

## Section 2. SOME LEGAL CONSEQUENCES OF THE LABEL “POSSESSION” (HEREIN OF *JUS TERTII*)

The following materials raise what seems at first glance to be a relatively simple question: At time one *P* possesses something—it could be land or it could be personal property, like a watch or fox pelt. Somehow *P* loses possession of the thing, and at time two *D* has possession of it. *P* sues *D* to get the thing back or for its value, and *D* admits that he does not own the thing but claims that *P* does not own it either and that some third person, *T*, is, in truth, the owner. (This is known as the *jus tertii* defense, from the Latin meaning “right of a third party.”) The question is can *D* raise the *jus tertii* defense or will he lose unless he can show that he, *D*, has a better right to the thing than *P*? (There is a subsidiary question: if *D* is allowed to raise the *jus tertii* defense, will he have to prove that *T* owns the thing or will *P* have the burden of proving that he, *P*, is the owner?)

It may surprise you to learn that it was not until quite recently that the law could give even the broad outlines of answers to these questions, and that there is still considerable disagreement about the details. Part of the reason for both the lateness of the general resolution and the disagreement is that the *jus tertii* defense may be raised in a number of different contexts, and lawyers and judges were (and remain) uncertain whether the answer provided in one context should be applied in another.

### 2 F. POLLOCK & F. MAITLAND, HISTORY OF ENGLISH LAW BEFORE THE TIME OF EDWARD I 40–44 (2d ed. 1898)

... Why does our law protect possession? Several different answers have been, or may be, given to this question. There is something in it that attracts the speculative lawyer, for there is something that can be made to look like a paradox. Why should law, when it has on its hands the difficult work of protecting ownership and other rights in things, prepare puzzles for itself by undertaking to protect something that is not ownership, something that will from time to time come into sharp collision with ownership? Is it not a main object of law that everyone should enjoy what is his own *de iure*, and if so why are we to consecrate that *de facto* enjoyment which is signified by the term *possession*, and why, above all, are we to protect the possessor even against the owner?

It is chiefly, though not solely, in relation to the classical Roman law that these questions have been discussed, and, if any profitable discussion of them is to be had, it seems essential that some definite body of law should be examined with an accurate heed of dates and successive stages of development. If, scorning all relations of space and time, we ask why law protects possession, the only true answer that we are likely to get is that the law of different peoples at different times has protected possession for many different reasons. Nor can we utterly leave out of account motives and aims of which an abstract jurisprudence knows nothing. That simple justice may be done between man and man has seldom been the sole object of legislators; political have interfered with juristic interests. An illustration may make this plainer. We may well believe that Henry II. when he instituted the possessory assizes was not without thought of the additional strength that would accrue to him and his successors, could he make his subjects feel that they owed the beatitude of possession to his ordinance and the action of his court. Still, whatever may be the legislator's motive, judges must find some rational principle which shall guide them in the

administration of possessory remedies; and they have a choice between different principles. These may perhaps be reduced in number to four, or may be said to cluster round four types.

In the first place, the protection given to possession may be merely a provision for the better maintenance of peace and quiet. It is a prohibition of self-help in the interest of public order. The possessor is protected, not on account of any merits of his, but because the peace must be kept; to allow men to make forcible entries on land or to seize goods without form of law, is to invite violence. Just so the murderer, whose life is forfeited to law, may not be slain, save in due form of law; in a civilized state he is protected against irregular vengeance, not because he deserves to live, for he deserves to die, but because the permission of revenge would certainly do more harm than good to the community. Were this then the only principle at work, we should naturally expect to find the protection of possession in some chapter of the criminal law dealing with offences against public order, riots, affrays, and the like.

Others would look for it, not in the law of crimes, but in the law of torts or civil injuries. The possessor's possession is protected, not indeed because he has any sort of right in the thing, but because in general one can not disturb his possession without being guilty, or almost guilty, of some injury to his person, some act which, if it does not amount to an assault, still comes so dangerously near to an assault that it can be regarded as an invasion of that sphere of peace and quiet which the law should guarantee to every one of its subjects. This doctrine which found expression in Savigny's famous essay has before now raised an echo in an English court:— 'These rights of action are given in respect of the immediate and present violation of possession, independently of rights of property. They are an extension of that protection which the law throws around the person.'

A very different theory, that of the great Ihering, has gained ground in our own time. In order to give an adequate protection to ownership, it has been found necessary to protect possession. To prove ownership is difficult, to prove possession comparatively easy. Suppose a landowner ejected from possession; to require of him to prove his ownership before he can be reinstated, is to require too much; thieves and land-grabbers will presume upon the difficulty that a rightful owner will have in making out a flawless title. It must be enough then that the ejected owner should prove that he was in possession and was ejected; the ejector must be precluded from pleading that the possession which he disturbed was not possession under good title. Possession then is an outwork of property. But though the object of the law in protecting possession is to protect the possession of those who have a right to possess, that object can only be obtained by protecting every possessor. Once allow any question about property to be raised, and the whole plan of affording easy remedies to ousted owners will break down. In order that right may be triumphant, the possessory action must be open to the evil and to the good, it must draw no distinction between the just and the unjust possessor. The protection of wrongful possessors is an unfortunate but unavoidable consequence of the attempt to protect rightful possessors. This theory would make us look for the law of possession, not in the law of crimes, nor in the law of torts, but in very close connexion with the law of property.

There is yet another opinion, which differs from the last, though both make a close connexion between possession and proprietary rights. Possession as such deserves protection, and really there is little more to be said, at least by the lawyer. He who possesses has by the mere fact of his possession more right in the thing than the non-possessor has; he of all men has most right in the thing until someone has asserted and proved a greater right. When a thing belongs to no one and is capable of appropriation, the mere act of taking possession of it gives right against all the world; when a thing belongs to *A*, the mere fact that *B* takes possession of it still gives *B* a right which is good against all who have no better.

An attempt might be made, and it would be in harmony with our English modes of thought, to evade any choice between these various 'abstract principles' by a frank profession of the

utilitarian character of law. But the success which awaits such an attempt seems very doubtful; for, granted that in some way or another the protection of possession promotes the welfare of the community, the question still arises, why and in what measure this is so. Under what sub-head of 'utility' shall we bring this protection? Shall we lay stress on the public disorder which would be occasioned by unrestricted 'self-help,' on the probability that personal injuries will be done to individuals, on the necessity of providing ready remedies for ousted owners, on the natural expectation that what a man possesses he will be allowed to possess until some one has proved a better title? This is no idle question, for on the answer to it must depend the extent to which and the mode in which possession ought to be consecrated. Measures, which would be quite adequate to prevent any serious danger of general disorder, would be quite inadequate to give the ejected owner an easy action for recovering what is his. If all that we want is peace and quiet, it may be enough to punish ejectors by fine or imprisonment; but this does nothing for ejected possessors, gives them no recovery of the possession that they have lost. Again, let us grant that the ejected possessor should be able to recover the land from the ejector if the latter is still in possession; but suppose that the land has already passed into a third hand; shall the ejected possessor be able to recover it from him to whom the ejector has given or sold it? If to this question we say Yes, we shall hardly be able to justify our answer by any theory which regards injury to the person, or something very like injury to the person, as the gist of the possessory action, for ere we shall be taking possession away from one who has come to it without violence.

Now we ought—so it seems to us—to see that there well may be a certain truth in all these theories. That the German jurists in their attempts to pin the Roman lawyers down to some one neat doctrine of possession and of the reasons for protecting it, may have been engaged on an impossible task, it is not for us to suggest in this place; but so far as concerns our own English law we make no doubt that at different times and in different measures every conceivable reason for protecting possession has been felt as a weighty argument and has had its influence on rights and remedies. At first we find the several principles working together in harmonious concert; they will work together because as yet they are not sharply defined. Gradually their outlines become clearer; discrepancies between them begin to appear; and, as the result of long continued conflict, some of them are victorious at the expense of others.

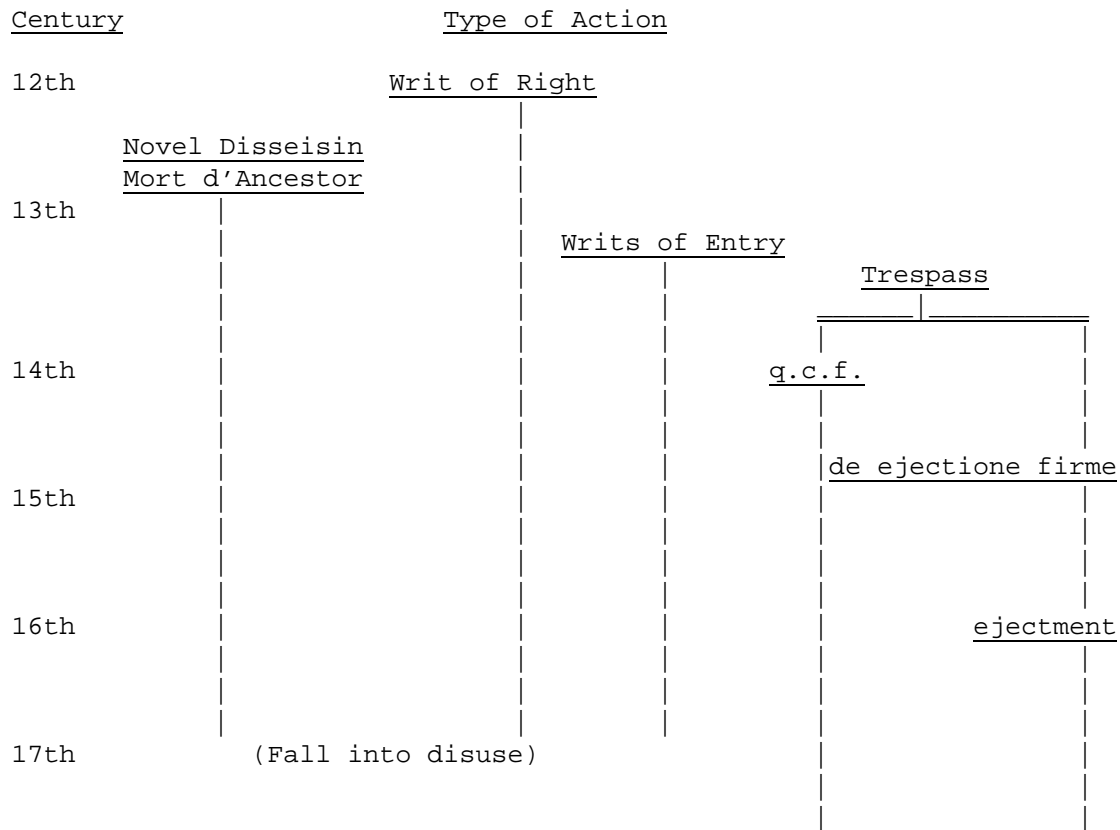
#### ***Note on the History of Actions to Recover Real Property***

The next case, *Tapscott v. Cobbs*, involves an action in ejectment brought to recover possession of land. The history of the common law actions to recover real property is an extraordinarily complex one, only the briefest outlines of which can be given here.

The forms of action were abolished at various times in various places over the course of the nineteenth century. In a work published in 1909, F.W. Maitland said, "The forms of action we have buried, but they still rule us from their graves." *THE FORMS OF ACTION AT COMMON LAW* 2 (1909). Whether that statement is still true a hundred years later, we may have some doubt, but a nodding acquaintance with the forms does help to explain how we got to where we are today, and we would almost certainly not be in the same place were it not for the forms. Consider the following graphic, which traces the rise and fall of various actions that concern real property, or that, with some pushing and hauling can be made to concern real property. The writ of right, novel disseisin, mort d'ancestor, and the writs of entry are the "real" actions. Trespass and its derivatives are "personal" actions. Originally, the real actions were the only way in which the plaintiff could recover real property specifically. The personal actions, including trespass to land (q.c.f. = *quare clausum fregit*, "because he [the defendant] broke the close"),<sup>1</sup> and *de ejectione*

<sup>1</sup> This was the standard action for trespass to land corresponding in importance to the action *de bonis asportatis* ('concerning goods taken away') for chattel.

*firmæ* ("concerning ejectment from a leasehold") only resulted for the successful plaintiff in the recovery of money damages.



1. *Seisin and the Real Actions*. At early common law there were numerous real actions differing in the circumstances under which they could be brought. They formed an array extending from the situation where the plaintiff relied on a very ancient seisin, on the one hand, down to the case where he relied on his own seisin, which may have lasted only a few days. Novel disseisin was available, at least initially, only where the defendant had himself disseised the plaintiff, and that within a relatively recent period. Mort d'ancestor was available where a very close ancestor of the plaintiff had died, and the defendant got onto the property before the plaintiff-heir could. The writs of entry alleged specific flaws in the defendant's title, such as that the plaintiff had leased him the land for a term that had now expired. The writ of right, on the other hand, was available for a plaintiff who claimed on the basis of seisin more ancient than that alleged in the other actions, and it could, in most cases, be brought by someone who had lost one of the other actions. See A. SIMPSON, AN INTRODUCTION TO THE HISTORY OF THE LAND LAW 35-37 (1961) <this should be updated to the 2d ed. 1986>.

The history of these actions is largely the story of how they became so complicated, dilatory and [p\*55] confused that they were no longer satisfactory as actions to try title. What the plaintiff sought to recover in the various real actions was the seisin of the land. In the twelfth century, the concept of seisin was virtually identical to actual (or *defacto*) possession. Anyone could tell who was seised of a particular piece of land, because that person was usually "sitting" (whence the word "seisin" is derived) on the land. Likewise, disseisin was a simple ejection from land. By the end of the Middle Ages, seisin and disseisin had become highly technical, legalistic terms. Simpson attributes this development to a process by which the law concerning the title to land

was “elaborated to serve the needs of policy and justice,”<sup>2</sup> and, since seisin lay at the root of all title, the concept was correspondingly refined, modified and elaborated.

As the old real actions became more complicated and more dilatory, they also became less and less satisfactory as means to try title to land, and lawyers began to employ other means to get the job done.

... In the fifteenth century considerable use was made of trespass and other personal actions to try title to land. Before the action of ejectment was devised in the sixteenth century trespass *quare clausum fregit*, for example, could be employed; by appropriate pleading, in which the alleged trespasser justified his entry, a question of title would arise, and the court would have to settle it. Specific recovery of the land could not be ordered, but a judicial decision as to title would often in practice settle a dispute . . . . Very frequently actions were brought on the Statutes of Forcible Entry. These statutes had made forcible entry a criminal offence; the courts allowed a civil action to lie upon them, and these actions performed in the fifteenth century much the same function as the assize of novel disseisin had performed at an earlier period. The popularity of these actions is an indication of the state of decay to which novel disseisin had come. Yet for all their archaic procedure and ludicrous complexity the old real actions were still in frequent use until late in the sixteenth century.

A. SIMPSON, *supra*, at 42.

2. *Ejectment*. While the old real actions protected the person who had seisin, the person whose possessory right was founded on a lease was not protected by a real action in the king’s courts. By the fourteenth century, however, he was granted an action against those who dispossessed him, known as an action *de ejectione firmæ*, or simply the action of ejectment. This action was a brand of trespass alleging force and arms and resulting, like all trespass actions, in money damages. In the sixteenth century, however, perhaps because of the rapid inflation in that period, the king’s courts began to give the dispossessed lessee who won an ejectment action specific recovery of land.

At this point, the history becomes somewhat obscure. Perhaps the pleading in the old real actions had become too precise or the delays too great. In any event, the lawyers for persons claiming a freehold decided that it would be advantageous if their clients had the remedies of a lessee. In order to achieve this, they would have their client enter the claimed land (a rightful act), execute a lease to a friend, leave the land, and wait for the friend to be ejected by the possessor. The friend then sued in ejectment relying on his lessor’s title. If the friend won the judgment, he would then be placed into possession by the sheriff and convey his leasehold interest back to the original claimant. As time went [p\*56] on, the whole process of entry, lease and ejectment became fictionalized, but the memory of the origin of the action remained into the nineteenth century in the way in which the case was styled: “John Doe [a totally fictional party by this time] ex demissione [as a result of the lease of] Peter Martin versus Charles Donahue.”

With the ready availability of the action of ejectment, the real actions fell into disuse. The majority of them were abolished in England by the Real Property Limitation Act of 1833, 3 & 4 Will. 4, c. 27, 36, 37, and they never enjoyed much currency in the United States. But the question remained what the new action had done to the theory of the old real actions. Some thought that it replaced the older notion of title grounded upon relatively better possessory rights with a notion of absolute ownership. See 7 W. HOLDSWORTH, *HISTORY OF ENGLISH LAW* 57–81 (2d ed. 1937); Holdsworth, *Terminology and Title in Ejectment—A Reply*, 56 L.Q. Rev. 479 (1940). Others felt that no such fundamental change had been made. See Hargreaves, *Terminology and Title in Ejectment*, *id.* at 376. For a useful summary and analysis, including a

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<sup>2</sup> A. SIMPSON, *AN INTRODUCTION TO THE HISTORY OF THE LAND LAW* 38 (1961).

discussion of the "general rule" mentioned at the beginning of *Tapscott v. Cobbs*, *infra*, see Bordwell, *Ejectment Takes Over*, 55 IOWA L. REV. 1089 (1970).

For more on the history of real actions, see generally D. SUTHERLAND, *THE ASSIZE OF NOVEL DISSEISIN* (1973); S. MILSOM, *HISTORICAL FOUNDATIONS OF THE COMMON LAW* 119–65 (2d ed. 1981); A. SIMPSON, *supra*, at 24–43, 70–72, 87–88, 135–41, 259. For a general discussion of the relation of seisin to possession in our law, see Philbrick, *Seisin and Possession as the Basis of Legal Title*, 24 IOWA L. REV. 268 (1939).

### **TAPSCOTT v. COBBS**

Court of Appeals of Virginia.

52 Va. (11 Gratt.) 172 (1854).

[This was an action in ejectment brought by the lessee of Elizabeth A. Cobbs against William Tapscott. The land in question originally belonged to Thomas Anderson. When he died in 1800, he left a will giving his executors the power to sell the land. In 1802, the executors obtained a patent (which Anderson had not done, though he had the land surveyed). Some time between 1820 and 1825, it appears that the executors contracted to sell the land to Sarah Lewis. Later, they put the land up to auction, and it was knocked off to Robert Rives, one of the executors. There was no evidence, however, that either Mrs. Lewis or Rives paid the purchase price or received a deed. In 1825, Rives bought an interest in another tract of land from Mrs. Lewis and agreed to pay her for it by paying the purchase price of the land at issue in this case to the executors. In 1826, in a document settling the Anderson estate Rives assumed the liability for the purchase price of the land. Shortly after her purchase contract was made, Mrs. Lewis took possession of the land, built upon it and improved it, and lived there until her death in 1835. There was no evidence that the heirs of Mrs. Lewis (Mrs. Cobbs and the other lessors) occupied the land after Mrs. Lewis' death. Tapscott took possession of the land in 1842 without pretense of title. In 1844, he made an entry with the surveyor of the county with a view to obtaining the title to it. Defendants demurred to the evidence, judgment was given upon demurrer for the plaintiffs, and defendant appealed.] . . .

DANIEL, J. 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 [p\*57] that the defendant may maintain his defense by simply showing that the title is not in the plaintiff, but in some one else. And the rule is usually thus broadly stated by the authorities, without qualification. There are, however, exceptions to the rule as thus announced, as well established as the rule itself. As when the defendant has entered under the title of the plaintiff he cannot set up a title in a third person in contradiction to that under which he entered. Other instances might be cited in which it is equally as well settled that the defendant would be estopped from showing defects in the title of the plaintiff. In such cases, the plaintiff may, and often does recover, not by the exhibition of a title good in itself, but by showing that the relations between himself and the defendant are such that the latter cannot question it. The relation between the parties stands in the place of title; and though the title of the plaintiff is tainted with vices or defects that would prove fatal to his recovery in a controversy with any other defendant in peaceable possession, it is yet all sufficient in a litigation with one who entered into the possession under it, or otherwise stands so related to it that the law will not allow him to plead its defects in his defense.

Whether the case of an intrusion by a stranger without title, on a peaceable possession, is not one to meet the exigencies of which the courts will recognize a still further qualification or explanation of the rule requiring the plaintiff to recover only on the strength of his own title, is a question which, I believe, has not as yet been decided by this court. And it is somewhat remarkable that there are but few cases to be found in the English reporters in which the precise question has been decided or considered by the courts.

The cases of *Read & Morpeth v. Erington*, Croke Eliz. 321; *Bateman v. Allen*, Ibid. 437; and *Allen v. Rivington*, 2 Saund. R. 111, were each decided on special verdicts, in which the facts with respect to the title were stated. In each case it was shown that the plaintiff was in possession, and that the defendant entered without title or authority; and the court held that it was not necessary to decide upon the title of the plaintiff, and gave judgment for him. In the report of *Bateman v. Allen*, it is said that Williams Sergeant moved, "that for as much as in all the verdict it is not found that the defendant had the primer possession, nor that he entered in the right or by the command of any who had title, but that he entered on the possession of the plaintiff without title, his entry is not lawful;" and so the court held.

And in *Read & Morpeth v. Erington*, it was insisted that for a portion of the premises the judgment ought to be for the defendant, in as much as it appeared from the verdict that the title to such portion was outstanding in a third party; but the court said it did not matter, as it was shown that the plaintiff had entered, and the defendant had entered on him.

I have seen no case overruling these decisions. It is true that in *Haldane v. Harvey*, 4 Burr. R. 2484, the general doctrine is announced that the plaintiff must recover on the strength of his own title; and that the "possession gives the defendant a right against every man who cannot show a good title." But in that case the circumstances under which the defendant entered, and the nature of the claim by which he held, do not appear; and the case, therefore, cannot properly be regarded as declaring more than the general rule. . . .

In this country the cases are numerous, and to some extent conflicting, yet I think that the larger number will be found to be in accordance with the earlier English decisions. I have found no case in which the question seems [p\*58] to have been more fully examined or maturely considered than in *Sowder, & c. v. McMillan's heirs*, 4 Dana's R. 456. The views of the learned judge (Marshall) who delivered the opinion in which the whole court concurred, are rested on the authority of several cases in Kentucky, previously decided, on a series of decisions made by the Supreme Court of New York, and on the three British cases of *Bateman v. Allen*, *Allen v. Rivington*, and *Read & Morpeth v. Erington*, before mentioned. "These three cases (he says) establish unquestionably the right of the plaintiff to recover when it appears that he was in possession, and that the defendant entered upon and ousted his possession, without title or authority to enter; and prove that when the possession of the plaintiff and an entry upon it by the defendant are shown, the right of recovery cannot be resisted by showing that there is or may be an outstanding title in another; but only by showing that the defendant himself either has title or authority to enter under the title."

"It is a natural principle of justice, that he who is in possession has the right to maintain it, and if wrongfully expelled, to regain it by entry on the wrongdoer. When titles are acknowledged as separate and distinct from the possession, this right of maintaining and regaining the possession is, of course, subject to the exception that it cannot be exercised against the real owner, in competition with whose title it wholly fails. But surely it is not accordant with the principles of justice, that he who ousts a previous possession, should be permitted to defend his wrongful possession against the claim of restitution merely by showing that a stranger, and not the previous possessor whom he has ousted, was entitled to the possession. The law protects a peaceable possession against all except him who has the actual right to the possession, and no other can rightfully disturb or intrude upon it. While the peaceable possession continues, it is protected against a claimant in the action of ejectment, by permitting the defendant to show that a third person and not the claimant has the right. But if the claimant, instead of resorting to his action, attempt to gain the possession by entering upon and ousting the existing peaceable possession, he does not thereby acquire a rightful or a peaceable possession. The law does not protect him against the prior possessor. Neither does it indulge any presumption in his favor, nor permit him to gain any advantage by his own wrongful act." . . .

To the same effect are the decisions in New Jersey, Connecticut, Vermont and Ohio. . . .

In Delaware, North Carolina, South Carolina, Indiana, and perhaps in other states of the Union, the opposite doctrine has been held.

In this state of the law, untrammelled as we are by any decisions of our own courts, I feel free to adopt that rule which seems to me best calculated to attain the ends of justice. The explanation of the law (as usually announced) given by Judge Marshall in the portions of his opinion which I have cited, seems to me to be founded on just and correct reasoning; and I am disposed to follow those decisions which uphold a peaceable possession for the protection as well of a plaintiff as of a defendant in ejectment, rather than those which invite disorderly scrambles for the possession, and clothe a mere trespasser with the means of maintaining his wrong, by showing defects, however slight, in the title of him on whose peaceable possession he has intruded without shadow of authority or title.

The authorities in support of the maintenance of ejectment upon the force of a mere prior possession, however, hold it essential that the prior possession must have been removed by the entry or intrusion of the defendant; and that the entry under which the defendant holds the possession [p\*59] must have been a trespass upon the prior possession. *[S]owde[r] v. McMillan's heirs*, 4 Dana's R. 456. And it is also said that constructive possession is not sufficient to maintain trespass to real property; that actual possession is required, and hence that where the injury is done to an heir or devisee by an abator, before he has entered, he cannot maintain trespass until his re-entry. 2 Tucker's Comm. 191. An apparent difficulty, therefore, in the way of a recovery by the plaintiffs, arises from the absence of positive proof of their possession at the time of the defendant's entry. It is to be observed, however, that there is no proof to the contrary. Mrs. Lewis died in possession of the premises, and there is no proof that they were vacant at the time of the defendant's entry. And in Gilbert's Tenures 37, (in note,) it is stated, as the law, that as the heir has the right to the hereditaments descending, the law presumes that he has the possession also. The presumption may indeed, like all other presumptions, be rebutted: but if the possession be not shown to be in another, the law concludes it to be in the heir.

The presumption is but a fair and reasonable one; and does, I think, arise here; and as the only evidence tending to show that the defendant sets up any pretense of right to the land, is the certificate of the surveyor of Buckingham, of an entry by the defendant, for the same, in his office, in December 1844; and his possession of the land must, according to the evidence, have commenced at least as early as some time in the year 1842; it seems to me that he must be regarded as standing in the attitude of a mere intruder on the possession of the plaintiffs.

Whether we might not in this case presume the whole of the purchase money to be paid, and regard the plaintiffs as having a perfect equitable title to the premises, and in that view as entitled to recover by force of such title; or whether we might not resort to the still further presumption in their favor, of a conveyance of the legal title, are questions which I have not thought it necessary to consider; the view, which I have already taken of the case, being sufficient, in my opinion, to justify us in affirming the judgment.

ALLEN, MONCURE and SAMUELS, JJ., concurred in the opinion of DANIEL, J.

LEE, J., dissented.

Judgment affirmed.

#### *Note on Sovereign Immunity and the Winchester Case*

The next case, *Winchester v. City of Stevens Point*, is an action for permanent damages, i.e., reduction in land value, brought by a landowner against a city which had built a dike which obstructed her access to her land and had caused her land to be flooded. In England, it was clear that one could not sue the king unless he had consented to be sued, and the same principle was



applied in the United States to the states and to the United States. But the City of Stevens Point is not the State of Wisconsin, and the principle of sovereign immunity does not necessarily apply to cities. Nonetheless, Wisconsin, like most American states, held until quite recently, that a municipal corporation could not be sued for the torts of its employees and agents even when they are acting within the scope of their employment or under the city's direction. *See, e.g., Hayes v. City of Oshkosh*, 33 Wis. 314 (1873) (city not liable for negligent operation of a fire engine as a result of which plaintiff's stock of goods was destroyed). Even today in Wisconsin, and in most states where governmental tort immunity has been abolished, there are limits on the amount which may be recovered (\$50,000 maximum in Wisconsin) and on the types of torts for which recovery may be had (in Wisconsin no recovery for intentional torts and no recovery for acts done in exercise of legislative or judicial functions), and special procedures (in general, in Wisconsin, within 120 days of the event a complaint must be submitted to an administrative body for settlement). *See WIS.STAT.ANN.* § 893.80 (West 2012).

If a city is immune from suit, however, how is the fifth amendment to the United States Constitution ("nor shall private property be taken for public use without the payment of just compensation") and the equivalent Wisconsin provision (WIS.CONST. art. I, § 13) to be enforced? Suppose the city simply takes a citizen's property for a public purpose and doesn't pay him for it. Throughout the nineteenth century the courts were groping for ways to enforce the just compensation provision of the Constitution, while at the same time keeping intact the basic principle that governments were not liable in tort. *See Brauneis, The First Constitutional Tort: The Remedial Revolution in Nineteenth-Century State Just Compensation Law*, 52 VAND. L. REV. 58–141 (1999); Scheiber, *The Road to Munn: Eminent Domain and the Concept of Public Purpose in the State Courts*, in *LAW IN AMERICAN HISTORY* 392 (Perspectives in American History No. 5, D. Fleming & B. Bailyn ed. 1971); *see generally* Frug, *The City as a Legal Concept*, 93 HARV.L.REV. 1057 (1980). We will have occasion later on to examine how twentieth century law has resolved this problem. In Wisconsin, at the time of the *Winchester* case, the courts simply recognized that certain kinds of cases were exceptions to the general rule of immunity. *See, e.g., Spelman v. City of Portage*, 41 Wis. 144, 148 (1876) (per Cole, J.: "We know of no principle of law which justified the city in making an embankment without proper culverts or drains, and thus damming up the waters and causing them to destroy plaintiff's property."); *Barden v. City of Portage*, 79 Wis. 126, 48 N.W. 210 (1891) (another flooding case).

But if the City of Stevens Point was immune from a normal action in tort, what were the characteristics of the type of action the court had recognized in *Spelman*? Is it founded on possession or ownership? That is at least one of the ways of stating the issue in *Winchester*.

### WINCHESTER v. CITY OF STEVENS POINT

Supreme Court of Wisconsin  
58 Wis. 350, 17 N.W. 3 (1883)

[Plaintiff's complaint alleged that she was the owner in fee simple of certain described lots in the City of Stevens Point and had been the owner and in actual possession of the lots for more than one year before the commencement of this action; that in order to prevent the overflow of the Wisconsin River from passing into the City, the defendant City had built a dike across the street which was plaintiff's only means of access to her property; that the dike seriously impaired all ingress to plaintiff's lots; that as a result of the dike, the overflow of the river did not flow through its natural bounds but flooded plaintiff's land instead; and that because of the dike, her property was diminished in value and that she had sustained damages in the sum of \$700.] . . .

The answer, besides a general denial, alleged that said dike had been built and maintained for more than twenty years.<sup>1</sup>

It appeared from the evidence given on the trial that the dike was originally built in 1855; that it was rebuilt in 1880 and made considerably higher; and that its height was again increased in 1881. Other facts, and the view taken by this court of the evidence in relation to the plaintiff's title, will sufficiently appear from the opinion. There was a special verdict to the effect that at the time of the injury complained of and at the time of bringing this action the plaintiff was the owner and in the actual possession of the premises; that the raising of the dike was done by the authority of the city; and that the premises were damaged by such increased height to the amount of \$225. A motion for a new trial was denied, and from a judgment on the verdict the defendant appealed.

...

COLE, C. J. It is plain that the plaintiff in her complaint does not treat this as an ordinary action of trespass to the realty. She alleges that she was the owner in fee simple and in the actual possession of the premises described. Her *gravamen* is that the defendant city has constructed a dike or embankment in front of these premises, which renders them inaccessible, and that this embankment dams up the water and sets it back upon her lots. Then comes the averment, "by means whereof the said premises are greatly diminished in value, and the plaintiff has sustained damage in the sum of \$700." If there could be any doubt that the action is for a permanent injury to the realty, it would be removed by the character of the evidence offered on the part of the plaintiff on the trial to sustain her case. For instance, the witness Packard was asked what, in his opinion, was the damage to the premises arising from the building of the dike, and then how much they were damaged in value by reason of the damming up of the water and setting it about the premises. This and other testimony, of the same character, was given by plaintiff against defendant's objection. The court, also, in one portion of its charge, in effect told the jury that the plaintiff, in order to recover, must satisfy them that she was the owner of the property alleged to be injured. These remarks are made for the purpose of showing that the action is not for the mere injury to the possession, but is to recover damages for an injury to the freehold. That being the case, it was essential for the plaintiff to show a title beyond what would be necessary to maintain trespass; for the question of title was made a material issue by the pleadings. There was no dispute about plaintiff's possession. But she attempted to prove a good paper title and failed. Nevertheless, she recovered for the permanent depreciation in the value of the property. The question is, Can the recovery be sustained upon the evidence given? . . .

But what proof of title was it necessary for the plaintiff to make in order to maintain the action on the theory upon which it was tried? Her counsel contends it was sufficient for her to show she was in actual possession under claim of title. He also says that she established a good paper title; but this certainly is a mistake. Not to dwell on other defects in her claim of title, it will be noticed that the deeds from Kingston to Fay, and from Solomon Smith to William Randall, each had but one subscribing witness. The former was excluded; the latter was admitted in evidence against objection. Neither of the deeds was entitled to be recorded, and could not be proven by the record as the last one was.

There are authorities which hold that the seizin of the plaintiff in any real action is proved, *prima facie*, by evidence of his actual possession under claim of title. . . . That is, these facts afford presumptive evidence of seizin in fee simple, until the contrary appears. But that rule would not save the plaintiff's case, because she offered evidence which disproved or overcame the presumption arising from these facts. She was not content to show actual possession under claim of title, but she undertook to prove title and failed. The evidence was probably offered to prove an adverse possession, under paper title, for ten years. That would have been sufficient had

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<sup>1</sup> [Why did the defendant allege this? Ed.]

she established the fact of such adverse possession for the requisite time. But she did not; so the question returns. Was not the plaintiff bound, under the circumstances, to prove her title? We think she was. For if she was not the owner of the premises, why should she recover damages for a permanent injury to them? She saw fit to put her title in issue, to rely upon it, and sought to recover as owner. The case is much like condemnation proceedings, and should be governed by the same rule as to proof of title. Since the early case of *Robbins v. M. & H. R. R. Co.*, 6 Wis. 636, it has been understood that the plaintiff must show title, and that title will not be presumed from evidence of possession under claim of title.

In the recent case of *Diedrich v. N. W. U. R'y Co.*, 42 Wis., 248, the correctness of this rule is implied in the whole discussion by the chief justice. He discusses most elaborately the extent of Diedrich's title, and closes the opinion with these remarks: "As in ejectment, a party seeking compensation in such a proceeding as this, must recover on the strength of his own title; and until he prove title in himself, is in no condition to question the right of the other party." Page 272. It seems to us this rule as to making proof of title is applicable to the case before us. Evidently the learned circuit court was of the same opinion, though his charge is not consistent with itself. In one place the jury is told that the plaintiff must satisfy them by her proof that she was the owner, in order to recover for the injury done to the freehold. In another place the jury were directed that if the evidence showed she was in possession under claim of paper title she might maintain the action. The charge was misleading, upon the evidence given, and there must be a new trial. The other questions discussed will not be noticed.

*By the Court.*—The judgment of the circuit court is reversed, and a new trial ordered.

[The opinion of CASSODAY, J., concurring in the result, is omitted.]

TAYLOR, J. . . .

The complaint sets out in apt language a claim for damages to the plaintiff's real estate, affecting the freehold, resulting from the unauthorized acts of the defendant city. The answer simply denies the allegations of the complaint not in any way justifying the acts complained of. The question lying at the basis of the controversy is this: Can a party in the actual possession of real estate recover for an injury to the freehold, against a mere wrongdoer who neither has nor claims any title to the premises or to the possession thereof, nor sets up any justification of the acts complained of under the authority of some third person who claims under a title paramount to the plaintiff's, without showing a perfect title to the premises? By the opinion of the court filed in this case this question would seem to be answered in the negative. Among other things in that opinion the chief justice says: "These remarks are made for the purpose of showing that the action is not for the mere injury to the possession, but is to recover damages for injury to the freehold. That being the case, it was essential for the plaintiff to show title beyond what would maintain trespass, for the question of title was made a material issue by the pleadings." These remarks, when considered in connection with the evidence produced by the plaintiff in this action, must mean that the plaintiff cannot maintain her action for an injury to the freehold by merely proving that she was in the peaceable possession of the premises when the defendant committed the injury complained of, claiming title thereto. The plaintiff had proved that she had such possession at the time the injury was committed, and that she, and those under whom she claimed, had held such possession for several years before.

With due deference to the opinion of the majority of the court, I cannot believe but that this decision is in direct conflict with well-established rules of law governing cases of this kind. It appears plain to me that the rule as stated in the opinion is in direct conflict with two well-established principles: First, that in an action for an injury to real estate, whether the injury be simply one which injures the rights of a mere occupant or one which affects the freehold, proof of actual possession of the premises by the plaintiff under a claim of title at the time the injury was

committed, is *prima facie* evidence that the plaintiff is the owner in fee, and no further proof of that fact is required of the plaintiff in order to support his action; second, in all such cases, when the defendant is a mere wrong-doer, setting up no title in himself, or in another under whose authority he did the acts complained of, such proof of actual possession under claim of title by the plaintiff is not only *prima facie* evidence of title in the plaintiff, but it is conclusive on the defendant; and it is no defense to the plaintiff's action, as against such mere wrong-doer, that the plaintiff's title is defective.

That proof of actual possession of either real or personal property under claim of title is *prima facie* evidence that the person having such possession is the owner in fee of the real estate, and of an absolute title to personal property so in his possession, has been frequently declared by this court. . . .

Taking it for granted that such proposition is fully established, it would seem to follow, as a matter of course, that, in an action for injury to real property brought by the person so in the actual possession under claim of title, he would be entitled to recover for all the injuries inflicted by a mere wrong-doer to such real estate, whether such injuries were such as affected the mere right of occupancy, or such as affected the freehold interest. Under the rule above established, the proof of the plaintiff's actual possession under claim of title being *prima facie* evidence of his title in fee, he is certainly entitled to all the damages which such owner in fee could recover, until the proofs rebut such presumption of title.

In the opinion of this court in this case, it seems to be laid down as a rule of law that in every case where a plaintiff seeks to recover damages for an injury to his freehold estate, and when the answer denies his title and possession, proof of actual possession under claim of title is not sufficient to maintain such action, and that in every such case it is necessary for the plaintiff to go further and prove an actual title in fee, either by a chain of conveyances from the United States, or by actual adverse possession for a sufficient length of time to bar the real owner and vest the title in such actual occupant. This ruling seems to me in direct conflict with the decisions of this court . . . as well as with all the other authorities. If it should be said that the language used by the court in its opinion must be interpreted by the facts of the case, and that all that is meant is that if the proofs in the case show that the plaintiff has not in fact a clear chain of title from the government, and has not shown an adverse possession which would bar the owner and vest the title in the possessor, he cannot recover for damages to the freehold, I still think the decision wrong, and in conflict with the authorities. It seems to me well settled, if anything can be settled in the law, that a mere trespasser, having no title and not claiming under a third person having a title, who intrudes upon the actual peaceable possession of one claiming title, cannot defend by questioning such possessor's title.

This question was fully discussed by the court of errors and appeals of the state of New Jersey, in the case of *Todd v. Jackson*, 26 N.J.Law, 526. . . .

"The action of trespass, both as to real and personal property, is a possessory action. A party in possession is *prima facie* the owner, and that possession will entitle him to recover to the extent of the injury done, unless the defendant show something in mitigation of the damages. . . . They did not rebut the *prima facie* case which resulted from the fact of possession, that the plaintiffs were entitled to recover to the full extent of the injury. It would be a monstrous doctrine, and fraught with innumerable evils, that a plaintiff in trespass cannot recover for a permanent injury to the freehold, and to the full extent of the injury, without first establishing his title to the freehold, in addition to his title by possession. What would be the consequences in those numerous cases where men are in peaceable possession of property and have paid for it, and yet, through some neglect, have failed to procure a title, or have lost their title deed. Can any stranger enter upon such possession, pull down the dwelling-house over the head of the occupant, and, when called upon to respond in damages, complacently ask the person he has injured to

exhibit his documentary evidence of title? A man who is in possession of a dwellinghouse has by that possession a title good against all the world, for every purpose, until a superior one is shown, and most certainly it cannot be law, and ought not, that such possession is not *prima facie* evidence of title against a wanton wrongdoer. . . . There is nothing in the idea that the plaintiffs are prejudiced by the fact of having attempted to prove their title, and failed. If the title is immaterial, their failure to prove it is immaterial . . . .”

In the case at bar it is said the plaintiff ought not to recover her damages to the freehold because one of the deeds in her chain of title was witnessed by but one witness, and so was not entitled to record, and the record was not good evidence. She was in possession and claiming title under this deed. Supposing the grantor in this deed had brought ejectment, or an action against the plaintiff for some injury to the freehold, would it not be perfectly clear that she would have a good defense in equity, and I think in the law, to such action? The deed so imperfectly executed would, as we have just decided in the case of *Dreutzer v. Lawrence*, [58 Wis. 594, 17 N.W. 423 (1883)] be in equity a good contract to convey the land to the plaintiff, and on its face would prove the payment of the consideration for the lands, as well as the right to the possession of it under such contract. Yet this defect, which would be of no avail to the grantor in the deed, is permitted to be set up by a mere wrong-doer as a defense to an action for a wilful injury to the plaintiff's lands. A wrong-doer may, perhaps, mitigate the damages, as was said by the chancellor in the case just cited, by showing that the plaintiff's possession is under a claim of title which leaves an estate in reversion, or in remainder in another, as that he is a tenant for years, or at will, or sufferance, or for life; but when the plaintiff is in possession, claiming title adverse to everybody, then he is a disseizer of the true owner, and there is no person having an estate in remainder or reversion who can maintain an action. The disseizee himself cannot maintain an action of trespass either against his dissezor or any other person. His only remedy is to bring his action of ejectment, and if he succeeds in that, he can then recover against the party in possession his damages and rents and profits. . . . If, in an action like the one at bar, the plaintiff cannot recover for her permanent damages to the premises, there is no one who can, and the wrong-doer will escape all liability, except for such as affect the rights of a mere occupant who claims no title. . . .

The only cases which are relied upon as supporting the opinion of the court in this case are *Robbins v. M. & H. R. R. Co.*, 6 Wis., 636, and *Diedrich v. N. W. U. R'y Co.*, 42 Wis., 248. These were both cases under the statute to have assessed the plaintiff's damages for lands taken by a railroad company under the statute. The railroad company was not a wrong-doer in any sense. It was taking the plaintiff's land as it had the right to do; and in such case it might be very just to compel the plaintiff to show his title before he should be entitled to charge the company with the price of the lands taken. The rule established in such cases ought to have no application where the plaintiff is proceeding against a mere trespasser who makes no claim of right as against the plaintiff.

I am inclined to think the judgment of the circuit court ought to be reversed, but for a reason not discussed, though referred to in the opinion of the court. It seems to me that the acts complained of by the plaintiff are in the nature of a continuing trespass or nuisance, and that the rule as to the damages which the plaintiff may recover in such actions is not the damages the plaintiff may sustain in the future, but such as he has sustained at the time the action was commenced. See *Carl v. S. & F du L. R. R. Co.*, 46 Wis., 625; *Blesch v. C & N. W. R'y Co.*, 43 Wis., 183; *Cumberland & O. Canal Corp. v. Hitchings*, 65 Me., 140; and other cases cited in *Carl v. S. & F du L. R. R. Co.* If the reversal of the judgment had been placed upon that ground, I should have concurred in the opinion of the court. The judgment should be reversed, not because the plaintiff did not show sufficient title to the locus in quo to entitle her to recover damages for the injury done to her freehold estate, but because she was permitted to recover damages to which

she would not have been entitled, even though she had established a perfect title in herself by a chain of conveyances from the United States to herself.

### *Notes and Questions*

1. There is a great deal said in Justice Cole’s opinion about the plaintiff’s failure to show title. What was the defect in her title? What does the opinion indicate might have happened if the plaintiff had not asserted a paper title?

2. What do you think of the court’s distinction between injury to freehold and “mere” injury to possession? Should the title make any difference as to the plaintiff’s rights against the defendant?

3. Can this case be reconciled with *Tapscott*? What difference does it make who the defendants are in the two cases?

4. Of what relevance is Justice Taylor’s point that possession is *prima facie* evidence of title in fee? Is his citation of *Todd v. Jackson* apt?

5. Very few jurisdictions have the same rule for condemnation proceedings as Wisconsin. J. SACKMAN, NICHOLS ON EMINENT DOMAIN § 5.02[3][c] (rev. 3d ed. 2012):

[T]he general rule in condemnation proceedings is that proof of possession under claim of title will be treated as *prima facie* evidence of ownership in fee, and will be sufficient to entitle the person in such possession to receive the compensation awarded for the land, if no one showing a better title lays claim to it.

*See, e.g., United States v. Certain Land*, 314 F.Supp. 1372 (D.Mass.1970).

6. On the basic question, American courts today generally follow the rule of *Tapscott* and not that of *Winchester*:

There are cases which hold that a plaintiff in ejectment cannot recover on possessory rights alone, unless such possession has ripened into title by prescription or limitation, and that something more than a mere naked prior possession is necessary as a basis for ejectment; but generally prior possession of the plaintiff or those under whom he or she claims is sufficient to establish a *prima facie* title which will support the action, although the plaintiff shows no paper title, and although such possession has not ripened into title by adverse possession.

Possession, however short, is sufficient. A plaintiff who relies on possession alone must show a possession anterior in date to the possession of the defendant, even though the defendant may be regarded as a mere naked trespasser. Where no legal title is shown in either party, the party showing prior possession in himself or herself or those through whom he or she claims will be held to have the better right, and such right is not defeated by the subsequent entry and occupation by the opposing claimant until the latter’s claim has ripened into title by adverse possession.

C.J.S. *Ejectment* § 24 (2012) (citations omitted).

Among the recent cases applying the majority rule are: *Stewart v. Sidio*, 358 S.W.3d 524 (Mo. App. 2012); *Department of Conservation ex rel. People v. Fairless*, 273 Ill. App. 3d 705, 653 N.E.2d 446 (Ill.App. 1995).