining the circumstances where seisin had critical importance in the past and comparing the present situation.

Conveyance of land was most commonly effected before the Statute of Uses by feoffment with livery of seisin, though that statute, by allowing the passing of seisin without change of possession, made this method unpopular. In modern times conveyance is completed by the use of the word "grant"[76] and the registration of a deed of feoffment has the same effect as if there had been livery of seisin.[77] Previously a disseisor could sell the property and pass a good title, but now tortious feoffment is not permitted.[78] Feoffment with livery of seisin may be employed even at present, but is cumbrous and rarely used. Also depending on seisin were dower (widow took life estate in one-third of her husband's lands of which he was seised for an estate of inheritance in possession) and curtesy (life estate taken by husbands surviving their wives, in lands possessed by the wives, provided that the marriage was valid). These interests have been abolished.[79] Seisin had been the basis of the law of descent; thus heirs obtained seisin in fact only after they entered into possession, and if the testator was disseised at the time of the devise or at the time of death, the devise was void. By the provisions of the Inheritance Act, 1838,[80] seisin could be passed by will, and the rule as to necessity of seisin was abolished. Dispositions by married women and tenants in tail depended on them having seisin, but this was abolished by the Fines and Recoveries Act, 1833.[81] Real actions were based on seisin, but with the exception of trespass and ejectment these have been abolished.[82] After 1837 the rightful owner has a right of entry which cannot be tolled by discontinuance or warranty.[83] One of the vital rules of mediaeval land law was that there shall be no abeyance of the seisin. Section 16(1) of the Conveyancing Act, 1919[84] sweeps away this rule, although it brings into play the Rule against Perpetuities.

Seisin still has importance in the case of feoffment, since livery of seisin is necessary to allow it to be effective. Secondly, the meaning of seisin must be investigated in the type of case exemplified by *Leach* v. *Jay*.[85] There a testator devised all the real property of which he was "seised", and the court gave a technical meaning to the words of the devise, and since the testator had no seisin at the time of his death, no property passed under the devise, resulting in a defeat of the testator's intention. In *Trustees* . . . v. *Short*,[86] the Privy Council held that the Statutes of Limitation only run if some one is in possession of the land; learned writers[87] have suggested that the decision means that if a disseisor abandons possession without the intention of returning, the doctrine of remitter operates and the disseisee is restored to his seisin.

---

[75] (1837) Act 8 Wm. 4, No. 3 (N.S.W.), s.36.
[76] Conveyancing Act, 1919 (N.S.W.); Act No. 6, 1919—Act No. 40, 1954, s.43.
[77] Registration of Deeds Act, 1843 (N.S.W.): 7 Vic. No. 16, s.25.
[78] Conveyancing Act, 1919 (N.S.W.); Act No. 6, 1919—Act No. 40, 1954, s.22.
[79] *Id.* at s.21, and Wills, Probate and Administration Act (1898-1954) (N.S.W.); Act No. 13, 1898—Act No. 40, 1954, s.52.
[80] 3 & 4 Wm. 4, c. 106, adopted in N.S.W. in 1837 by 7 Wm. 4, No. 8, ss.2-4.
[81] 3 & 4 Wm. 4, c. 74, ss.15, 40, 41. Fines and recoveries were never used in N.S.W. and consequently the English Act abolishing them was not adopted here. See Millard, *Real Property* (5 ed. 1939) 29.
[82] Real Property Limitation Act, 1837; 8 Wm. 4, No. 3 (N.S.W.), s.36.
[83] 8 Wm. 4, No. 3 (N.S.W.), s.39.
[84] Act No. 6, 1919-Act No. 40, 1954.
[85] (1878) 9 Ch. D. 42.
[86] (1888) 13 A.C. 793 (P.C.).
[87] H. W. Challis (1889) 5 *L.Q.R.* 185; and Lightwood on *Possession.*

But the operation of Statutes of Limitation does not depend on seisin, and the decision only extends to abandonment of possession, their Lordships not having even mentioned remitter.

It is suggested that Fullagar, J.'s remarks have been fully borne out by the decisions, and apart from feoffment and the use of the word "seisin" in a technical way, the doctrine of seisin is of no consequence. We have retained the word seisin to denote title to land, the oldest seisin is still the best title to land, but now seisin means ownership and not possession. Goodeve in his work on *Real Property*[88] defines seisin in modern law as meaning "having the legal estate, either in possession or remainder or reversion", provided that it had not been turned into a mere right of entry. Seisin lost its meaning of "feudal possession" and its position was taken over by possession. Both trespass and ejectment depend not on ownership, but on possession. Since modern law protects possession that is rightful, it is no wonder that seisin has lost its former significance.

ANDREW LANG, Case Editor—Third Year Student.

OFFER AND ACCEPTANCE BY TELEX

ENTORES LTD. v. MILES FAR-EAST CORPORATION

In this case,[1] the plaintiffs, Entores Ltd., were an English company with a registered office in London, and the defendants were an American corporation with headquarters in New York and with agents in all parts of the world, including a Dutch company in Amsterdam. The plaintiffs, and also the defendants' agents, i.e. the Dutch company in Amsterdam, had in their offices equipment known as a "Telex Service". A teleprinter operated like a typewriter despatched a message from one country and that message was received (for all practical purposes instantaneously) and typed in another country.

In September 1954, a series of communications by Telex Service passed between the plaintiffs and the Dutch company as to the purchase by the plaintiffs of copper cathodes from the defendant corporation. The material communication was a counter-offer by the plaintiffs on 8th September, 1954, and an acceptance of that offer by the Dutch company on behalf of the defendants received by the plaintiffs in London on 10th September, 1954.

The plaintiffs, later alleging breach of contract, applied for leave to serve notice of a writ on the defendants in New York on the ground that the contract was made in England and therefore fell within the terms of Order XI, r.1 of the Rules of the Supreme Court of Judicature.[2] It was held by the Court of Appeal (Denning, Birkett and Parker, L.JJ.), that the counter-offer was not accepted until the offeror had received notification of its acceptance, that notification was received by the offeror in London, that the contract was therefore made in England, and that leave to serve the writ in New York ought therefore to be granted.

The decision results in two propositions:

1. The rules of private international law for determining *where* a contract is made spring from the rules of municipal law determining *when* a contract is made.
2. That the rule of municipal law is that a contract is made *when* the offeror receives notification of the acceptance by the offeree of his offer.

---

[88] (3 ed. 1897) 365.

[1] (1955) 2 All E.R. 493.

[2] Corresponds to s.18(3)(a) of the N.S.W. Common Law Procedure Act. By these provisions the court or a judge may allow service of a writ outside the jurisdiction in which the action is brought, if he is satisfied that the contract for breach of which the action is brought, was made within the jurisdiction.