

We return here to the middle road.

<u>Century</u>	<u>Type of Action</u>
12th	<u>Writ of Right</u>
13th	<div> <div> <u>Novel Disseisin</u> <u>Mort d'Ancestor</u> </div> <div> <u>Trespass</u> </div> </div>
14th	<div> <div> <u>q.c.f.</u> </div> <div> <u>de ejectione firme</u> </div> </div>
15th	
16th	<u>ejectment</u>
17th	(Fall into disuse)

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damages for an injury to possession. Claim of freehold is not necessary; hence the lessee may bring them. Indeed, originally, only the lessee could bring ejectment.

4. Ejectment 16th century style, the action to recover possession of land brought by a freeholder employing first a real lessee and then a fictitious one. What is the effect of this action on the notion of relativity of title? Curiously, that issue is still being debated in the 19th century. Indeed, it is one way of stating the issue in *Tapscott*.

III. TAPSCOTT v. COBBS

1. Let us suppose that that Mrs. Cobbs wants to sue in 1250 rather than 1854. What action should she have brought?
2. Hence what is happening in *Tapscott* is that what was clear in 1250, etc., has become unclear because of the change in the form of the action. The reason that it is unclear is because the bifurcated process contemplated by the procedure of the old real actions can no longer be followed. The concept of *res judicata*.
3. How does the court formulate the result that it reaches?
 - a. Possession is good title against a wrongdoer.
 - b. If the ancestor was in possession, the law presumes that the heir is.
4. What does the first sentence of the opinion mean? “It is no doubt true, as a general rule, that the right of a plaintiff in ejectment to recover, rests on the strength of his own title, and is not established by the exhibition of defects in the title of the defendant, and that the defendant may maintain his defense by simply showing that the title is not in the plaintiff, but in some one else.”
5. Should Mrs. Cobbs be protected?
 - a. Adverse possession.
 - b. Title in equity.
 - c. Improvements leading to an estoppel against the true owner.

IV. WINCHESTER v. CITY OF STEVENS POINT

1. Can we say that as a general matter the *jus tertii* defense will not be allowed in actions involving land? If the answer to that question is ‘yes’, what do we make out of *Winchester*?

<https://www.google.com/maps/place/1745+Briggs+St,+Stevens+Point,+WI+54481/@44.5249002,-89.5734,3061m/data=!3m1!1e3!4m2!3m1!1s0x88005ae0be1315:0x886be6e944a73e7f>

2. In the first place, what does the case hold?
3. Why *Winchester* different from *Tapscott*?
 - a. She undertook to prove ownership?
 - b. She must prove ownership because she’s seeking permanent damages?
 - i. How to do this at common law.
 - ii. The problem of sovereign immunity.
4. Suppose that it had not been the city of Stevens Point that built the dike, but Joe and Irma Doaks, two neighboring landowners. What action, what result? Herewith of ejectment coupled with trespass for mesne profits.
5. The concept of inverse condemnation.

6. Should the city be allowed to raise the *jus tertii*?
 - a. What happened to the policy of protecting peaceable possession?
 - b. Need we worry about the city having to pay twice?
 - c. Is there any reason why the city should not have to pay at least once? Or, to put it another way, is it a sensible concept that the city should not have to pay someone who cannot show that she is owner?

V. SUMMARY

1. Historically our concept of ownership of land is based on a series of actions that do not try title but try relatively better rights to possession, called seisin. Both elements are important: ‘possession’ and ‘relatively better’.
2. When the historical actions on which that notion was based disappeared, the question became whether the notion of ownership based on relatively better possessory title also disappeared. By and large, that question was answered ‘no’. *Tapscott* is typical. It certainly reaches the result that would have been achieved under the old real actions. What it says is slightly different, but not much, from what I said above. The formulation that we used was that peaceable possession is good title against a wrongdoer. It then turned out that a wrongdoer was not just someone who came with three goons and gave the possessor the bum’s rush, but anyone who entered on a peaceable possessor, even when the peaceable possessor wasn’t there, maybe even when she’d never been there.
3. At first glance *Winchester* seems to be very different. There’s certainly language in *Winchester* that suggests a sharp distinction between possession and ownership, and the dissent, in its effort to show how much out of the mainstream the opinion is, has the curious effect of reinforcing this language. We suggested, however, that *Winchester* and *Tapscott* could be reconciled, and that the way to do it was by pointing out that *Winchester* involved an action for permanent damages to a freehold. That led to the question what was that action historically and to the startling proposition that the action didn’t exist historically and that its introduction was necessitated by the combination of the concept of sovereign immunity and the constitutional provisions forbidding the taking of property by the government without the payment of just compensation.
4. That still does not decide the question whether the city should compensate someone who cannot show that she is the true owner. I would suggest that the policy of protecting peaceable possession is still there. And that the problem of the possibility of someone showing up with a better title is not unsurmountable. The states are split in the result that they reach on this issue. Most compensate the peaceable possessor.
5. On the basic question, American courts today generally follow the rule of *Tapscott* and not that of *Winchester*.
6. On the eminent domain question, very few American jurisdictions today seem to have the same rule for condemnation proceedings as Wisconsin was developing in 1883. That is to say, most give the possessor the condemnation award unless someone can show better title than the possessor.

VI. WHY PROTECT POSSESSION? PRINCIPLES AND POLICIES

1. Proof (notice how nicely it works in *Tapscott* and how it would have worked had they gone with possession in *Winchester*). That’s a policy in the more technical sense.
2. Peace. From the point of view of society at large or from the point of view of the individuals involved. That, too, is a policy in the more technical sense.

3. Possession worth protecting in itself? That's a principle.