

TITLE BY POSSESSION.

This subject is discussed in the Dominion Law Reports in an article written by Mr. E. Douglas Armour, K.C., of the Toronto Bar, as an annotation to some recent cases. The article is as follows:—

The law respecting title by possession, where a trespasser encloses a piece of the adjoining land overhung by the projecting eaves of his neighbour's house seems to be assuming a novel shape. We are not without instances of cases where prior decisions have been accepted without criticism, until at last the law becomes settled beyond hope of reclamation; and the same fate may attend the question which was involved to some extent in the cases of *Rooney v. Petry* (1910), 22 O.L.R. 101, and *DeVault v. Robinson* (1920), 54 D.L.R. 591, 48 O.L.R. 34. *DeVault v. Robinson* followed the other case without criticism, the reasoning being adopted and accepted as correct. It will therefore be convenient to examine the earlier case.

In *Rooney v. Petry*, the plaintiff's north wall was situated about a foot from the northerly boundary of his lot, and the eaves of his house projected over this one foot space. The defendant for "many years" treated the one-foot strip as part of his lawn and sometimes planted flowers in it. The plaintiff was in the habit of using the land to the north of his house for the purpose of painting it. The Court held that the defendant had extinguished the plaintiff's title to the strip but that his title was "subject to the easements, (1) the maintenance of the roof, and (2) the right of entry and support, etc., for painting, etc., the north side of the house and front fence." It is unfortunate that the number of the "many years" was not stated, as the question of the acquisition of an easement is involved therein.

In giving judgment Riddell, J., said, 22 O.L.R., at 107:—"That the right of a person to have his eaves or roof project over another's land is an easement is, of course, elementary, and the power of acquiring such an easement by the statute has been admitted since *Thomas v. Thomas* (1835), 2 Cr. M. & R. 34, 150 E.R. 15; *Harvey v. Walters* (1873), L.R. 8 C.P. 162; *Lemmon v. Webb*, [1894] 3 Ch. 1, at 18."

Let us now examine these three cases, in order to ascertain whether they decide that a projecting eave constitutes an easement.

In *Thomas v. Thomas*, 2 Cr. M. & R. 34, at 36, 150 E.R. 15, the plaintiff complained that the defendant by building had obstructed a drain which discharged through the defendant's premises (which need not be further remarked upon) and that the building was "so near to the said wall and to the thatch thereof, that by reason thereof . . . the rain which from time to time descended to and fell upon the thatch of the said wall was wholly prevented from dripping and falling from the thatch thereof in manner aforesaid." The issues in the case were two, viz.: (1) whether unity of possession had extinguished the easement of dripping or shedding water, and (2) whether the plaintiff by having raised the height of his wall had lost his easement. The effect of the judgment on the latter point is shortly and correctly expressed in the head-note:—"Where a party has a right to have the droppings of rain