COURT OF APPEAL OF THE LAW STUDENTS' SOCIETY OF VICTORIA[1]

C . . . . . Appellant — July 27, 1938

and

B . . . . . Respondent

Adverse Possession—Ejectment—Title by Possession only—Jus tertii —Statuory Conveyance—Property Law Act 1928, Ss. 276 and 301[2]

On Appeal from the Court of the President.

A, the owner of land, ceased to occupy it in 1915. B ejected A in 1915 and occupied the land without title until 1928. C ejected B in 1928 and was the occupier of the land up to the date of this action. In 1934 B obtained a conveyance from A. B brought an action for ejectment against C.

Held, that B had the better title and was entitled to succeed.

Decision of Mr. President Bradshaw affirmed.

Clifton McPherson and K. A. Aickin appeared for the appellant.

T. R. Blamey and Edward I. Sykes appeared for the respondent.

Reference was made to the following cases: *Doe v. Carter,*[3] *Willis v. Howe,*[4] *Robertson v. Butler,*[5] *Atkinson & Horsfall's Contract,*[6] *Dixon v. Gayfere,*[7] *May v. Martin,*[8] *Taylor v. Horde,*[9] *Harper v. Charlesworth,*[10] *Graham v. Peat,*[11] *Frogmorten v. Scott,*[12] *Roe v. Harvey,*[13] *Danford v. McAnulty,*[14] *Doe v. Cleveland,*[15] *Allen v. Rivington,*[16] *Stokes v. Berry,*[17] *Doe v. Davis,*[18] *Emmerson v. Maddison,*[19] *Doe v. Cooke,*[20] *Doe v. Dyball,*[21] *Davison v. Gent,*[22] *Doe v. Webber,*[23] *Nagle v. Shea,*[24] *Doe v. Jauncey,*[25] *Lambert v. Strother,*[26] *Whale v. Hitchcock,*[27] *Doe v. Martin,*[28] *Doe v. Barnard,*[29], *Doe v. Barker,*[30] *Asher v. Whitlock,*[31] *Perry v. Clissold,*[32] *Solling v. Broughton,*[33] *Thomas v. Thomas,*[34] *Doe v. Thompson,*[35] *Doe v. Horn,*[36] *Doe v. Baytup,*[37] *Incorporated Society v. Richards,*[38] *Trustees Executors v. Short,*[39] *Dalton v. Fitzgerald,*[40] *Tichborne v. Weir.*[41] Holdsworth,[42] Halsbury[43] and G. A.Wiren[44](*vide* the bibliography therein) were also referred to.

1. Present: A. D. G. Adam, T. W. Smith and C. I. Menhennitt.
2. Sec. 276.—After the first day of June One thousand eight hundred and sixty-four, no person shall make an entry or distress or bring an action to recover any land or rent, but within fifteen years next after the time at which the right to make such entry or distress or to bring such action has first accrued to some person through whom he claims, or, if such right has not accrued to any person through whom he claims, then, within fifteen years next after the time at which the right to make such entry or distress or to bring such action has first accrued to the person making or bringing the same.
   Sec. 301.—At the determination of the period limited by this Part to any person for making an entry or distress or bringing any action or suit, the right and title of such person to the land or rent for the recovery whereof such entry distress action or suit respectively might have been made or brought within such period shall be extinguished.
3. [1847] 9 Q.B. 863.
4. [1893] 2 Ch. 545.
5. [1915] V.L.R. 31.
6. [1912] 2 Ch. 9.
7. 17 Beav. 423.
8. 11 V.L.R. 562.
9. (1757) 1 Burr. at 90.
10. 4 B. & C. 595.
11. 1 East. 244.
12. 2 East. 467.
13. 4 Burr. 2484 at 2487.
14. 8 A.C. at 462.
15. 9 B. & C. 864 at 871.
16. 2 Wm. Saunds. 111.
17. 2 Salk. 421.
18. 2 M. & W. at 516.
19. [1906] A.C. at 575.
20. 7 Bing. 346.
21. (1829) 3 C. & P. 610.
22. (1857) 1 H. & N. 744.
23. 1 A. & E. 119.
24. [1874] 8 I.R. Rep. C.L. 224, 9 I.R. Rep. 39.
25. (1837) 3 C. & P. 99.
26. Willis Rep. 221.
27. [1876] 34 L.T. 137.
28. 1 C. & M. 32.
29. [1849] 13 Q.B. 945.
30. 2 T.R. 749.
31. L.R. 1 Q.B. 1.
32. [1907] A.C. 72 at 79.
33. [1893] A.C. 556 at 561.
34. 2 K. & J. 83.
35. 13 Q.B. 670.
36. 3 M. & W. 334.
37. 3 Ad. & El. 188.
38. (1841) 1 Dr. & War. 257.
39. 13 A.C. 793.
40. [1897] 2 Ch. at 90.
41. 67 L.T. 735.
42. H.E.L. Vol. VII.
43. *Laws of England,* Vol. XX, p. 745.
44. L.Q.R. Vol. xli, p. 139.

The following judgments were delivered:

Mr. A. D. G. Adam:

This is an appeal from a judgment of the learned President in an action in which one B sought to recover possession of certain land from one C. Judgment was given for the Plaintiff and the Defendant has appealed.

The plaintiff entered into possession of the land without title in 1915 and continued to occupy the same in the assumed character of owner until 1928, when he was ejected by the defendant, who has since remained in possession. The plaintiff claims that his prior possession for thirteen years entitled him to recover the land from the defendant.

In 1934 the defendant obtained a conveyance of the land from one A, who, at the commencement of the plaintiff's possession, was the rightful owner. In the circumstances the defendant did not improve his position by this conveyance. In 1934 A had no title. At that time he had been continuously out of possession for upwards of fifteen years, during which period there had been continuous adverse possession, first by the plaintiff, then by the defendant. By operation of Part IX of the Property Law Act 1928, A's title had thereby been extinguished. This result would clearly have followed had the plaintiff alone, or the plaintiff and other persons claiming through him, been in possession throughout, and the same result would follow, in my opinion, even though, during the statutory period, the possession was in successive independent adverse possessors. *In Willis v. Howe*,[1] Kay L.J. said: "A continuous adverse possession for the statutory period though by a succession of persons not claiming under one another does, in my opinion, bar the true owner." The important thing is that adverse possession should be continuous as against the true owner during the statutory period, *Trustees Executors v. Short*.[2]

The appellant addressed an argument to us based on the construction of the Property Law Act, which I should deal with at this stage. The argument, as I understood it, was that, on the expiration of the statutory period, a *statutory* title was conferred on the then possessor: It was, of course, conceded that in terms the statute is purely negative: that all it purports to do is to bar the remedy and extinguish the rights of a true owner out of possession for the prescribed period —but the argument was that, by implication, a title must be taken to be conferred by the Statute on the person in possession at the moment the true owner's title extinguished, as otherwise there would be a vacancy in the title to the land—a result repugnant to the principles of the law: and not to be imputed to the legislature. This argument is, I think, untenable. Suffice it to say that no such implication is required to avoid a vacancy in the title. The argument ignores the doctrine that possession is itself title (later referred to)

1. [1892] 2 Ch. 553.
2. 13 A.C. 793.

and also the doctrine that if there is no other owner, the land reverts to the Crown. It is interesting to notice, in passing, that Holroyd J.[3] in fact arrived at the conclusion that land reverted to the Crown upon the extinguishment of the true owner's title by adverse possession.

The question at issue in the present case is whether B's prior possession of the land, which occurred during a period when A was the rightful owner, gave him sufficient title to maintain ejectment against C, who ejected him: The learned President held that it did.

It is not disputed that in an action of ejectment "the plaintiff cannot recover but upon the strength of his own title. He cannot found his claim upon the weakness of the defendant's title. For possession gives the defendant a right against every man who cannot show a good title."[4] The question remains: What is sufficient title for a plaintiff in ejectment against a mere possessor? As I understood it, the argument for the appellant, C, was as follows:

1. The plaintiff's prior possession of the land did not by itself confer any title on him. At most such possession raised a presumption of title: it furnished "prima facie evidence" of seisin in fee.

2. Proof that during the whole period of the plaintiff's possession the title to the land was in A rebuts the presumption of title in the plaintiff arising from his possession.

3. Therefore the plaintiff, being unable to establish any title whatever in himself, cannot succeed in ejectment.

As to (1), there is a considerable amount of authority supporting the proposition that possession merely provides rebuttable evidence of title.[5]

Perhaps the strongest authority is *Doe d. Carter v. Barnard.*[6] In that case the lessor of the plaintiff, who had been in possession for 13 years, was ejected by a defendant without title. She brought ejectment, but failed because it appeared that a third person had a superior title. The reason for the decision is stated by Patterson J. in these words: "possession is *prima facie evidence of title,* and no other interest appearing in proof evidence of seisin in fee. Here, however, the lessor of the plaintiff . . . . proved the possession of her husband before her for 18 years, which was prima facie evidence of his seisin in fee, and as he died in possession and left children, it was prima facie evidence of the title of his heir against which the lessor of the plaintiff's possession for 13 years could not prevail, and therefore she has by her own shewing proved the title to be in another of which the defendant is entitled to take advantage."

If the proposition that possession is merely prima facie evidence of title is accepted, proposition (2) above follows logically—see *May v. Martin*—and so does proposition (3): I think the appellant's argument fails in its first step.

3. *May v. Martin,* 11 V.L.R. at 590.
4. *Roe v. Harvey,* 4 Burr. at 2487.
5. *Stokes v. Berry,* 2 Salk. 421. *Doe d. Wilkins v. Cleveland,* 9 B. & C. 864. *Doe d. Harding v. Cooke,* 7 Bing. 346. *Doe d. Lewis v. Davies,* 2 M. & W. 510. *Doe v. Martin,* Cor. & M. 32. *May v. Martin,* 11 V.L.R. 575: 583: 591.
6. 13 Q.B. 945.

Despite authority to the contrary, I think the proposition that possession is merely *evidence* of title is unsound: I think the better view is that possession is itself "a root of title." In *Asher v. Whitlock*,[7] Cockburn C.J. said: "I take it as clearly established that possession is good against all the world except the person who can shew a good title: and it would be mischievous to change this established doctrine . . . . All the old law on the doctrine of disseisin was founded on the principle that the disseisor's title was good against all but the disseisee." And Mellor J.[8] said: "I agree with the Lord Chief Justice in the importance of maintaining that possession is good against all but the rightful owner."

The doctrine that possession of land is merely evidence of title and does not itself confer title is, I think, disposed of by the Privy Council in *Perry v. Clissold*.[9] Lord Macnaghten said: "It cannot be disputed that a person in possession of land in the assumed character of owner and exercising peaceably the ordinary rights of ownership *has a perfectly good title against all the world but the rightful owner* . . . ." ". . . . On behalf of the Minister reliance was placed on the case of *Doe v. Barnard*, which seems to lay down this proposition, that if a person having only a possessory title to land be supplanted in the possession by another who has himself no better title and afterwards brings an action to recover the land, he must fail in case he shews, in the course of the proceedings, that the title on which he seeks to recover was *merely possessory*. It is, however, difficult, if not impossible, to reconcile this case with the later case of *Asher v. Whitlock*, in which *Doe v. Barnard* was cited. The judgment of Cockburn C.J. is clear on the point . . . . The conclusion at which the Court arrived in *Doe v. Barnard* is hardly consistent with the views of such eminent authorities on real property law as Mr. Preston and Mr. Joshua Williams. It is opposed to the opinions of modern text writers of such weight and authority as Professor Maitland (see L.Q.R., Vols. 1, 2 and 4) and Holmes J. of the Supreme Court of the United States (Holmes, *Common Law*, p. 244)."[10]

Acceptance of the proposition that possession gives a title against all the world except the rightful owner, in my opinion, necessarily involves, if full meaning is given to it, acceptance of the further proposition that prior possession confers a good title as against subsequent possessors without other title than possession. The plaintiff, by virtue of his possession, acquired a title to the land good against all except A. A's title is now extinguished. It follows, in my opinion, that, until the plaintiff has disposed of, or forfeited his title in some manner recognized by law, he is entitled in assertion of that title, to recover possession from any person ejecting him or any subsequent possessor. This conclusion makes irrelevant the circumstances in the case before us that the defendant in the action

7. 1 Q.B. 1 at 5.
8. *ibid*, p. 7.
9. [1907] A.C. 73 at 79.
10. See, too, Prof. Ames, 3 Harvard L.R. 324(n).

is the actual ejector of the plaintiff, a person who has acquired possession by committing a trespass against the plaintiff.

There is strong authority for the proposition that, whatever the general rule as to the title to be proved by a plaintiff in ejectment, prior possession is sufficient title for a plaintiff suing another who has got possession by committing a trespass against the plaintiff.[11]

According to the view accepted, these cases are to be treated as exceptions to a general rule that mere possession is not sufficient title upon which to maintain ejectment, or as illustrative of a general rule that possession is sufficient title against any person who cannot show a better title in himself. I prefer to rest my decision on the ground that these cases illustrate the general rule above referred to.

As there was, at the time of action brought, no title to the land outstanding in any third person, it is unnecessary for the purposes of this decision to consider the correctness of the view expressed by Holdsworth that a *jus tertii* is in general a good defence in ejectment, though a defendant does not justify under it: or, to put it in another way, that a Plaintiff in ejectment must show *an absolutely good right*—a right relatively better than the defendant's being insufficient.[12]

As the matter has been referred to in argument, I think it perhaps not out of place to say that, in my opinion, a *jus tertii* does not in itself, afford any defence in ejectment and is relevant only when the defendant justifies under it or where it negatives any title in the plaintiff. Thus in *Doe v. Barnard* what might be termed a defence of *jus tertii* succeeded, but only because it negatived any title in the plaintiff. As we have seen, the Court in that case assumed that the plaintiff's possession conferred no title but was evidence of title. Proof of title in another—a *jus tertii*—destroyed the presumption of title, leaving the plaintiff with no title. The doctrine of the *jus tertii* is, I think, bound up with the erroneous doctrine that possession is not title but merely evidence of title, and falls with it. The view that a *jus tertii* is a good defence in ejectment brought by a possessor against a subsequent possessor without title is, I think, inconsistent with the views expressed in *Asher v. Whitlock* and *Perry v. Clissold,* to the effect that a person in possession has a good title against all the world but the rightful owner.

In my opinion, it is sufficient in ejectment for plaintiff to show a better right than the defendant to possession. It follows from this that I should have concluded that the plaintiff was entitled to succeed, even if action had been brought before A's title was extinguished.

The appeal must be dismissed.

Mr. T. W. Smith:

I agree with the conclusion reached, but not for precisely the same reasons. As to the first ground of B's claim, namely, his

11. *Allen v. Rivington,* 2 Saund. 110. *Doe v. Dyball,* 3 Car. & P. 610. *Davison v. Gent,* 1 H. & N. 744. *Whale v. Hitchcock,* 34 L.T. 136.
12. Holdsworth, *Introduction to the Land Law,* p. 182; H.E.L., Vol. VII, pp. 65, 66.

documentary title, I think that his case is not advanced by proof of the conveyance to him because at the time of the conveyance the paper title had been extinguished. With regard to the second ground of his claim, namely, possessory title, I feel great difficulty in accepting the view that whenever there is proof that the title is in fact outstanding in a third person, the person who happens to be in possession can always resist any action for possession brought against him by a prior possession. Any jurisprudence worthy of a civilized community would reject this view and would provide a remedy for the protection of possessory titles; for, in the absence of an adequate remedy by action, disputes between claimants whose titles were merely possessory would be left to be determined by force. Further, there is, in fact, respectable modern authority for the proposition that possession is not merely evidence of title, but is itself a title; and if this is correct, then proof that the title is outstanding in a third person should not prevent a person with a possessory title from succeeding in an action to recover possession. In my view, in a case like the present, where there has been a forcible ejectment of the plaintiff by the defendant, the position is fairly clear, even if full weight is given to the early authorities relating to actions of ejectment. There may, in the light of those authorities, be greater difficulty in applying the modern view in cases where the possessor who is later in time has not ejected the earlier. But in cases of forcible ejectment, I think that this Court, even if it were bound by authority, should hold that the prior possessor can recover possession by action. I understand, however, that this Court is not bound by any authority. I therefore think that it should adopt as the true rule of law the principle that, as between two competing possessory titles, the better possessory title should prevail. Applying this principle, it would follow that, where the possessor who was later in time had ejected the earlier, the earlier could ordinarily recover possession. On the other hand, it would not necessarily follow in the case where the later had not ejected the earlier that the earlier in time had the better title. For example, the earlier in time might have abandoned possession, or there might for some other reason be no virtue in his having been in at an earlier time. Applying this principle to the present case, I think that, subject to the question of statutory conveyance, B is entitled to succeed. He had possession and he has a better possessory title than C, who forcibly ejected him. Then, as to the argument that the Act has operated to make a statutory conveyance to C, there is, in my opinion, nothing in the Act to warrant the doctrine formerly held that when time has run the statute vests the title in the person who is then in possession. The doctrine of statutory conveyance has been repeatedly rejected. A recent instance is *Twin-berrow's* case.[1] Therefore, I think that, on the ground that he has the better possessory title, B should succeed.

1. [1935] 2 K.B.

Mr. C. I. Menhennitt:

I concur. In my opinion the appeal should be dismissed, and in particular I agree with the reasons stated by my brother Adam.

I was at first impressed by the arguments for the appellant based on Sections 276 and 301 of the Property Law Act. Upon further consideration, however, I feel that the determination of this case is not assisted by the provisions of those Sections. It was argued that, under Section 276, the only type of action which is limited to a fifteen-year period is an action which could be brought against the person actually in possession at the termination of the fifteen-year period, and that, as by Section 301, the right to bring such type of action against such person then actually in possession is extinguished, by implication the extinguishment must be in favour of that person then in possession. Counsel for the respondent agreed that the only type of action limited by Section 276 was that against the person actually in possession. But the next step is, to my mind, pure assumption, and whilst in absence of anything to the contrary such assumption might have been made, it does not seem to me to be sufficiently strongly implied in the Section to outweigh what I have concluded in the consequence at common law when the right of action for entry is extinguished after fifteen years.

As I have indicated, I agree with the reasoning of my brother Adam as to the legal consequences of adverse possession as between competing disseisors. On one aspect only of that question do I desire to add anything. It has been decided that in an action of this kind, a *jus tertii* may be set up in certain circumstances. It may at first appear somewhat surprising that it could be a defence to a defendant for him to show that, without justifying his own right, nevertheless the title lay not in the plaintiff but in some third person. Whatever the nature and extent of such a doctrine, in my opinion it does not extend to a set of facts such as are in issue in this case. The Privy Council, in *Emmerson v. Maddison*,[1] apply the doctrine of the *jus tertii*, but upon examination it is seen that that case is not authority for any more than the proposition that, if at the trial the defendant proves that the true owner's title has not then been extinguished at all because the full period of time has not run, then that is a good defence. In that case the land was Crown land and it was proved that, even on the plaintiff's own showing, the necessary sixty years had not run as against the Crown. But the Court did not consider what the position would be where it was proved that the true owner's title had been extinguished.

The argument advanced as to the *jus tertii* is that it is competent for the defendant in a case such as this to prove that, at the date the action accrued against himself by the plaintiff, the plaintiff did not have a title, as the necessary fifteen years had not run, and that such proof is a good defence. I am unable to accept such a proposition. In my opinion, evidence as to the position at an antecedent date, namely, when the defendant disseised, the plaintiff is

1. [1906] A.C. 569.

irrelevant. The only relevant evidence which can be admitted is evidence as to the rights of a third person at the date of the trial. This is all *Emmerson v. Maddison* decides, and, I think, is the full extent of the doctrine.

I am unable to agree, however, with the proposition argued for the respondent that possession in itself constitutes title, as distinct from being merely evidence of title. The most that possession gives is a right to remain in occupation of land as against the whole world, except the true owner, and on this view the first disseisor has a right against the whole world except the true owner, and the second disseisor has a right against the whole world except the true owner and the first disseisor. When, then, the rights of the true owner are extinguished, no evidence is admissible against the rights of the first disseisor. But this does not mean that possession is itself title. Because, if so, until fifteen years of adverse possession had run, there would be title in two persons, which is contrary to my understanding of the concept of title.

For these reasons I agree that the appeal should be dismissed.

Appeal Dismissed.