

## ***Asher v Whitlock (1865), LR 1 QB 1***

At the trial before Cockburn, C.J., at the last Bedfordshire Spring Assizes, the following facts appeared in evidence. About Michaelmas, in the year 1842, Thomas Williamson inclosed from the waste of a manor a piece of land by the side of the highway; and in 1850, he inclosed more land adjoining, and built a cottage; the whole being the land as described and claimed in the writ. He occupied the whole till his death in 1860. By his will he devised the whole property, describing it as “a cottage and garden, in Keysoe Row, in which I now dwell,” to his wife Lucy Williamson, for and during so much only of her natural life as she might remain his widow and unmarried; and from and after her decease, or second marriage, whichever event might first happen, to his only child Mary Ann Williamson, in fee. After the death of Thomas Williamson, his widow remained in possession with the daughter, and in April, 1861, married the defendant; and from that time they all three resided on the property till the death of the daughter, aged eighteen years, in February, 1863. On her death, the defendant and his wife, the widow of the testator, continued to reside on the premises; the widow died in May, 1863, and the defendant still continued to occupy.

The female plaintiff is the heir-at-law of the testator’s daughter Mary Ann Williamson. The writ was issued 11th of April, 1865.

These facts being undisputed, the Chief Justice directed a verdict for the plaintiff for the whole of the property claimed; with leave to move to enter the verdict for the defendant, on the ground that the testator had no devisable interest in any part of the property.

A rule nisi was afterwards obtained to enter the verdict for the defendant, on the ground that no title in the plaintiffs was shewn to either portion of the land enclosed.

To this point, the law reporter excerpted here has described the undisputed facts as they were presented to the Court at trial. Next, the lawyers’ arguments before the Court are summarized. First, the plaintiff’s lawyer Markby sets out their position. Merewether, the defendant’s lawyer, then attempts to respond. In square brackets, you can see summaries of the judges’ comments in dialogue with Merewether.

This back-and-forth between the lawyer and the judges is very much an active example of the structure of common law arguments/counter-arguments we studied in Unit 1. Try to identify as many argument types as you can in these exchanges.

Markby (Nov. 2nd), shewed cause. The testator, at the time of his death, had acquired no title by lapse of time; and the point made and reserved at the trial was, that the testator being only a trespasser in possession, had no devisable interest; that his interest was at most that of a tenant at will only; and that the devisee, if in possession, was only a new trespasser. But the authorities are

conclusive to shew that a person in peaceable possession of land has, as against every one but the true owner, an interest capable of being inherited, devised, or conveyed. In *Doe v. Jauncey*, which was also the case of an inclosure from the roadside, a somewhat similar objection was taken; but Coleridge, J., said: "The moment the father had taken the land, if he died, it would (provided the owner did not interfere) descend to his son." In *Doe v. Barnard*, a distinction is clearly drawn by the court between persons who succeed each other in possession, claiming one from the other by descent, devise, or conveyance, and persons who succeed each other in possession, there being no such relation between them. The same doctrine is recognised in *Doe v. Birchmore*. Moreover, in this case, the plaintiff was not bound to shew any title at all as against the defendant. The defendant must be taken on the facts to have entered by the daughter's permission, whose title, therefore, he cannot dispute. So neither can he dispute the title of the female plaintiff, the daughter's heir-at-law. *Doe v. Birchmore*[3] is a direct authority on this point. There the defendant had come in as the servant of the testator, who was himself only tenant at will; and in ejectment brought by the devisee against the defendant, who remained in possession after the death of the testator, the court held that the defendant, the servant, could not compel the devisee to prove that the testator had title; and that it was sufficient to shew that the defendant came in under the testator.

Merewether (Nov. 2nd and 3rd), in support of the rule. As to the point last made, the defendant did not come in under the plaintiff's title, that is under the will, but adversely to it; for at the very moment of the marriage, the estate of the widow ceased; and the defendant entered as a wrong-doer.

[COCKBURN, C.J. The widow had rightful possession, which became wrongful on her marriage; but she had the same actual possession. She, therefore, coming in under the will, cannot dispute title claimed under it, and by means of the marriage her possession became that of the defendant; if she cannot dispute the validity of the will, neither can he.]

When the defendant entered, the wife being already married had ceased to hold under the will.

[MELLOR, J. The defendant's contention is, that the woman being a free agent, could throw up her estate, and that the defendant, coming in after the marriage, came in as a wrong-doer. COCKBURN, C.J. The widow, after her second marriage, would not be a wrong-doer in the sense of a trespasser.]

The defendant cannot be said to come in under the will, for he entered and took possession in spite of the will.

[COCKBURN, C.J. Why are we to assume his possession was in spite of the will? He goes into the cottage, and lives with the mother and daughter, who claim under the will.]

Secondly, assuming the defendant's possession to be adverse to the will, the case is that of two trespassers, and in such a case, the one last in possession is entitled

to keep the land until the person having title ejects him; and the devise of the first confers no title on his devisee, so as to enable her or her heir to maintain ejectment against the present possessor.

[COCKBURN, C.J. Under the old law, a disseisor had good title against all but the disseisee; and if the disseisor died before entry by the disseisee, the latter's entry was tolled, and he was driven to his real action.]

This is not the case of a disseisor. In *Doe v. Barnard*, a prior possession being shewn, the plaintiff, who had only a title from mere possession for less than twenty years, was held incapable of maintaining her action of ejectment. In such a case, any one getting possession, without force or fraud, can maintain his possession. In *Dixon v. Gayfere*, where there had been several successive and independent occupiers, all without title, and the possession ultimately came to the court, the Master of the Rolls decreed possession to the last occupier, expressly on the ground that at law he could have maintained his possession against all but the true owner, who in that case was barred by lapse of time.

[COCKBURN, C.J. The Master of the Rolls may be right in equity, but I doubt his being right in law. In *Doe v. Dyeball*, Lord Tenterden held, that possession for one year by the plaintiff was sufficient, to maintain ejectment against a person who came and turned him out, without any further proof of title.]

In that case the possession of the defendant was obtained by force. Here it was simply adverse.

[COCKBURN, C.J. A person being peaceably in possession of a house, a person, going in and taking possession without his leave, commits a trespass, and all trespass implies force in the eye of the law.]

Having described the arguments and counter-arguments present at trial before the court, the law reporter goes on to summarize the judges' decisions in the case.

Here, our goal is to see how the tensions present in the earlier argument pairs are supposedly resolved by the judges. What features of the classical legal style are employed here?

COCKBURN, C.J. —

I am of opinion that this rule should be discharged. The defendant, on the facts, is in this dilemma; either his possession was adverse, or it was not. If it was not adverse to the devisee of the person who inclosed the land, and it may be treated as a continuance of the possession which the widow had and ought to have given up, on her marriage with the defendant, then, as she and the defendant came in under the will, both would be estopped from denying the title of the devisee and her heir-at-law. But assuming the defendant's possession to have been adverse, we have then to consider how far it operated to destroy the right of the devisee and her heir-at-law. Mr. Merewether was obliged to contend that possession acquired, as this was, against a rightful owner, would not be

sufficient to keep out every other person but the rightful owner. But 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. In *Doe v. Dyeball* one year's possession by the plaintiff was held good against a person who came and turned him out; and there are other authorities to the same effect. Suppose the person who originally inclosed the land had been expelled by the defendant, or the defendant had obtained possession without force, by simply walking in at the open door in the absence of the then possessor, and were to say to him, "You have no more title than I have, my possession is as good as yours," surely ejectment could have been maintained by the original possessor against the defendant. 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. It is too clear to admit of doubt, that if the devisee had been turned out of possession he could have maintained ejectment. What is the position of the devisee? There can be no doubt that a man has a right to devise that estate, which the law gives him against all the world but the true owner. Here the widow was a prior devisee, but *durante viduitate* only, and as soon as the testator died, the estate became vested in the widow; and immediately on the widow's marriage the daughter had a right to possession; the defendant however anticipates her, and with the widow takes possession. But just as he had no right to interfere with the testator, so he had no right against the daughter, and had she lived she could have brought ejectment; although she died without asserting her right, the same right belongs to her heir. Therefore I think the action can be maintained, inasmuch as the defendant had not acquired any title by length of possession. The devisee might have brought ejectment, his right of possession being passed by will to his daughter, she could have maintained ejectment, and so therefore can her heir, the female plaintiff. We know to what extent encroachments on waste lands have taken place; and if the lord has acquiesced and does not interfere, can it be at the mere will of any stranger to disturb the person in possession? I do not know what equity may say to the rights of different claimants who have come in at different times without title; but at law, I think the right of the original possessor is clear. On the simple ground that possession is good title against all but the true owner, I think the plaintiffs entitled to succeed, and that the rule should be discharged.

MELLOR, J. —

I am of the same opinion. It is necessary to distinguish between the case of the true owner and that of a person having no title. The fact of possession is *prima facie* evidence of seisin in fee. The law gives credit to possession unless explained; and Mr. Merewether, in order to succeed, ought to have gone on and shewn the testator's title to be bad, as that he was only tenant at will, but this he did not do. In *Doe v. Dyeball* possession for a year only was held sufficient against a person having no title. In *Doe v. Barnard* the plaintiff did not rely on her own possession merely, but shewed a prior possession in her husband, with whom she was unconnected in point of title. Here the first possessor is connected in title with the plaintiffs; for there can be no doubt that the testator's interest was

devisable. In the common case of proving a claim to landed estate under a will, proof of the will and of possession or receipt of rents by the testator is always *prima facie* sufficient, without going on to shew possession for more than twenty years. I agree with the Lord Chief Justice in the importance of maintaining, that possession is good against all but the rightful owner.

LUSH, J., concurred.

Rule discharged.