

Chapter 9

Question 1: What do you understand by the concepts of “title by possession”, “relativity of title” and the “extinguishment” of title by limitations?

These terms are classically used in explaining the operation of adverse possession in unregistered land. To answer this question, you should consider the nature of title to unregistered land and review the outline of the operation of adverse possession in section 9.3.

- *Title by possession.* In English law, title both to land and personal property has historically been obtained by possession. A person in possession of land (or indeed of personal property) thereby acquires title to the land. It is for this reason that possession is an independent means of obtaining property rights.
- *Relativity of title.* Closely related to the concept of title by possession is the idea that title is a relative concept. English law does not have a concept of absolute ownership, but recognises that more than one person may have title, concurrently, to land. The strength of each person’s title is determined by the order in which they obtained possession of the land. For example, consider the possibility that a paper owner (PO) obtained possession by the execution of a deed in 1980. In 1985, C1 moved into adverse possession and in 1987 C1 was dispossessed by C2 moving into adverse possession. PO, C1 and C2 all have title to the land. PO’s title is relatively stronger than that of C1 or C2 as PO obtained possession first. Hence (until the expiry of the limitation period) PO can assert title and exclude C1 and C2. C1’s title is stronger than that of PO, but weaker than C2. Hence, C1 can bring an action to assert title against C2, despite being vulnerable to PO’s title. C2’s title is vulnerable to challenge by PO and C1, but C2 would still be able to assert his or her title against subsequent trespassers.
- *Extinguishment of title by limitations.* Limitation periods provide a long-stop on a person’s ability to assert their legal rights. The ability to assert title to land, like the ability to assert other legal rights, is subject to a limitation period. Rights are lost if they are not asserted within the required time frame. S 15 of the Limitation Act 1980 provides a 12-year limitation period for actions to recover land. S 17 of the Act provides that, once the limitation period has expired, title is “extinguished”. For a title to be extinguished by limitations therefore means that the title is lost if it is not asserted against an adverse possessor within the 12-year limitation period. To continue the example in the preceding paragraph, if PO did not assert title within 12 years of C1 entering into adverse possession, then (assuming a continuous period adverse possession was maintained) PO’s title would be extinguished by limitations 12 years after the commencement of C1’s adverse possession. At that stage, C1’s title would become the strongest title to the land, as it would no longer be vulnerable to challenge by PO. It is important to note, as is explored further in the following question, that ss 15 and 17 no longer apply to registered land.

Question 2: To what extent are the concepts in question 1 compatible with registration of title? Consider how any differences you identify are reflected in the operation of adverse possession in registered land.

To answer this question you will find it useful to review sections 9.5.2 and 9.5.3. It is particularly important to consider the changes to the operation of adverse possession introduced by the LRA 2002.

- *Title by possession.* This concept made sense in the context of the system of unregistered titles in which it developed. In the absence of a central record of land ownership, possession provided the most reliable and identifiable evidence of title. It makes less sense where ownership of land can readily be identified by reference to a central register. As the Law Commission explain in the extract in section 9.5.3, “[t]itle to registered land is not possession-based as is title to unregistered land. It is registration that vests the legal estate in the owner...”. This is reflected in the new procedure for adverse possession contained in the LRA 2002. For claims governed by that procedure, legal title to registered land can no longer be acquired purely through adverse possession. The 12-year limitation period for actions to recover land provided by s 15 of the Limitation Act 1980 is disapplied in respect of registered land by s 96 of the LRA 2002. Instead, completion of a period of adverse possession (10 years) enables the applicant to apply to become registered proprietor of the estate. Legal title is acquired, if at all, by registration.

- *Relativity of title.* The concept of relativity of title is *not* necessarily incompatible with registered land, but it is overshadowed by the overarching principle that legal title is acquired by registration. In registered land, as in unregistered land, a person who enters into adverse possession thereby acquires an independent freehold title, based on their possession. This title is relatively weaker than that held by a registered proprietor, but may still be enforceable against a subsequent possessor.
- *Extinguishment of title by limitations.* This concept is wholly incompatible with registration of title and s 17 of the Limitation Act 1980 (which provides for the extinguishment of title by limitations) is disapplied in respect of registered land by s 96 of the LRA 2002. A registered title is not extinguished by the operation of limitations, since for so long as a person is registered as proprietor they remain vested with legal title. We have seen in section 9.5.2 that the LRA 1925 sought to reconcile the idea of title being extinguished by limitations with principles of land registration through the imposition of a trust. An attempt at reconciliation is not provided by the LRA 2002 which instead gives a clean break from unregistered land concepts. Under the procedure for adverse possession provided by the LRA 2002, and discussed in section 9.5.3.1, the result of a successful claim to adverse possession is that the adverse possessor ‘is entitled to be entered in the register as the new proprietor of the estate’. The estate is therefore not extinguished, but instead there is a statutory transfer of the estate to the adverse possessor. In section 9.5.3.2 we see that instead of the registered title being extinguished, by virtue of schedule 6, paragraph 9 of the LRA 2002 the title the adverse possessor acquired by virtue of his or her adverse possession is extinguished from the moment that he or she becomes registered as proprietor of the estate.

Question 3: How is adverse possession established? To what extent is this dependent on the intention of the adverse possessor and the paper owner / registered proprietor?

This question is concerned with how a claimant establishes that he or she is in adverse possession. It should be noted that, in this respect, the same principles apply to registered and unregistered land. To answer this question, you should review the material contained in sections 9.4.1 (on the nature of “adverse”) and 9.4.2 (on the nature of “possession”). The issue of intent is relevant to “possession”. In *JA Pye (Oxford) Ltd v Graham*, reflecting previous case law, the House of Lords defined possession as requiring both factual possession and an intention to possess: ‘without the requisite intention, in law there can be no possession’ (per Lord Browne-Wilkinson). As noted in section 9.4.2.2, it is, generally, an objectively expressed intention to possess that counts.

The relevant intent referred to in *Pye v Graham* is, however, the intention of the adverse possessor, *not* that of the paper owner or registered proprietor. This distinction is important, as for a period of time the paper owner’s intent was considered to be relevant to the claimant’s ability to demonstrate adverse possession. This was a result of the rule in *Leigh v Jack* (1879) 5 Ex D 264 (discussed in section 9.4.2.3) which suggested that a paper owner could not be dispossessed by a claimant whose acts were not inconsistent with the paper owner’s intended use of the land. In *Pye v Graham*, Lord Browne-Wilkinson commented that “the suggestion that the sufficiency of the possession can depend on the intention not of the squatter but of the true owner is heretical and wrong”. He explained that the paper owner’s intended use may be relevant only to the extent that it sheds light on the claimant’s intention. You should refer to paragraph 45 of the Lord Browne-Wilkinson’s judgment, which is extracted in section 9.4.2.3.

Question 4: Is it possible for a party to be both the registered proprietor of land, and an adverse possessor of that land?

Here, you should refer to section 9.4.1.2. This question was, in 2013, answered in the negative by the Court of Appeal in *Parshall v Hackney*. In that case, the same strip of land had been mistakenly registered under two different titles, No 29 and No 31. The proprietor of No 31 had been in possession of the strip, and claimed they had obtained title to it by adverse possession. Mummery LJ, however – focussing on a particular sentence from Slade LJ’s judgment in *Buckingham County Council v Moran*, to the effect that ‘[p]ossession is never “adverse” within the meaning of the Act of 1980 if it enjoyed under a lawful title’ – held that it is impossible for someone with a registered title to land to be, at the same time, in adverse possession of that land, because their occupation of the land would not be unlawful. ‘Lawful’, for Mummery LJ, did not only mean ‘with the paper

owner's permission'; it also encompassed having a registered title. As such, the proprietor of No 31 was not able to establish adverse possession.

The Court of Appeal in *Rashid v Nasrullah*, however, has since rejected this aspect of the decision in *Parshall*: possession *can* be adverse even if the possessor holds a registered title to the land. In that case, C was the registered proprietor of the relevant land, the registered title having been transferred to him by his father, B – a fraudster who previously forged the title documents and became registered as proprietor in place of the original paper owner, A. C, who had possession of the land, argued that A's claim to have the register rectified in his favour should fail because C had established 12 years of adverse possession (that is, before the coming into force of the LRA 2002). The Court allowed C's appeal. Lewison LJ held that Mummery LJ's approach placed 'an interpretation on the [relevant] passage from *Buckinghamshire* which misunderstands what Slade LJ has said and is irreconcilable with Lord Brown-Wilkinson's subsequent analysis in *Pye*' – namely that the question of whether someone has gone into adverse possession 'is *simply* whether the defendant squatter has dispossessed the paper owner by going into ordinary possession of the land for the requisite period without the consent of the owner.'

Question 5: Should it be possible to obtain a legal title to land when the occupation of the land is a criminal offence?

The question of the relationship between the criminal law and adverse possession has been brought to the fore by the criminalisation of residential squatting by s 144 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 (LASPO). In *Best v Chief Land Registrar*, extracted in section 9.6.2, the Court of Appeal held that the fact a person's claim to adverse possession includes acts that are a criminal offence under s 144 should not affect a claim to legal title to the land under schedule 6 of the LRA 2002. In *Best*, Sales LJ explained that Sch 6 of the LRA 2002 provides a careful balance between protecting registered proprietors from the loss of their title by adverse possession and the public interest in the active use and marketability of land and the positive role that adverse possession plays in this respect. He rejected an argument by the Chief Land Registrar that criminalisation made a critical difference to how the balance should be drawn due to the strong public interest in ensuring that people do not benefit from their crimes. Sales LJ considered that LASPO was not intended to draw (or re-draw) the balance between these competing interests, but to assist owners of residential buildings in a practical way, particularly by helping owners gain entry when squatters have moved in. The Court of Appeal's decision was no doubt influenced by the fact that no consideration was given to the relationship between LASPO and the LRA 2002 when the criminal offence was introduced. Hence, there had been no explicit attempt to alter the operation of the LRA 2002, or a consideration of the impact on the operation of registration of title that such a change may have.

In short, the best approach, arguably, is a nuanced one that seeks to balance the policy value of the criminal offence contained in s 144 against the (competing) policy value in accepting certain claims to title based on adverse possession. To hold that s 144 simply eliminates any adverse possession claim that involves any violation of s 144, thus, would be a blunt solution that, as Sales LJ found, would lead to practical absurdities and have a "profoundly disruptive effect" on the carefully calibrated regime under schedule 6.