

# TOPIC 5: FRAGMENTATION BY REFERENCE TO THE NATURE OF TITLE: POSSESSION AND THE DOCTRINE OF RELATIVITY OF TITLES; **ADVERSE POSSESSION**

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General law land – Old  
Torrens system – New

## Steps:

### Definition:

1. What is adverse possession?

- Adverse possession is where the possessor of land, even as a wrongful possessor, gains a right in land which can be enforced against the world at large, except against someone with a superior title (Toohey J in *Mabo*)

### Exceptions:

2. Is it Crown land (LAA s 7), railroads (s 7A), land owned by water authorities (S 7AB), council land (s 7B), or common property owned by a body corporate (s 7C)?

- Cannot have a claim of AP

### Who has a better claim?

2. Who has the better claim?

- Person with a documentary title, or person who has possession first (Regardless if it was through a wrongdoing or tort) (*Jeffries*)
- If the AP has had it for over 15 years, the documentary title holder or person with the relatively better interest cannot bring an action to recover the land (S 8 of the LAA) or 6 years if it's a chattel (S 5 LAA)

### Time:

3. When did time start running?

- Time starts to run when the right action first accrues to the owner
- It may be aggregated if the transfers of land are **continuous and uninterrupted** (s 14(2) LAA). See *Mulcachy*
- Is it a lease?
  - o Time not running against a landlord if they're under an active lease
    - Check when time starts running depending on the type of lease
  - o If a stranger goes into adverse possession of land under a lease?
    - Tenant can bring an action straight away (they have possession)
    - Landlord can't, as he has no right to possession.
- Is it a future interest?
  - o Right to recover doesn't accrue until the **day** the individual is **vested with possession** (eg when life interest person dies) (s 10(1) LAA).

4. When did the true owner stop time running?

- 1. By effectively asserting their title
  - o Writ
  - o Effective entry

- 2. Acknowledgement of title by the claimant
- 3. Possessor abandons possession
- 4. Giving licence to the adverse possessor

### **Factual/mental element**

5. Is there factual control?
  - Physical control? Consent? Exclusive possession? Dealing with it as an owner would?
6. Is there mental control?
  - Intention to possess on one's own behalf and benefit
  - Intention to exclude
    - o Fencing
    - o Payment of rates
  - Doesn't have to be 24/7
7. Can the get an injunction?
  - See *Shelfer*
8. How to make your fee simple registered

## **Adverse possession generally:**

### **Before 15 years:**

- Possessor of land, even a wrongful possessor, **gains rights** in land which can be **enforced to the world at large**, except against someone with a superior title (**Toohey J in *Mabo***)
  - o Documentary title or earlier possessory title (***Jeffries v Great Western Railway Co (1856); Mabo***)
- **Therefore, they have a presumed fee simple.**
  - o **Vulnerable as it can be taken away by someone with a relatively better right**
  - o Can leave it in a will, sell it, give it away, mortgage it (***Mabo per Toohey J***)
  - o But that person is just as vulnerable as you were. Can be taken away by someone with a relatively better right (documentary title or prior possession)
- With the Aborigines:
  - o ***Mabo*** argued that they could establish a possessory title through their ancestors and themselves, which amounted to a possession in law through a presumptive fee simple interest in the land
  - o Crown had to show on acquisition of NSW/QLD, that they had a relatively better claim to possession, which it could not do.
  - o Therefore, presumption of a fee simple title in the indigenous possessors of land was left undisturbed

### **After 15 years:**

- An adverse possessor can become impeachable after 15 years of possession (**S 8 of LAA**)
  - o Fee simple ownership
  - o Can apply to be the registered owner once documentary titleholder's interest has been extinguished per **s 60-62 of the Transfer of Land Act**
  - o (Both general law land and Torrens system land (**S 42(b) TLA**)).

***Jeffries v Great Western Railway Co (1856)*– person who has possession first (even if it is through wrongdoing/a tort) has a relatively better title compared to someone who takes it off of him**

### **Facts:**

- Owen owned trucks. Went bankrupt.

- All title of property vests in the trustee in bankruptcy
  - o Up to the trustee to give the money to creditors
- Before trustee had possession, Owen purported to sell the trucks to **Jeffries** and Great Western Railways
- Both thought they were buying the title, neither were. Title with the trustee.
- Jeffries took possession of the trucks. Then GWR took it from Jeffries.

#### **Held:**

- Neither have title, title is with the trustees in bankruptcy
- The P needed to argue he had a relatively better right than D
  - o Jeffries relied on the fact he had prior possession
  - o GWR didn't have documentary title
- Cant rely on jus tertii, not acting on behalf of the creditors
- Arguments that it's unfair
  - o True owner is the trustee in bankruptcy
  - o Shouldn't reward people for seizing possession
- Same principles as land: possession = title

## **TEST FOR ADVERSE POSSESSION**

### **What can't you AP?**

**LAA:** Does not apply to Crown land (**s 7**), railroads (**s 7A**), land owned by water authorities (**S 7AB**), council land (**s 7B**), or common property owned by a body corporate (**s 7C**).

- **S 7 Crown Land**
  - o **Policy issues.**
  - o Time consuming, expensive, tax payer money. See Pamela O'Connor.
  - o Community assets.
  - o **Rights accrue/time starts running when it becomes private land and ceases to be crown land (S 8 of the LAA)**
- **S 7A railroads:**
  - o Stops having public transport corporation to having to constantly monitor fences
  - o Eg train tracks, land on either side, move fence closer.
- **S 7C common property:**
  - o Cant AP if you own one of the lots, but can as a stranger.
  - o Land, which is commonly affected by the owner's corporation, is not affected by adverse possession.
  - o Areas of common property: driveways, garden area, open area. Time is not running.

### **Time period:**

- After **15 years of AP**, **owner** cannot bring an action to recover land (**S 8 of the LAA**) and the title of the owner is extinguished (**s 18 of the LAA**)
- A's interest is not passed to B. A's interest is extinguished.
- Adverse possession doesn't extinguish the rights of 3<sup>rd</sup> parties who have property interest over the land that don't cover to right of possession
  - o Eg easement
- For **chattels** under **S 5 of LAA**, six years from date cause of action accrued.

### **When does time start to run?**

