

CURRENT ISSUES AFFECTING ADVERSE POSSESSION

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Introduction

1. In this lecture, I want to say a word about *Beaulane Properties Ltd v Palmer*¹ and then to address three current issues concerning the intention to possess:
 - (a) Does a person who wrongly believes they are occupying with the owner's consent have the intention to possess?
 - (b) If a squatter encloses the disputed land to keep animals in, rather than to keep people out, does he have the intention to possess?
 - (c) Is it relevant whether the squatter has an existing right, such as an easement or profit à prendre, to use the disputed land?

Beaulane Properties Ltd v Palmer

2. I want to make just two points about this controversial decision. As is now well known, Nicholas Strauss QC held that:
 - (a) The law of adverse possession as stated by the House of Lords in *JA Pye (Oxford) Ltd v Graham*² infringed the human rights of the registered proprietor under Article 1 of the First Protocol of the Convention.
 - (b) Under s.3 of the Human Rights Act 1998, it was possible to re-interpret the Limitation Act 1980 in line with the decision in *Leigh v. Jack*³ where Bramwell B said:

“In order to defeat a title by dispossessing the former owner, acts must be done that are inconsistent with his enjoyment of the soil for the purposes for which he intended to use it”.

¹ [2005] 4 All ER 461

² [2003] 1 AC 419

³ (1879) Ex. D. 264

That was so even though, in *Pye*, Lord Browne-Wilkinson said that Bramwell B's dictum was "heretical and wrong"⁴.

- (c) As Mr. Palmer's use of the disputed land was not inconsistent with any use or intended use of the land by the registered proprietor, Beaulane, his possession of it was not "adverse".
3. First, it is well arguable that Nicholas Strauss QC paid quite insufficient attention to para 8(4) in Sch 1 to the Limitation Act 1980, which provides:

"For the purpose of determining whether a person occupying any land is in adverse possession of the land it shall not be assumed by implication of law that his occupation is by permission of the person entitled to the land merely by virtue of the fact that his occupation is not inconsistent with the latter's present or future enjoyment of the land. This provision shall not be taken as prejudicing a finding to the effect that a person's occupation of any land is by implied permission of the person entitled to the land in any case where such a finding is justified on the actual facts of the case."

4. That provision was introduced, on the recommendation of the Law Reform Committee in its 21st Report, to abolish the principle stated by Lord Denning MR in *Wallis's Cayton Bay Holiday Camp Ltd v Shell-Mex and BP Ltd* [1975] QB 94, that unless the squatter's use was inconsistent with the owner's purposes, the squatter's possession of the land was to be treated as being pursuant to an implied licence from the true owner. Lord Denning said:⁵

"When the true owner of land intends to use it for a particular purpose in the future, but meanwhile has no immediate use for it, and so leaves it unoccupied, he does not lose his title to it simply because some other person enters on it and uses it for some temporary purpose, like stacking materials; or for some seasonal purpose, like growing vegetables. Not even if this temporary or seasonal purpose continues year after year for 12 years, or more: see *Leigh v. Jack* (1879) 5 Ex.D. 264; *Williams Brothers Direct Supply Ltd. v. Raftery* [1958] 1 Q.B. 159; and *Tecbild Ltd. v. Chamberlain* (1969) 20 P. & C.R. 633. The reason is not because the user does not amount to actual possession. The line between acts of user and acts of possession is too fine for words. The reason behind the decisions is because it does not lie in that other person's mouth to assert that he used the land of his own wrong as a trespasser. Rather his user is to be ascribed to the licence or permission of the true owner. By using the land, knowing that it does not belong to him, he impliedly assumes that the owner will permit it: and the owner, by not turning him off, impliedly gives permission."

⁴ Para 45

⁵ At 103

5. Lord Denning's implied licence was, then, no more than a rationalisation of the *Leigh v Jack* principle. Parliament, on the advice of the Law Reform Committee, expressly introduced into the Limitation Acts a provision to make it clear that principle was wrong. Nicholas Strauss did not consider the significance of that, when deciding that the resurrection of the *Leigh v Jack* heresy can be justified under s.3 of the Human Rights Act 1998. Mr Strauss said he was doing no more than interpreting the legislation in the way in which it was understood when enacted⁶. Arguably, that gives insufficient weight to the fact that, since then, Parliament expressly enacted a provision to make it clear that the understanding in question was incorrect.
6. Second, it can be said that the *Leigh v Jack* principle is an uncertain and unsatisfactory basis for trying to make the law compatible with the Convention. The principle does apply where the owner has known future plans for the property – in *Leigh v Jack* to use the land for the construction of a road. It is not clear, however, whether the principle applies where the owner's future plans are not known to the squatter. The principle will not assist where the owner has no particular future plans for the land. It will not assist where the squatter's use of the land is inconsistent with such future plans. Thus the principle does not, on any view, protect the human rights of all landowners, but only those who have future plans for the disputed land, where the squatter's use is consistent with those plans.
7. In a recent County Court decision, where only the squatter was represented, HHJ Viljoen declined to follow *Beaulane* on the ground that the decision did not render UK law compatible with Article 1 of the First Protocol⁷.
8. In *Dann v Wadge*⁸ Professor Abbey, sitting as a Deputy Adjudicator of the Land Registry, declined to grant a squatter's application for first registration of unregistered land. He held that the squatter had been in factual possession of the disputed land, with the intention to possess, for more than 12 years. He rejected the claim of the respondent to the application to have paper title to the disputed land. Despite that, he refused to register the applicant as proprietor. The reason for rejecting the application was that part of the 12 year period had occurred after the Human Rights Act 1998 came into force. The Professor said that, because of the decision of the ECHR in *JA Pye (Oxford) Ltd v United Kingdom*, "the Human Rights legislation stops time running after it came into force". However, he gave no reasons for that decision. Presumably that left the squatter with an unregistered freehold title. It is difficult to see how that assisted the human rights of the paper owner, whoever he was.

The intention to possess

9. On 4 July 2002, the judicial committee of the House of Lords gave judgment in *JA Pye (Oxford) Ltd v Graham*⁹. Lord Browne-Wilkinson delivered the leading speech. All the other members of the House agreed with him. He said that, in order to be in

⁶ See para 213

⁷ *Rehman v Benfield* (Unreported, Kingston County Court 9 March 2006).

⁸ Unreported, 17 November 2005

⁹ [2003] 1 AC 419

possession there were two necessary elements: (1) a sufficient degree of physical custody and control - ‘factual possession’; and (2) an intention to exercise such custody and control on one’s own behalf and for one’s own benefit – the ‘intention to possess’ (para 40). The second of those two elements, the “intention to possess” used to be called the *animus possidendi*, before Lord Woolf abolished Latin.

10. Lord Browne-Wilkinson endorsed (at para 43) the following definition of the intention to possess given by Slade J in *Powell v MacFarlane* (1977) 38 P&CR 452:

“the intention, in one’s own name and on one’s own behalf, to exclude the world at large, including the owner with the paper title if he be not himself the possessor, so far as is reasonably practicable and so far as the processes of the law will allow.’

11. It might have been thought that this statement of the law, at the highest level, would put an end to all doubt and difficulty as to what intention a squatter must demonstrate. However, fortunately for members of the Property Bar Association, this has not proved to be so.

The uncontroversial aspects of the intention to possess

12. Before turning to the problems which I have identified, it is helpful to remind ourselves of certain aspects of the intention to possess which are clear from Lord Browne-Wilkinson’s speech and other cases:

- (a) The squatter must both actually intend to possess, and must manifest that intention by his actions. In *Prudential Assurance Co Ltd v Waterloo Real Estate Inc*¹⁰ Peter Gibson LJ said: “The claimant must of course be shown to have the subjective intention to possess the land but he must also show by his outward conduct that that was his intention.”
- (b) The intention to possess does not require a “confrontational, knowing removal of the true owner from possession”¹¹. The word “adverse” in “adverse possession” means that the possession is without the owner’s consent, not that it is consciously hostile. Thus a squatter who mistakenly believes himself to be the owner will have the intention to possess.¹² So will a squatter who mistakenly believes himself to have a tenancy of the disputed land¹³

¹⁰ [1999] 2 EGLR 85 at 87

¹¹ *Pye* para 38

¹² See e.g. *Hughes v Cork* [1994] EGCS 25

¹³ *Tower Hamlets London Borough Council v Barrett* [2005] EWCA CIV 923 at para 42

- (c) The squatter need not intend to own the land. He need not have a long term intention to acquire a title¹⁴. The required intention is to possess the land for the time being.¹⁵
- (d) The squatter may prefer to be in possession lawfully. He may say that he would have paid for the right to use the land if asked. This does not prevent the squatter having the intention to possess¹⁶.
- (e) The owner's future intentions for the land will ordinarily be irrelevant in considering whether the squatter has the intention to possess. However, if the squatter is aware of a special purpose for which the paper owner uses or intends to use the land and the use made by the squatter does not conflict with that use, that may provide some support for a finding as a question of fact that the squatter had no intention to possess the land in the ordinary sense but only an intention to occupy it until needed by the paper owner. However, there will be few occasions in which such inference could be properly drawn in cases where the true owner has been physically excluded from the land¹⁷.
- (f) The squatter need not intend to keep out the true owner if the owner asks him to leave during the limitation period. The squatter has no right to do that. It is sufficient if he intends to keep the true owner out for the time being and until he is evicted.¹⁸
- (g) If it is unclear whether the squatter demonstrated the intention to possess, rather than merely intending to use the disputed land without excluding others, his claim will fail. If his acts are open to more than one interpretation and he has not made it perfectly clear to the world at large by his actions or words that he has intended to exclude the owner as best he can, the Courts will treat him as not having had the requisite intention. The Courts will require clear and affirmative evidence that the trespasser, claiming that he has acquired possession, not only had the requisite intention to possess, but made such intention clear to the world.¹⁹
- (h) Evidence of the squatter's intentions given by the squatter in the witness box are unlikely to count in his favour, but may tell against him. In *Powell v McFarlane*²⁰, Slade J said: "... past or present declarations as to his intentions, made by a person claiming that he had possession of land on a particular date, may provide compelling evidence that he did *not* have the requisite animus possidendi, in my judgment statements made by such a person, on giving oral evidence in court, to the effect that at a particular time

¹⁴ *Pye* para 42

¹⁵ *Buckinghamshire County Council v Moran* [1990] Ch 623, 643E, *Lambeth London Borough Council v Blackburn* [2001] EWCA Civ 912, (2001) 82 P & CR 494 at para 27

¹⁶ *Pye* para 46

¹⁷ *Pye* para 45

¹⁸ *Lambeth London Borough Council v Blackburn* [2001] EWCA Civ 912, (2001) 82 P & CR 494 at para 17

¹⁹ *Powell v McFarlane* (1977) 38 P & CR 452 at 472

²⁰ (1977) 38 P & CR 452 at 476

he intended to take exclusive possession of the land, are of very little evidential value, because they are obviously easily capable of being merely self-serving, while at the same time they may be very difficult for the paper owner positively to refute. For the same reasons, even contemporary declarations made by a person to the effect that he was intending to assert a claim to the land are of little evidential value for the purpose of supporting a claim that he had possession of the land at the relevant date unless they were specifically brought to the attention of the true owner". In *Bolton MBC v Musa*²¹, Peter Gibson LJ said of evidence from the squatter that: "... such self-serving evidence is hardly ever likely to be of assistance. The ordinary way in which the relevant intention is ascertained is by inference from the actions of the adverse possessor in the light of all the circumstances affecting the land".

- (i) The way in which the intention to possess will be manifested will depend on the nature of the land in question. This is normally demonstrated by enclosure, but this is not invariably required. Ploughing and planting agricultural land without enclosure will suffice.²² In one case last year, it was held that with land running alongside a driveway, consisting of a grass verge and steep banks, it sufficed to maintain a hardcore and gravelled entrances, flanked by walls, to lay another hardcore and gravelled entrance and then maintain it, to mow and cut the verge and bank, to sweep up leaves, and to plant and tend some plants, even though the land was not enclosed²³. Chadwick LJ said: "In a case of this nature, the court must ask itself what it is that would be expected of somebody in possession of land of this kind. What would such a person be expected to be doing in order to demonstrate his intention to exclude the world at large."²⁴

The historical emergence of the intention to possess

13. Before turning to the problems I wish to discuss, let me say a word about the history of the intention to possess. In *Pye*, Lord Browne-Wilkinson said "... there has always, both in Roman law and in common law, been a requirement to show an intention to possess in addition to objective acts of physical possession"²⁵. It might be thought, then, that historical research might be useful in shedding light on the intention to possess. Perhaps there is a rich vein of nineteenth century authority in which the intention to possess was exhaustively examined? Sadly not. Such research has been undertaken by Oliver Radley-Gardner in article called *Civilized Squatting*²⁶. In that article, Mr Radley-Gardner demonstrates that the intention to possess was first mentioned in connection with adverse possession in 1899, by Nathaniel Lindley, then

²¹ (1998) 77 P & CR 36

²² *Seddon v Smith* (1877) 36 LT 168, *Powell v McFarlane* (1977) 38 P & CR 452 at 477: "There are a few acts which by their very nature are so drastic as to point unquestionably, in the absence of evidence to the contrary, to an intention on the part of the doer to appropriate the land concerned. The ploughing up and cultivation of agricultural land is one such act".

²³ *Chapman v Godinn Properties Ltd* [2005] All ER (D) 313 (Jun)

²⁴ *Ibid* at para 28, per Chadwick LJ

²⁵ *Pye* para 40

²⁶ (2005) 25(4) Oxford Journal of Legal Studies p.727

Master of the Rolls, in *Littledale v Liverpool College*²⁷, and that the concept appears to have been imported into English law from the German legal writers, via books by Oliver Wendell Holmes and Frederick Pollock. One can read these books – I have done so – but they are of no help to the practising lawyer seeking to advise on whether a squatter has the intention to possess.

Does a person who wrongly believes they are occupying with the owner's consent have the intention to possess?

14. Here are two quotations from High Court judges. They are taken from adverse possession cases decided last year.
 - (a) “A person who is in factual possession and who intends to remain in possession (and to use that factual possession for his own benefit) so long as the true owner continues to permit him to do so does not have the necessary intention to possess for the purpose of starting a period of limitation running in his favour”: Hart J in *Clowes Developments (UK) Ltd v Walters*²⁸.
 - (b) “An erroneous belief by the occupier that he has the consent of the owner does not mean that he is not in possession of the property”: David Richards J correct to hold, in *Wretham v Ross*²⁹.
15. In *Clowes*, company A granted a woman a licence to occupy a house and land without payment. She moved out, but her daughter and her daughter's husband remained in occupation. The company then sold the land to company B. No new licence was granted by company B. Hart J held that the sale automatically determined the licence. However, as the daughter and her husband thought that they were in occupation with the permission of the owner, they did not have the intention to possess.
16. In *Wretham*, the owner of some sheds granted permission to his neighbour to use them. That licence terminated automatically when the owner died, and no new licence was granted by his successors in title. The neighbour carried on using the sheds. David Richards J held that the termination of the licence on the owner's death made the neighbour's possession unlawful and so adverse.
17. Nor is this difference of approach limited to those two cases. The approach adopted by Hart J was also applied by Laddie J in *Trustees of the Michael Batt Charitable Trust v Adams*³⁰ the squatter let his farm to a tenant. The tenant made use of another field, not belonging to the squatter, but fenced in with the squatter's land. This land did not belong to the squatter but to the adjoining owner. The tenant assumed that, as the disputed land appeared to be part of his landlord's farm, he had the landlord's implied permission to use it. The tenant never knew that the landlord did not have a paper title to it and always treated it as part of his tenancy.

²⁷ [1990] 1 Ch 19

²⁸ [2005] EWHC 669 (Ch) at para 40

²⁹ [2005] EWHC 1259 (Ch) at para 41

³⁰ (2001) 82 P & CR 406

18. Laddie J held that the tenant did not have the intention to possess, because:
- (a) The tenant never knew of the possibility that someone other than the landlord was the title owner. As far as he was concerned, his landlord had not given him an express tenancy over the disputed land, but had permitted him to use it at will. He was not charged for such use. There is nothing here that suggests that it was at any time the tenant's intention to exclude the person whom he believed was the owner of the land. He did not believe he was in adverse possession, and he did not intend to be in adverse possession. During his time on the farm, he never had to turn his mind to the question of adverse possession, and it is impossible to say that he intended such possession.
 - (b) The tenant had given evidence that, in the early years of the tenancy, if the paper title owner had requested him to leave, he might have sought compensation. This, Laddie J said, showed that the tenant would not have made any attempt to resist a call for him to vacate. At the most, he might have asked for some money. This did not prove an intention to exclude the paper title owner.
 - (c) The tenant gave evidence that, once he had been tenant for many years, he would have resisted any request by the paper title owner that he leave, and would not have left without checking the position with the landlord and thereby giving him an opportunity to assert title. Laddie J held that this showed that, even if the tenant would have resisted a claim to possession by the paper title owner, he would not have done so for the purpose of asserting any title on his own behalf. He would have allowed the landlord to assert title.
 - (d) The evidence did not disclose an intention to take adverse possession of the disputed land. On the contrary, it was consistent with the tenant mistakenly believing his possession to be with the consent of the true owner.
19. The approach of David Richards J was applied by the Hong Kong Court of Appeal in *Ho Hang Wan v Ma Ting Cheung*³¹, a license to occupy property terminated automatically on the death of the licensor. The licensees, ignorant of the death, continued in possession. That possession was held by the Hong Kong Court of Appeal to be adverse. The occupiers had the intention to possess. Unequivocal evidence of exclusive physical possession necessarily established the intention to possess. Hunter J.A. quoted with approval from the judgment of Anderson J in *Beaudoin v Aubin*:³² “In this case the possession is certain and unequivocal, and the *animus possidendi* is to be presumed”.
20. The same approach was applied by the Ontario High Court in *Hamson v Jones*³³, the squatters took possession under a contract for the sale of the disputed land which was, in fact, void because contrary to a planning statute, which gave municipalities the

³¹ (1990) 1 HKLR 649

³² 125 DLR (3rd) 277 at 287, quoted at (1990) 1 HKLR 649 at 654D

³³ (1989) 52 DLR (4th) 143

power to designate areas of subdivision control, after which any document made in contravention of the section did not create any interest in the land. Parker CJHC held that the squatters were not licensees were in adverse possession.

21. So who is right? In favour of the Hart/Laddie view, it can be said that someone who intends to make use of property with the owner's permission does not intend to exclude the owner, and that is the essence of the intention to possess. It can also be said that a person given a gratuitous permission to use property does not, unlike a tenant at will, have a right to keep the owner out, and does not intend to keep the owner out. A tenant, even a tenant at will, has the right to the exclusive use of the property so long as the tenancy lasts, and can bring a claim in trespass against the owner if he enters on the property unless he has reserved the right to do so in the tenancy. A gratuitous licensee, however, has no right to keep the owner out, although he is entitled to reasonable notice of the termination of his licence before he can be evicted. Further, it can be said that a licensee occupies in the name of and on behalf of the licensor³⁴, whereas it is of the essence of the intention to possess that the squatter must have the intention "in one's own name and on one's own behalf" to exclude others. If someone intends to occupy with the permission of the owner, he does not intend to occupy in his own name and on his own behalf.
22. In favour of the David Richards/Hong Kong Court of Appeal/Ontario High Court view, it can be argued that a person given the exclusive right to use property by the owner does intend to keep the owner out, albeit only because the owner has agreed to stay out. He intends to exclude the owner by virtue of that permission, and if the permission is terminated without his knowledge, his intention is not affected. It can also be said that this approach is consistent with the decision of the House of Lords in *Governors of Magdalen Hospital v Knotts*³⁵ that where a void lease is granted, time runs in favour of the lessee from the date of the grant. That case dates from 1879, 20 years before the intention to possess was invented by Nathaniel Lindley in 1899, and so naturally there is no discussion in it of the intention to possess. It can further be said that, if there is a tenancy at will, which is then determined on the transfer of the reversion, there can be no doubt that the tenant has the intention to possess, and there is no distinction in principle between the intention of a tenant at will and a licensee.
23. Perhaps the answer to this problem should depend on the nature of the permission given. If it is simply a permission to use the property, but not to use it to the exclusion of the owner, then the licensee probably will never have the intention to exclude the owner, and should not be treated as having the intention to possess. If, however, the permission is for the exclusive use of the property - as where the owner gives the licensee the only keys to the property - then the licensee does intend to exclude the owner and if the licence is terminated, he has the intention to possess sufficient to enable time to run in his favour.

³⁴ *Sze To Chun Keung v Kung Kwok Wai David* [1997] 1 WLR 1232, at 1235F: "For the purposes of limitation, therefore, possession from 1961 must be regarded as having been in the Crown, which possessed through its licensee, the defendant."

³⁵ (1879) 4 App Cas 324

If a squatter encloses the disputed land to keep animals in, rather than to keep people out, does he have the intention to possess?

24. In *London Borough of Hounslow v Minchinton*³⁶ the squatters used the disputed strip as part of their garden. They enclosed the strip so as to keep their dogs in the garden. It was argued that this showed that the enclosure was to keep the dogs in rather than to keep other persons out. Millett LJ rejected that argument, saying³⁷: “Their motive is irrelevant. The important thing is that they were intending to allow their dogs to make full use of what they plainly regarded as their land, and which they used as their land”
25. In other cases, however, the courts have held that motive is relevant, deciding that a fence erected in order to keep animals in, rather than people out, did not manifest an intention to possess³⁸. Most recently, in *Inglewood v Baker*³⁹ a squatter claimed he had been in adverse possession of a triangular parcel of woodland. The squatter had erected a fence in 1984. The Court of Appeal held that the fence had been erected to keep sheep in, not to keep the true owner out. Therefore neither the subjective nor the objective elements of the *animus possidendi* had been made out. However, *Minchinton* was not referred to.
26. The approach of the Court of Appeal to the relevance of motive in those two decisions is not easy to reconcile. However, the facts of the cases were very different. In *Minchinton* the disputed land was a strip of rough land about 3 feet wide at the bottom of the squatter's garden. The original owner of the strip and adjoining land had developed the land to the west of the strip, planted a hedge on the strip to screen the new development, and erected a fence on the east side of the hedge (the side nearest to the development). This cut the strip off from the rest of the owner's land, so that there was no access to the strip from the owner's land. The owner then conveyed the strip to the council. The strip was treated throughout the limitation period as part of the squatters' garden. The strip had been enclosed on the north and south sides, originally by an elderberry tree on one side and a corrugated iron fence on the other, and later by new fences, to prevent the squatters' dogs from escaping from the garden. So physically the disputed land appeared to simply form part of the squatters' garden, due to a mislocated boundary line. The Court of Appeal held that the squatters were in possession. The acts of possession relied on by the squatters were described by Millett LJ as “not substantial”⁴⁰. They consisted of trimming the hedge from time to time, weeding, looking after the elderberry bushes, and keeping a compost heap⁴¹. However, they sufficed to put the squatters in possession because: “... that was the only sensible use of the land. It was rough land at the end of a garden”.

³⁶ (1997) 74 P & CR 221

³⁷ At 233

³⁸ *Fruin v Fruin* [1983] Court of Appeal bound transcript 448, *Trustees of the Michael Batt Charitable Trust v Adams* (2001) 82 P & CR 406

³⁹ [2002] EWCA Civ 1733

⁴⁰ (1997) 74 P & CR 221 at 233

⁴¹ (1997) 74 P & CR 221 at 225

27. In *Inglewood v Baker*⁴², however, the disputed land was a triangle of woodland adjacent to grazing land belonging to the squatter. It looked different to the squatter's adjoining land. The only use made of it was for feeding sheep from feeders, and minor use for dumping rubbish, shooting, playing by children and motorbike riding.
28. The cases can perhaps be reconciled, then, on the basis that in *Minchinton* the intention to possess was manifested by the visible incorporation of the disputed land into the squatters' garden. The erection of the fence was part of that incorporation, and the fact it was done to keep dogs in was irrelevant. In *Inglewood*, however, the only act of importance relied on as manifesting the intention to possess was the erection of the fence itself, so that the motive was important in assessing whether the fence did, in reality, manifest an intention to keep the owner out, or only to keep animals in.
29. If the cases cannot be reconciled, then perhaps *Minchinton* is to be preferred. What matters is the manifested intention, in one's own name and on one's own behalf, to exercise exclusive control of the disputed land. The fact that the intention to make exclusive use of the land is formed because of a desire to keep animals in does not affect the nature or quality of the intention. It explains the reason that the intention was formed, but does not in any way detract from the existence of the intention.

Is it relevant whether the squatter has an existing right, such as an easement or profit à prendre, to use the disputed land?

30. We have already seen that *Littledale v Liverpool College*⁴³ is the case in which the intention to possess was introduced into English law. That case concerned land adjacent to a certain Lane in Liverpool where, we are told, is a barber showing photographs of every head he's had the pleasure to know. Liverpool College had paper title to 2 fields and a grassy strip of land between them separated by hedges. The strip led to a field owned by the plaintiffs, and they had a right of way over the strip to their field from Penny Lane. More than twelve years before the action, the plaintiffs erected a gate at each end of the strip, and since had kept the gates locked and kept the keys.
31. The Court of Appeal held that the plaintiffs had not acquired title to the strip. Lindley MR gave the leading judgment. He said that if the plaintiffs had been strangers, having no right to or over the strip in question, the natural inference would be that they put up these gates in order to exclude every one, and that every one was in fact excluded. But here, the position was different. The plaintiffs had a right to put a gate at the strip on their field. The gate at the Penny Lane end of the strip may well have been put up to protect the strip and the plaintiffs' right of way over it from invasion by the public, and not to dispossess the College. The gate at the Penny Lane end of the strip may well have been put up to protect the strip and the plaintiffs' right of way over it from invasion by the public, and not to dispossess the defendants. There was evidence to show that rubbish was thrown on the strip at the Penny Lane end. He said:

⁴² [2002] EWCA Civ 1733

⁴³ [1990] 1 Ch 19

“They could not be dispossessed unless the plaintiffs obtained possession themselves; and possession by the plaintiffs involves an animus possidendi - i.e., occupation with the intention of excluding the owner as well as other people. The evidence that the plaintiffs never had any such intention is extremely strong. The correspondence shews that until quite recently they only claimed a right of way. Even when they commenced this action they claimed a right of way and no more. It was only at a later stage that they claimed the ownership of the strip. When possession or dispossession has to be inferred from equivocal acts, the intention with which they are done is all-important: see *Leigh v. Jack*. I am myself convinced that the gates were put up, not to exclude the defendants, but to protect the plaintiffs' right of way, and to prevent the public from going along the strip of land now claimed by the plaintiffs.”.

32. Romer LJ agreed. Sir F. H. Jeune said that he had read Lindley MR's judgment and “I am not prepared to differ from it. But I am bound to say that I have arrived at that conclusion with great hesitation.” He concluded, however, he was not I prepared to take the responsibility of differing:

“...because all through there has been an undoubted right of way in the plaintiffs as against the defendants, and it is very difficult to distinguish the acts done by the plaintiffs from acts which they would do, and would have a right to do, in exercise of their right of way. That observation is particularly applicable with regard to the gates. If there had been no right of way I should have thought that, when a man puts gates at each end of a strip of land and locks them, he has done as strong an act as he could do to assert his right to the ownership of the land. Such an act, which is, in fact, an inclosure, has always been held to be one of the strongest things that can be done to assert ownership. But when you find that the man who has done this had a right of way over the land, that one end of the piece of land runs out into a public road, and the other into his own land, and that along each side of the piece of land are hedges in which there has been an opening only for a short time, if ever, the erection of the gates and the locking and keeping them locked would appear referable rather to the exercise of the undoubted right of way than to acts of user such as to constitute dispossession.

In the same way the grazing, although to a less extent, admits, in my view, of explanation. It was necessary to keep down the grass in order to make the right of way practically exercisable by the person entitled to it. Of course, he would not like the grass to grow to such a length that there remained no path over it”.

33. That case was followed by the Court of Appeal in *George Wimpey & Co Ltd v Sohn*⁴⁴. In that case, Sohn had bought the Montpelier Hotel in Brighton in 1952. The hotel was sold with an easement entitling them to use adjacent land as a garden. The land had been fenced off from an adjacent road by the previous owners of the hotel in 1930. Sohn claimed that it had title to the land by adverse possession. The Court of Appeal held that the fencing was equivocal in circumstances where the hotel had a right to use the land as a garden. It was therefore legitimate to look at the evidence of intention, and that showed that the hotel owners had never intended to possess the garden to the exclusion of the freeholder.

34. Harman LJ gave the leading judgment. He said⁴⁵:

"The question here is whether what has been done is enough to exclude the freeholder who has a title on paper. Now it seems to me the only act which has any weight at all is the maintenance of the fences along the road, and the question is whether that fencing must of necessity have been intended to exclude the true owner or whether, as the judge found, it is equivocal and can be explained by the desire of the owners of the Montpelier Hotel or its component parts to keep the public from straying from the road into the gardens backing on the hotel. In other respects nothing was done inconsistent with the view that the Montpelier Hotel owners thought of themselves as merely exercising their rights to use the garden. It seems to me that this is precisely how they did regard themselves and that is shown by the fact that right up to 1960, when the contract was in preparation, it never occurred to the defendants or their predecessors that they had more to sell than the hotel building and easements over the garden. Where an act done is equivocal the intention with which it is done is of importance. This appears very clearly from *Leigh v. Jack*⁴⁶ I quote a passage from the headnote: "Acts of user committed upon land, which do not interfere and are consistent with the purpose to which the owner intends to devote it, do not amount to a 'dispossession' of him, and are not evidence of 'discontinuance of possession' by him...".

35. Later⁴⁷ he said:

"The facts of this case seem to me to be strong to show that the defendants never had any intention to exclude the freeholders. Neither they nor their predecessors in title made any claim at any time to have done so. I agree that the fencing of the road was on the face of it an act of exclusion, but the garden remained a garden and it was on the face of it to protect their rights over this and not to exclude the freeholders that the fencing was done."

36. Russell LJ said⁴⁸

⁴⁴ [1967] Ch 487

⁴⁵ At 506

⁴⁶ (1879) 5 Ex.D. 264

⁴⁷ At 508; Diplock LJ agreed with both Harman and Russell LJ

⁴⁸ At 512

"I am unable to hold that it is established that the occupation by the predecessors of the vendors of the blue land was animus possidendi in the sense of owning the land as distinct from exercising an easement to use it as a garden ... It must, of course, be a very exceptional case in which enclosure of the order indicated will not demonstrate the relevant adverse possession required for a possessory title. But where there is an easement as against the landowner to use the land as a garden, it seems to me that a very clear case must be made to establish possession adverse to the landowner so long as the land continues to be used as a garden".

37. Neuberger LJ has recently raised a question as to the correctness of *Littledale*. In *Tower Hamlets London Borough Council v Barrett*⁴⁹ he said:

"As to factual possession, although the Barretts did not erect the fence which effectively enclosed off the area from access, they installed a gate in it, which they kept locked, retaining the keys, and they maintained and repaired the fence when it was damaged. Enclosure is strong evidence of possession – see per Millett LJ in *London Borough of Hounslow v Minchinton* (1997) 74 P&CR 221 at 230. While it cannot be determinative of the issue in every case, it is worth pointing out that the authority normally cited for the proposition that enclosure is not necessarily decisive, *Littledale v Liverpool College* [1900] 1 Ch 19, was referred to with disapproval (though not on this precise point) in *Pye*'s case at paragraph 43."

38. In *Pye*⁵⁰, Lord Browne-Wilkinson said that there was no need for a squatter to intend to acquire ownership of the disputed land. He then said this about Lindley MR's judgment in *Littledale*:

"A similar manifestation of the same heresy is the statement by Lindley MR in *Littledale v Liverpool College* [1900] 1 Ch 19, p 23 that the paper owners "could not be dispossessed unless the plaintiffs obtained possession themselves; and possession by the plaintiffs involves an animus possidendi ie, occupation with the intention of excluding the owner as well as other people".

39. Neuberger LJ's point is this: if Lindley MR's judgment was founded on a heresy, the correctness of it must be somewhat suspect. It can further be said that in both *Littledale* and *Sohn*, reference was made to the reasoning in *Leigh v Jack* which was said by Lord Browne-Wilkinson in *Pye* to be "heretical and wrong"⁵¹.
40. It is, therefore, necessary to reconsider those decisions carefully. There is no doubt that a person who does no more than use land in a way permitted by an easement or profit à prendre does not manifest the intention to possess. Similarly, if he uses it in a way which goes beyond the rights granted to him, but not so as to manifest an intention to exclude the world at large. But what if he goes further, as in *Littledale* and *Sohn* and himself encloses the land over which he enjoys his right, by erecting locked gates, or fencing, so that no-one can get on to it except with his permission?

⁴⁹ [2005] EWCA CIV 923 at para 39

⁵⁰ Para 43

⁵¹ Para 45

41. As to *Littledale*, a person with a right of way over a track has no right to erect a locked gate at the end of the track. By erecting it, he does exclude the owner of the track and the world at large. However, it is certainly possible that his motive in erecting the gate is to prevent the public from interfering with his right of way. In *Littledale*, the public had thrown rubbish on to the strip, and it may be that the gate at the Penny Lane end was erected to address that problem. This appears to me to raise again the motive/intention issue discussed previously in relation to *Minchinton* and *Inglewood*. If the effect of erecting the locked gate is to exclude the world at large, including the owner, so that the squatter is in exclusive control of the strip, then perhaps it does not matter that his motive is to protect his existing right of way.
42. As to *Sohn*, if there had been nothing more than the enclosure of land which the hotel was entitled to use as a garden in common with others, the decision might be difficult to defend. However, Russell LJ drew attention⁵² to three matters that suggested that the squatters in fact had no intention of possessing the disputed land, despite the fact that, as he said, “ordinarily, of course, enclosure is the most cogent evidence of adverse possession and of dispossession of the true owner”:
- (a) Auction particulars in the past had treated the land as only subject to an easement and not as being in the squatters’ possession.
 - (b) The conveyance of the squatters’ property adjacent to the disputed land had not conveyed the disputed land.
 - (c) There had been an informal partition of the land subject to an easement in common with others, and the fencing could be referred to an intention to continue the easement but excluding the public and excluding the exercise by other householders of their easement over that particular land.
43. It is well arguable that, where a person who has enclosed land only claims an easement over it, that is clear evidence that he does not have the intention to possess, and the decision in *Sohn* can be justified on that basis.

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⁵² At 510-511