impediment. But there is no reason to suppose, upon the evidence, that, although the appellant is no longer able, satisfactorily, to perform the duties of an engineer, there are not open to him, notwithstanding his disability, avenues of employment which are just as wide and just as remunerative as those to which his engineering training would have led him. Indeed consideration of the evidence leads me to think that this is so and in the circumstances I am satisfied that the percentage of the appellant's incapacity for civil employment is less than thirty per cent. Accordingly the appeal should be dismissed.

Order that the appeal be dismissed. Further order that the appellant pay to the respondent its costs of the proceedings but not including the costs of and incidental to the case stated for the opinion of the Full Court.

Solicitors for the appellant, *Selwyn Gerity & Robinson.*

Solicitor for the respondents, *H. E. Renfree,* Crown Solicitor for the Commonwealth of Australia.

R. D. B.

[HIGH COURT OF AUSTRALIA.]

ALLEN AND ANOTHER . . . . . APPELLANTS;
DEFENDANTS,

AND

ROUGHLEY AND OTHERS . . . . . RESPONDENTS.
PLAINTIFFS,

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

H. C. OF A. 1955.

SYDNEY, *Mar.* 31, *April* 1; *Nov.* 28.

Dixon C.J., Williams, Fullagar, Kitto and Taylor JJ.

Ejectment—Proof of title—Claimant with incomplete documentary title—Possession for less than twenty years—Presumptions arising from possession—Discontinuance in possession—Whether necessary to prove possession for at least twenty years against subsequent possessor—Rights arising from possession—Devisable—Real Property Limitation Act 1833 (*Imp.*), *s.* 34.

Trusts and Trustees—Trust property—Acceptance of trust—Vesting of trust property in trustee—Deed defining trust property—Claim by trustee to beneficial interest in such property—Denial that property subject to trust—Suit by beneficiaries to enforce trust—Title of trust to property assumed against trustee—Burden of proof on trustee to establish interest.

In a suit instituted in the Supreme Court of New South Wales in its equitable jurisdiction in 1950 a trustee and the representatives of a deceased beneficiary sought (*inter alia*) a declaration that certain lands then in the occupation of one A., the other trustee, who was sued in his representative capacity, were assets in the estate of their testator C., who died in 1895. C. acquired the fee of such lands, which were under common law title, in 1880 by conveyance from P. as mortgagor and H. as mortgagee, P. having in 1877 mortgaged them to H. The lands were originally the subject of a Crown grant to T. in 1823, but there was no documentary or other evidence of the state of the title between the Crown grant and the mortgage of 1877. C. occupied the lands from the time of purchase till his death and by his will included them in a residuary devise to his trustees to the use of his son W. for life and, in the events which happened, remainder to all C.'s children. A. went into possession in 1898 and from that time used the lands for his own benefit. By deed dated 13th August 1937, in which they both joined, A. and the plaintiff-trustee were appointed new trustees of C.'s estate, which appointment was confirmed by a further deed dated 24th July 1945. The earlier deed in

assuring the property the subject of the trust incorporated by reference the lands comprised in and assured by the will, which expressly mentioned the subject lands. W. died in 1942. Between the death of C. and the year 1900 he lived with A. and his wife at the homestead on land adjoining the subject lands and worked as one with them, and about 1900 he went to New Zealand, where he remained till 1915. He then returned and till his death lived either at the homestead or in a small hut built by A. on the subject lands. At the hearing A's. defence was placed on two grounds (i) that he had assumed possession of the lands two or three years after C.'s death and had retained possession, so that the claims of the beneficiaries were barred; (ii) that there had been no proof of the title, if any, of C. to the subject lands. *Roper* C.J. in Eq. found against A., who appealed from the decree thus made, relying only on the second ground of defence above-mentioned.

Held, that the appeal should be dismissed,

By *Dixon* C.J., *Kitto* and *Taylor* JJ. on the ground that even assuming C. to have acquired no more than a possessory right in the lands from P. and H., such right was capable of devolving and did devolve upon his trustees and became vested in A. and the plaintiff-trustee upon their appointment, and A. could only show that the interests of the beneficiaries under the trust were defeated by establishing affirmatively that prior to his acceptance of the trusteeship he had acquired a possessory title to the lands, and this on the evidence he had failed to do.

Per Dixon C.J.: The principles of equity hardly allow a trustee who contests the title of the trust he has accepted to property on which the trust instrument has in fact declared trusts to place the burden on the beneficiaries of establishing the title of the trust.

By *Williams* J. on the ground that the onus was on A. to establish that his possession was adverse to W. and the whole of the evidence did not warrant the drawing of a positive inference in his favour that the possession of the lands was deliberately abandoned on or shortly after C.'s death by W. and C.'s trustees, thereby destroying C.'s inchoate possessory title and with it the interests therein created by C.'s will.

By *Fullagar* J. on the ground that it was not incumbent upon the respondents to prove a possessory title of not less than twenty years, and that C.'s possessory interest having devolved upon his trustees for his beneficiaries gave rights superior to those acquired by A., he having failed to establish the extinguishment of the former rights under s. 34 of the *Real Property Limitation Act* 1833 (Imp.).

Passages in *Cole* on *The Law and Practice in Ejectment* (1857), p. 212, and Sir *William Holdsworth*, *A History of English Law*, 2nd ed. (1937), vol. 7, pp. 64, 65, disapproved.

May v. *Martin* (1885) 11 V.L.R. 562, disapproved.

Meaning of "adverse possession" since the *Real Property Limitation Act* 1833, discussed.

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By *Kitto* and *Taylor* JJ. on the further ground that the possession of the subject lands enjoyed by C. from 1880 till 1895 afforded evidence from which it was legitimate to conclude that he had the fee which P. and H. purported to convey to him, and upon the whole of the evidence it was more probable than not that the testator in fact had the fee simple therein at his death.

By *Taylor* J. on the further ground that the inchoate interest in the lands arising from C.s' possession for fifteen years, being devisable, vested in C.'s executors upon the trusts of the will, and A., having entered into possession with knowledge of the outstanding beneficial interests therein, would, even if he had established a legal title by prescription, have been bound to hold the same subject to the equitable interests created by the will.

Scott v. *Scott* (1854) 4 H.L.C. 1065 [10 E.R. 779], applied.

It is not the law that evidence that the claimant in ejectment was at a former time in possession of the land is not prima facie evidence of title at that time if the possession be for a period less than twenty years, unless the defendant entered as a trespasser upon the claimant's possession. So *held* by *Dixon* C.J., *Fullagar*, *Kitto* and *Taylor* JJ.

N.R.M.A. Insurance Ltd. v. *B. & B. Shipping & Marine Salvage Co.* (1947) 47 S.R. (N.S.W.) 273, at p. 279; 64 W.N. 58, at p. 60, discussed by *Williams* J., and approved by *Fullagar* and *Kitto* JJ.

Decision of the Supreme Court of New South Wales in Equity (*Roper* C.J. in Eq.) affirmed.

APPEAL from the Supreme Court of New South Wales.

In 1950 Oliver Edwin Roughley, a trustee of the will of Henry Cusbert deceased (hereinafter called "the testator") and Henry William George Pashley, the legal personal representative of a deceased beneficiary of the testator issued a statement of claim out of the Supreme Court of New South Wales in its equitable jurisdiction against Edmund Ambrose Allen, the other trustee of the testator's estate, in his representative capacity claiming (1) an order removing the defendant from his position as trustee of the tesfator's estate; (2) a declaration that certain lands, including lands known as "Plunkett's land" the subject of the present appeal, were assets in the estate of the testator and subject to the trusts of his will; (3) a declaration that the defendant had no estate or interest in (*inter alia*) Plunkett's land; (4) a declaration that the defendant had since 13th August 1937 been a trustee of (*inter alia*) Plunkett's land for the persons entitled thereto under the will of the testator; (5) accounts; (6) if and so far as might be necessary, an order for the administration of the testator's estate; (7) an order for costs against the defendant; and (8) such further and other relief as the nature of the case might require.

Prior to the hearing the plaintiff Pashley died, and his executors John Neville Pashley and Esma May Holland were substituted as plaintiffs in his stead and the statement of claim was amended accordingly.

At the hearing *Roper* C.J. in Eq. found in favour of the plaintiffs and made decrees in terms prayers 2, 3, 4 and 7, reserving liberty to the plaintiffs to apply for orders in respect of the removal of the defendant as a trustee and in respect of accounts.

From this decree the defendant appealed to the High Court, but pending the hearing of the appeal he died. His legal personal representatives Reginald Edmund Allen and Winifred Elsie Boyle were substituted as appellants in his stead.

The relevant facts and his Honour's findings thereon appear in the headnote hereto and in the judgments of their Honours hereunder. The title to Plunkett's land was the only contest on the appeal.

R. M. Stonham, for the appellants. There being no evidence of the claim of title between the Crown grant to Turner in 1823 and the mortgage from Plunkett to Hyland in 1877 from both of whom the testator purported to acquire the fee in 1880, the testator had no good documentary title. Nor did he acquire a good title by possession, being in possession only from 1880 to 1895. Without twenty years' possession there is no presumption of seisin: Sir *William Holdsworth*, *A History of English Law*, 2nd ed. (1937), vol. 7, p. 64. The learned judge erred in considering that the defendant was endeavouring to establish a possessory title against the testator, whereas the defendant was endeavouring to establish and did establish a possessory title against the true owner. The mortgage to Hyland was not a good root of title without possession for twenty years. Where the only title documents proved cover less than twenty years and do not trace back to the Crown grant, the person claiming thereunder as owner and being then out of possession cannot eject another from possession on such proof, there being no presumption that the first conveying party had the seisin. When the authorities speak of possession being a good title against the true owner, true owner means the person actually seised. If a person in possession goes out of possession then the title reverts to the true owner according to the documentary title. Against such true owner, who is not the testator in the present case, the defendant had acquired a good possessory title prior to becoming a trustee in 1937. [He referred to Sir *William Holdsworth*, *A History of English Law*, 2nd ed. (1937), vol. 7, pp. 64, 65; *Cole on the Law*

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and Practice in Ejectment (1837), p. 212.] If the testator had the legal title the defendant would take the legal estate subject to the equities (*Scott* v. *Scott* (1)), but not having the legal title and not having acquired a good possessory title against the true owner he cannot establish a better title than that acquired by the defendant. The view of the trial judge is contrary to *May* v. *Martin* (2). Conveyancing practice is opposed to the view of *Roper* C.J. in Eq. that mere possession for less than twenty years is sufficient to give a good title. [He referred to *Doe d. Wilkins* v. *Cleveland* (3); *Phipson* on *Evidence*, 9th ed. (1952), p. 123.] It may be that the defendant was a trespasser against the true owner, but not against the testator. The only proper inference to be drawn from the conveyance to the testator is that Hyland was in possession, and that the conveyance passed whatever rights she had in the possession. It did not establish that Hyland had a good title, the interest of Turner under the Crown grant is outstanding. There is no proof of the intervening time. *Asher* v. *Whitlock* (4) should have been applied in the defendant's favour. [He referred to *Perry* v. *Clissold* (5); *Russell* v. *Wilson* (6); *Gatward* v. *Alley* (7).] The nature of the title obtained by possession is referred to in *Minister for Army* v. *Dalziel* (8). The difference between the true owner and the person in possession is illustrated by *Wheeler* v. *Baldwin* (9).

[DIXON C.J. referred to *Wheeler* v. *Baldwin* (10).]

The testator could not bind an estate he did not have. He had not extinguished the true owner's title under s. 34 of the *Real Property Limitation Act* 1833. The defendant remains unaffected by the equities purported to be vested in the remaindermen. [He referred to *N.R.M.A. Insurance Ltd.* v. *B. & B. Shipping & Marine Salvage Co. Pty. Ltd.* (11).] At the trial the original documents of title were not produced and registration copies were tendered and relied upon under s. 28 (3) of the *Evidence Act* 1898-1940 (N.S.W.). Section 28 (3) makes the certified copy of the document prima facie evidence that the document was properly executed by the persons purporting to execute it, but it does not establish that the document was a genuine document and did what it purported to do. Documents must be produced from proper custody to prove

(1) (1854) 4 H.L.C. 1065 [10 E.R. 779].
(2) (1885) 11 V.L.R. 562.
(3) (1829) 9 B. & C. 864, at p. 868 [109 E.R. 321, at p. 323].
(4) (1865) L.R. 1 Q.B. 1.
(5) (1907) A.C. 73.
(6) (1923) 33 C.L.R. 538, at p. 547.
(7) (1940) 40 S.R. (N.S.W.) 175, at pp. 178, 179; 57 W.N. 82, at p. 84.
(8) (1944) 68 C.L.R. 261, at p. 276.
(9) (1934) 52 C.L.R. 609, at p. 621.
(10) (1934) 52 C.L.R., at p. 632.
(11) (1947) 47 S.R. (N.S.W.) 273, at p. 279; 64 W.N. 58, at p. 60.

that they are genuine and their non-production from such custody does not establish their authenticity.

A. B. Kerrigan Q.C. (with him *R. D. Conacher*), for the respondents. Where a mortgage is produced under which a mortgagor deals with property, a presumption arises that the mortgagor is in possession of the property and entitled to deal with it. When by the next document produced the mortgagor and mortgagee join together in conveying the fee the presumption arises from that document that they are together entitled to dispose of the fee. The conveyance would thus give to the testator here an estate in fee simple on those presumptions. [He referred to *Taylor* on *Evidence*, 11th ed. (1920), p. 135.] The only evidence to the contrary put forward by the defendant is the Crown grant to Turner. The defendant carries the onus of establishing that the testator did not have the fee.

[DIXON C.J. Is the question this, that what would otherwise be a good title acquired before 1937 by adverse possession is not good because the defendant had notice of the trusts ?]

Yes. If the testator is presumed to have the fee the doctrine of *Scott* v. *Scott* (1) applies. If not so seised but having an incomplete title he could still create equities on it. Under the decree made by *Roper* C.J. in Eq. the defendant who claimed to have a title by adverse possession did not prove it. The disputed question of fact whether the defendant had established uninterrupted possession against anyone was resolved against the defendant. [He referred to *Halsbury's Laws of England*, 2nd ed., vol. 20, p. 722 ; *Scott* v. *Scott* (1).] At his death the testator upon the assumption that he had no documentary title had been in possession for fifteen years and had a title good against the defendant. It was a devisable title (*Asher* v. *Whitlock* (2)) and the testator could create an equitable interest in it. It is not necessary to establish continuous possession for twenty years for evidence of title. [He referred to *N.R.M.A. Insurance Ltd.* v. *B. & B. Shipping & Marine Salvage Co. Pty. Ltd.* (3) ; *Asher* v. *Whitlock* (4).]

[DIXON C.J. referred to *Doe d. Hall* v. *Penfold* (5).]

Wheeler v. *Baldwin* (6) also touches the matter. Whatever estate the testator had in the land passed to his executors and was an estate out of which an equitable interest could be created and the defendant is affected by the doctrine of *Scott* v. *Scott* (1). The

(1) (1854) 4 H.L.C. 1065 [10 E.R. 779].
(2) (1865) L.R. 1 Q.B., at p. 6.
(3) (1947) 47 S.R. (N.S.W.) 273, at p. 279 ; 64 W.N. 58, at p. 60.
(4) (1865) L.R. 1 Q.B. 1.
(5) (1838) 8 C. & P. 536, at p. 537 [173 E.R. 607, at p. 608].
(6) (1934) 52 C.L.R., at p. 621.

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defendant did not go in till 1898 and at that date there had been uninterrupted possession for more than twenty years in the executors, the testator and Plunkett, assuming that Plunkett had no title, and such title would be good against all the world even the true owner. So that an imperfect title in the testator was perfected in the hands of his executors, and the estate so perfected, assuming the earlier estate was insufficient to do so, would support the doctrine of *Scott* v. *Scott* (1). Consequently whether or not the testator had the fee on his death the defendant could acquire no title against the estate. Apart from the doctrine just referred to, if the Court is satisfied that the testator was in possession at his death, then his trustees can at any time turn out an intruder unless the latter can show twenty years continuous possession. Continuity of possession was an issue of fact resolved by *Roper* C.J. in Eq. against the defendant. There is no reason why this Court should interfere with the findings of fact made by the trial judge. Assuming the defendant did obtain a possessory title, he obtained it only against the life tenant, but the remaindermen would go unaffected. Once it is shown that the testator was in possession at his death, then in a suit such as the present the onus is on the trustee to show that the lands he claims are not lands of the estate which it is his duty to administer.

R. M. Stonham, in reply.

Cur. adv. vult.

Nov. 28.

The following written judgments were delivered :—

DIXON C.J. The suit out of which this appeal arises is to compel the administration in certain respects of the trusts of the will of Henry Cusbert who died in the year 1895. The appeal concerns the single question whether a piece of land called "Plunketts" containing almost fifty acres is or is not subject to those trusts. The testator died possessed of the land which he held under an incomplete documentary title. At the commencement of the suit in 1950 Edmund Ambrose Allen, a son-in-law of the testator, was in possession of this and other land of which the testator died possessed and he refused to acknowledge that it was subject to the trusts of the will. The suit was accordingly instituted against him as defendant. His defence, so far as concerns the land in question upon this appeal, was placed upon the grounds first that he had assumed possession of the land two or three years after the testator's death and had retained possession, so that the claims of those

(1) (1854) 4 H.L.C. 1065 [10 E.R. 779].

deriving under the will were barred, and secondly that in any case there had been no proof of the title if any of the testator.

The defences failed and a decree was made which, among other things, declared the land to be assets in the estate of Henry Cusbert deceased and subject to the trusts of his will. Allen appealed from the decree to this Court but he died before the appeal came on for hearing. His legal personal representatives have been substituted as appellants. In support of the appeal one ground only has been relied upon, namely that there was no proof or presumption sufficient to establish the testator's title to the land : that the defendant Allen was in beneficial occupation and possession of the land and if they were to deprive him of it those claiming under the will must establish the testator's title.

It will be seen that this contention proceeds upon the assumption that it lies upon those claiming under the will to prove against Allen, because he is found in possession of the land, that the testator had title thereto sufficient for example to support an action for ejectment.

The assumption, however, leaves out of account the very important considerations that the land is part of the property of which the testator purported to dispose by his will and that after the testator's death Allen, under an appointment of new trustees, had become a trustee in whom with his co-trustee was vested, in the language of the deed of appointment, " all those lands and premises comprised in and assured by the will or such of the same as were at the time of the appointment subsisting undetermined and capable of taking effect ". The plaintiffs in the suit consist first of the executors of a deceased beneficiary and second of Allen's co-trustee whose name is Roughley. They sued Allen in his capacity as a trustee. It appears to me that the assumption that the burden of proving the testator's title to the land lies on the plaintiffs is quite opposed to the principles upon which courts of equity proceed.

Whatever title the testator had has now devolved upon Allen and Roughley as trustees as part of his estate. That he had some title capable of devolution is clear enough.

What appears in evidence as to the documentary title may be briefly stated. The land in question was alienated from the Crown in 1823 by a grant in fee simple to one James Turner. There is then nothing until 1877. In that year it is shown that a husband and wife named Plunkett mortgaged the land to a mortgagee named Catherine Hyland. In 1880 the Plunketts and Catherine Hyland joined in conveying the land for a money consideration to the

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testator. If a chain of title existed between Turner and the Plunketts, it is missing, and there is no evidence about it. But I think, notwithstanding the appellants' contention to the contrary, that it is shown that the testator became possessed of the land and held it until his death. In his will he referred to it specifically as "all that piece or parcel of land containing forty acres being the land conveyed to me by Catherine Hyland and others". It was included in a residuary devise to his trustees and made subject to a use in favour of the testator's son William for life. A limitation of a remainder to his eldest child failed because William died a bachelor. On that event a direction to the trustees took effect requiring them to sell the land and divide the proceeds between all the children of the testator. The will appointed two trustees. They survived the testator but have since died. The executors of the survivor of them appointed the plaintiff Roughley and the defendant Allen as new trustees. That was done by a deed dated 13th August 1937. Subsequently the appointment was confirmed by another deed which was dated 24th July 1945, "doubts", so it was said, having arisen. Allen and Roughley were parties to both instruments. At the hearing of the suit Allen made a case that he had taken control of the land in 1898 and that from then on he had used it and worked it. He claimed that he had been in exclusive possession of the land for a very great number of years and that all rights of entry against him were barred and that any other title to possession of the land was extinguished.

This case of the defendant Allen did not succeed. For in the first place the defendant failed to satisfy *Roper* C.J. in Eq., who heard the suit, that for material periods his possession had been exclusive of William, the equitable life tenant with a right to call for the legal estate whom the trustees had treated as entitled to the enjoyment of the land. In the second place, *Roper* C.J. in Eq. considered that time would not bar the equities of the testator's children, whose interests did not become interests in possession until William died in 1942, a date at which the defendant Allen was a trustee, and from which twenty years have not yet elapsed.

The appellants did not attack the conclusion that the defendant Allen could not succeed in his defence based on the *Real Property Limitation Act* 1833 (in force in New South Wales by virtue of the colonial Act No. 3 of 8 Wm. IV). They did not do so because they were prepared to concede that time had not barred the interests of the children of the testator, which took effect after the death of William without issue.

The inference appears to me to be plain enough that at his death the testator was possessed of the land. Whatever may have been the infirmity of his title derived through or from the Plunketts and Catherine Hyland, if it amounted to no more than a possessory right, it devolved upon his trustees under the devise to them and was subject to the trusts of his will. If Allen had been able to show that before he became trustee he had acquired a possessory title to the land by time running in his favour and barring the interests derived under the will, then doubtless his title would not have been destroyed by his acceptance of the office of trustee. But that is the very thing that he has been unable to show. He is left simply as a person in possession of the land with no proprietary right or interest. Yet his bare possession of the land at the time he became trustee and afterwards is relied upon as enough to place his beneficiaries under the necessity of proving affirmatively that the land is subject to the trusts of the will. He accepted the office of trustee under a will purporting to dispose of the land. The testator had at least an interest in the land capable of devolving on the trustees and that interest became vested in Allen and Roughley as trustees subject to the trusts of the will. A trustee who insists that an interest which otherwise would thus devolve upon the trustee and enure for the benefit of the beneficiaries is overridden by, or must give way to, his own private rights cannot throw the burden of proof upon the beneficiaries. The principles of equity hardly allow a trustee who contests the title of the trust he has accepted to property over which the trust instrument has in fact declared trusts to place the burden on the beneficiaries of establishing the title of the trust. Any claim he may make to the enjoyment of the property, he must substantiate. It therefore appears to me that the case is not governed by the rules that would apply if Allen were a defendant in an action of ejectment brought by a stranger who depended on an alleged legal title to the land of which Allen was in possession and that he has failed to discharge the onus lying upon him. The appellants' case was, however, presented on the footing that it was governed by such rules. It was said to raise the interesting question whether a claimant in ejectment, failing proof of a documentary title to an estate of freehold or to a term of years or some other proof of seisin or of a chattel interest in the land entitling him to possession, can make a sufficient presumptive case against a defendant in possession by proving simply that at a prior date the claimant or his predecessors in title were possessed of the land for a period less than twenty years. The case was put on one side of a claimant who had been in possession but who had been

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ousted by the defendant who therefore, unless he could justify, gained his possession as trespasser. It was conceded that in such a case the claimant need prove no more than that the defendant as presumptively a trespasser deprived him of his possession of the land. But it was contended that short of this the claimant in an action of ejectment must recover upon the strength of his own title. He must establish his documentary title or, if he relies upon prior possession, he must show a period of possession of not less than twenty years. This argument had its source in the treatment of the subject by Sir *William Holdsworth*, *A History of English Law*, 2nd ed. (1937), vol. 7, pp. 62-65. Very different views were maintained by Mr. *A. D. Hargreaves* in the course of a paper entitled "*Terminology and Title in Ejectment*" (1), a paper which drew a reply from Sir *William Holdsworth* (2). For the reasons I have stated I am unable to regard proceedings of the kind before us as in any way falling within the scope of this learned controversy. But as much attention has been given to it by members of the Court I shall mention one or two considerations that seem to me to aid in determining what is the rule that now prevails.

In the first place the principle that "the possession of real estate, or the perception of the rents and profits from the person in possession, is prima facie evidence of the highest estate in that property, namely a seisin in fee" (*Best*, *Evidence*, 12th ed. (1922), § 366), is a rule of general application. It relates to the possession of a party at any given point of time, present or past. But it affords no more than prima facie evidence which may readily be rebutted. In other words its probative value depends upon circumstances. After the passing of 21 Jac. 1, c. 16, possession covering twenty years took on a new aspect; it was well nigh conclusive against all rights of entry. For s. 1 provided among other things "that no person or persons shall at any time hereafter make any entry into any lands, tenements or hereditaments but within twenty years next after his or their right or title, which shall hereafter first descend or accrue to the same; and in default thereof such persons so not entering and their heirs shall be utterly excluded and disabled from such entry after to be made". (A proviso conceded a further ten years to persons under incapacity or certain disabilities.)

A possession of twenty years tolled, that is took away or barred, the entry of any person who had been dispossessed or whose possession had been discontinued. It would seem to follow that the person who, or the last of the persons who together, had had possession for twenty years had become seised of the land, and it

(1) (1940) 56 L.Q.R. 376. (2) (1940) 56 L.Q.R. 479,

is in virtue of seisin that a recovery in ejectment may be had. In *Buller's Nisi Prius*, 4th ed. (1785), p. 103, this passage appears with reference to ejectment: "If the plaintiff prove that A was in the possession of the premises in question, and that his lessor is heir to A it is sufficient prima facie; for it will be intended that A had seisin in fee, till the contrary appear. And if he prove that his lessor or his ancestors had possession for twenty years without interruption, till the defendant obtained possession, it is a sufficient title; for by 21 Jac. 1, c. 16, twenty years possession tolls the entry of the person having the right and consequently though the very right be in the defendant yet he cannot justify ejecting the plaintiff." In this passage will be seen the two things side by side: possession as prima facie evidence of seisin: possession for twenty years as proof of seisin. The latter part of the passage is based, as the sidenote shows, on *Stokes* v. *Berry* (1) also reported as *Stocker* v. *Berny* (2). Sir *William Holdsworth*, *A History of English Law*, 2nd ed. (1937), p. 64, concludes that possession of less than twenty years will not serve to support the action. "The fact", he says, "that a plaintiff, who relies solely on his own possession, must show a possession for twenty years—the period fixed by James I's statute of limitation—seems clearly to involve the consequence that possession for any less period will not do".

If in this passage the word "solely" is charged with its literal meaning, it may for practical purposes be so. For it would mean only that where all that you know is that the defendant in an action of ejectment now has possession and that at one time the plaintiff had possession for a period short of twenty years, there is no sufficient justification for saying that at the issue of the writ the plaintiff was entitled to enter. But probably the passage has not a meaning so restricted. However that may be I do not think that there is a rule of general application requiring proof of possession for a period of twenty years in default of the production or proof of a sufficient chain of documentary title, that is in cases where the defendant in possession has not ousted the plaintiff or claimant or his predecessor in title.

For certain purposes nothing less than twenty years possession would do. If, for example, it appeared that to infer a title from a shorter period of possession by the plaintiff would be to suppose that the plaintiff derived title from one who could not alienate the land, it would necessarily follow that nothing would avail him but

(1) (1699) 2 Salk. 421 [91 E.R. 366]; (1699) Holt K.B. 264 [90 E.R. 1044].

(2) (1699) 1 Ld. Raym. 741 [91 E.R. 1396].

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the period which would secure for him the benefit of the statutory provision. This would account for the decision in *Goodtitle d. Parker* v. *Baldwin* (1). A defendant to an action for trespass *quare clausum* who pleads *liberum tenementum* confesses the prima facie wrong complained of and avoids it on the ground that he was then and there seised of an estate in possession entitling him to enter. This plea, so it has been said, cannot be made out by mere acts of ownership extending over a period prior to the trespass of less than twenty years: *Brest* v. *Lever* (2). *Parke* B., who delivered the judgment of the Court of Exchequer, said: "By the plea of *liberum tenementum*, the defendant admits that the plaintiff is in possession, and that he himself is, prima facie, a wrong doer; but he undertakes to shew a title in himself, which shall do away with the presumption arising from the plaintiff's possession. This he was bound to do, either by shewing title by deed, in the usual way, or by proving a possessory title for twenty years" (3). Again where it appeared that the plaintiff's title depended upon a feoffment with livery of seisin and the feoffment was given in evidence but proof of the livery of seisin failed, the fact of livery of seisin could not be presumed from the circumstance that the feoffee obtained and held possession for a period. In the absence of twenty years possession the plaintiff showed no title. That is the decision in *Doe d. Wilkins* v. *Cleveland* (4), followed in *Doe d. Lewis* v. *Davies* (5). There may be other particular issues which possession for a period of less than twenty years will not suffice to prove by the prima facie presumption it supplies. But from these special situations it appears to be a mistake to infer the existence of a rule of general application. The fact is that proof of the plaintiff's title in ejectment will be made out according to the circumstances by such admissible evidence as tends to prove that at the issue of the writ the plaintiff was entitled as against the defendant to possession of the land. Many cases illustrate this but it is enough to cite part of the note (*a*) to *Allen* v. *Rivington* (6) in *Williams Saunders*: "The decision in the principal case seems to be confirmed by modern authorities to the extent, that actual possession, not apparently tortious, will furnish a *prima facie* case for the plaintiff in ejectment. Thus in *Doe d. Hughes* v. *Dyeball* (7) ejectment was brought to

(1) (1809) 11 East 488 [103 E.R. 1092].
(2) (1841) 7 M. & W. 593 [151 E.R. 904].
(3) (1841) 7 M. & W., at p. 595 [151 E.R., at p. 905].
(4) (1829) 9 B. & C. 864 [109 E.R. 321].
(5) (1839) 2 M. & W. 503, at p. 516 [150 E.R. 857, at p. 862].
(6) (1670) 2 Wms. Saund. 111 [85 E.R. 813].
(7) (1829) M. & M. 346; 3 C. & P. 610, S.C. [172 E.R. 567].

recover possession of a room in a house : the defendant had forcibly taken possession of the house : the plaintiff proved a lease to him of the house and a year's possession, and rested his case there : it was objected, that no title was proved in the demising parties to the lease : but per Lord *Tenterden*, 'That does not signify ; there is ample proof ; the plaintiff is in possession and you come and turn him out ; you must shew your title.' See also *Doe d. Humphrey* v. *Martin* (1), *coram* Lord *Denman*, *accord*. So in *Doe d. Smith* v. *Webber* (2), where, at the trial of an ejectment, in 1834, it appeared that a mortgage had been executed in 1815, and that from that time till the defendant obtained possession, the mortgagor had occupied the premises ; it was held that this, though a possession of less than twenty years, entitled the mortgagee to recover against the defendant, who had adduced no evidence in support of his own claim " (3). The prima facie presumption arising from possession may form part of the proofs. Doubtless if it stood alone in a literal sense it would not suffice to displace the presumption arising from the defendant's possession at the very time of the issue of the writ. But in practical affairs proof of such a fact in complete isolation is not to be expected.

I have said so much on the subject of proof of title in ejectment because of the course the case has taken, but my decision of the appeal is based on the ground that the case is not governed in any way by considerations governing evidence of title in such an action.

In my opinion the appeal should be dismissed.

WILLIAMS J. This is an appeal from a decree of the Supreme Court of New South Wales in its equitable jurisdiction made by *Roper* C.J. in Eq. in a suit brought by one of the trustees of and the executors of a beneficiary in the estate of Henry Cusbert deceased as plaintiffs against the other trustee as defendant for declarations that two blocks of land of which the defendant claimed to be the owner formed part of that estate and for consequential relief. His Honour found for the plaintiffs and held that both blocks of land formed part of the estate. The defendant died prior to the appeal coming on to be heard and the appellants are his executors. Although the whole decree was appealed from, it was only contended on the hearing of the appeal that his Honour was wrong with respect to one of the blocks. This is a block of approximately forty-nine

(1) (1841) Car. & M. 32 [174 E.R. 395].
(2) (1834) 1 A. & E. 119 [110 E.R. 1152].
(3) (1670) 2 Wms. Saund. 111, note (*a*) [85 E.R. 813].

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acres referred to in the evidence and his Honour's judgment as Plunkett's or as Hyland's land. The other block, the ownership of which is no longer in dispute, is referred to in the evidence and his Honour's judgment as Martin's land. The two blocks adjoin one another but are not contiguous being separated by a narrow road. The testator lived in a homestead built on Martin's land and at the time of his death had done practically nothing to develop Hyland's land. By his will the testator devised the homestead portion of Martin's land and also Hyland's land to his executors and trustees on trust for his son William Ephraim Cusbert for life without impeachment of waste and after his death, in the events that happened, upon trust for sale and to divide the proceeds equally between all his children, the child or children of any child of his dying before actual distribution to take the share of their parent *per stirpes* in such distribution. The life tenant William Ephraim Cusbert died a bachelor in 1942. Under the devise William was entitled to a legal life estate, but the legal estate vested in the executors on the grant of probate and nothing was done by way of conveyance or acknowledgment to vest the legal life estate in him.

The documentary title to Hyland's land commenced with a Crown grant of the land in fee simple to James Turner on 30th June 1823. The only other documents of title in evidence are a legal mortgage of the land by James Plunkett and his wife to Catherine Hyland by an indenture of mortgage dated 10th September 1877 and a conveyance of the land in fee simple to the testator by these three persons by an indenture of conveyance dated 15th September 1880. The testator was aware that the title to Hyland's land was doubtful, for so he told the defendant shortly before he made his will on 24th August 1894. But there is no doubt that the testator had entered into possession of the land and was still in possession of it at the date of his death. He died on 15th February 1895. Probate of his will was granted to his executors on 28th March 1895. About that time William granted a lease of the homestead portion of Martin's land to the defendant and his wife (a sister of William) for five years at a rental of five pounds per annum. But William for some years continued to live at the homestead with the defendant and his wife, or in a small shack on Hyland's land. About 1900 William left for New Zealand and appears to have remained there until about 1915 when he returned to New South Wales and thereafter lived until his death either at the homestead with the defendant and his wife or in a small weatherboard hut which the defendant built on Hyland's land.

From the time the defendant and his wife moved into the homestead the defendant appears to have worked the homestead portion and Hyland's land as a unit. He claims that about 1898, or shortly afterwards, he entered into adverse possession of the land in dispute and had been in continuous adverse possession ever since. Soon after he entered into possession he fenced the land, cleared it, planted an orchard on part of it, divided it into three paddocks, and ran stock on part of it, either his own or cattle on agistment. He applied the revenue derived from these activities to his own use and from time to time paid the rates and taxes levied on the land. By deed dated 13th August 1937 one of the plaintiffs, O. E. Roughley, and the defendant were appointed trustees of the will of the testator and they were still in office on the commencement of this suit. The defendant, however, claimed that he had then been in continuous adverse possession of the land for more than twenty years and that, by virtue of ss. 3 and 34 of the *Real Property Limitation Act*, 3 and 4 Wm. IV c. 27, adopted in New South Wales by 8 Wm. IV No. 3 from 1st August 1837, he had acquired a title in fee simple to the land at the end of the twenty years so that it was no longer part of the estate of which he became a trustee.

Counsel for the appellants admitted that if it is necessary to establish a good title by twenty years possession against anyone who had the prior possession the appeal must fail because, although such a title could be established against William, the defendant had notice of the equities affecting the land under the testator's will and time could not commence to run against the remaindermen until their estates fell into possession in 1942: *Halsbury's Laws of England*, 2nd ed., vol. 20, p. 722. But he contended that, as the testator could not trace his title back to James Turner, he never had a good documentary title to the land and that the plaintiffs could not rely on a possessory title because proof of possession of land for any less period than twenty years is not presumptive evidence of a seisin in fee. He contended that the defendant simply entered into possession of vacant land of which no one was then in possession and that the defendant, by virtue of such possession, immediately acquired a good title against the whole world except the true owner. The only person, therefore, who could sue to dispossess him would be a person who could show a good documentary title by devolution from the Crown grant or who could prove prior possession for more than twenty years. This the plaintiffs were unable to do. There was nothing to show any devolution of title from Turner to the Plunketts and the testator had been in possession

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of the land for at most fifteen years at the date of his death. He relied on the following passage from *Holdsworth's A History of English Law*, 2nd ed. (1937), vol. 7, pp. 64, 65: "(i) The fact that a plaintiff, who relies solely on his own possession, must show a possession for twenty years—the period fixed by James I.'s statute of limitation—seems clearly to involve the consequence that possession for any less period will not do. We have seen that the necessity for showing a possession for twenty years was laid down by *Holt* C.J., in 1699; but it was apparently not till the beginning of the nineteenth century that it was clearly ruled that possession for a less period was insufficient. In 1829, in the case of *Doe d. Wilkins* v. *Cleveland* (1), it was held that 'no possession short of twenty years was sufficient to warrant the jury in presuming the fact of livery of seisin'; per *Littledale* J. (2), and this was approved by *Parke* B., in 1837—'if,' he said, 'the fact of livery of seisin is sought to be inferred from possession alone, such possession ought to have existed for twenty years.' *Doe d. Lewis* v. *Davies* (3). The reason for this rule is obvious. The defendant is in possession, and therefore presumably entitled in fee simple. Though prior possession for twenty years does raise the inference that the person so possessed had an absolute right by virtue of the statute, possession for a less time can raise no inference at all. Therefore the presumption in favour of the defendant stands. As *Cole* says, *Law and Practice in Ejectment* (1857), p. 212, 'proof of mere possession by the plaintiff, or of the person through whom he claims, within twenty years before action, is not generally sufficient to support an ejectment, because the defendants in such action *are sued as tenants in possession*; and their possession is presumed to be lawful, in the absence of proof of title in the claimants'." We were referred to a passage in the judgment of *Jordan* C.J. in *N.R.M.A. Insurance Ltd.* v. *B. & B. Shipping & Marine Salvage Co.* (4), which appears to state that a plaintiff who can prove that he has been in possession of land for any period of time prior to the possession of the defendant makes a prima facie case in ejectment that he is seised in fee. If this means that the presumption in his favour continues after he has abandoned the possession and would be available against any person who subsequently entered into possession so that any plaintiff who could prove prior possession at any time could recover the land against any subsequent possessor,

(1) (1829) 9 B. & C. 864 [109 E.R. 321].
(2) (1829) 9 B. & C., at p. 871 [109 E.R., at p. 324].
(3) (1837) 2 M. & W. 503, at p. 516 [150 E.R. 856, at p. 862].
(4) (1947) 47 S.R. (N.S.W.) 273, at p. 279; 64 W.N. 58, at p. 60.

I cannot accept it. It is opposed to the passage cited from *Holdsworth*. It is also opposed to the opinion of Lord *Macnaghten*, delivering the judgment of the Privy Council in *Agency Co.* v. *Short* (1) that " the possession of the intruder, ineffectual for the purpose of transferring title, ceases upon its abandonment to be effectual for any purpose " (2). I do not doubt that the law is correctly set out in the passage in *Holdsworth*, but I do not think that it has any application to the facts of the present case. It refers, and refers only, to cases where a person in possession abandons the land so that a succeeding intruder does not disturb an existing possession in any one. If an existing possession is disturbed, the person in possession can sue the disturber as a trespasser. Proof that he is in possession confers on him a good title against the whole world, except those who show a better title. This is pointed out in the passage in *Holdsworth* which immediately follows the above passage. The learned author says (p. 65) : " But it must be noted that this principle does not apply in the two following cases : (*a*) we have seen that if an action of ejectment is brought against a trespasser, the plaintiff is entitled to recover merely on proof of his possession and its disturbance by the defendant just as if he had brought an action of trespass ". The correctness of this passage is placed beyond doubt by *Doe d. Hughes* v. *Dyeball* (3); *Davison* v. *Gent* (4) and by the approval by the Privy Council in *Perry* v. *Clissold* (5) of the expression of opinion to the same effect by *Cockburn* C.J. in *Asher* v. *Whitlock* (6). *Holdsworth* continues (p. 65) : "(*b*) if an action of ejectment is brought against a defendant whose possession is not adverse to that of the plaintiff (e.g. if the defendant is in possession merely as a bailiff for the plaintiff) the plaintiff, by construction of law, is and has always been in possession ; and the defendant, being estopped from disputing this fact, the plaintiff is entitled to succeed."

I would have thought that it would have been open to his Honour to have found on the evidence that the defendant and his wife were permitted by William to live in the homestead and that the defendant was permitted by him to work the adjoining land both Martin's block and Hyland's block for his own benfit. In that event the occupation of the defendant would not have been adverse to the possession of William but on his behalf and the latter's possession would have continued by construction of law and the defendant would have been estopped from disputing it.

(1) (1888) 13 App. Cas. 793.
(2) (1888) 13 App. Cas., at p. 799.
(3) (1829) 3 C. & P. 609 [172 E.R. 567].
(4) (1857) 1 H. & N. 744 [156 E.R. 1400].
(5) (1907) A.C. 73.
(6) (1865) L.R. 1 Q.B. 1.

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But his Honour was not prepared to go this far. He said: "The defendant says that when William lived at the homestead or at the hut on Hyland's Lot he did so with the defendant's permission but I find it difficult to believe that the real owner should seek or obtain permission to occupy his own land from one who was there as a trespasser. It may be that the position was reversed and that the defendant was in occupation with the permission, express or tacit, of the life tenant. The evidence does not enable me to form a conclusion as to that; but, and in this matter I think that the onus is on the defendant, I am not satisfied that while William was residing on either Lot, the defendant was in possession adversely to him of that lot and so I am not satisfied that the defendant acquired a title even as against William during his life by adverse possession or brought about the position that William was barred of his remedies in respect of the land".

I agree with his Honour that the onus was on the defendant to prove that the possession which he had of Hyland's lot was adverse to William and not a possession on behalf of or by permission of William. Under ss. 2 and 3 of the *Real Property Limitation Act* time would only have commenced to run against William in favour of the defendant after William had been dispossessed or had discontinued the possession. In *Rains* v. *Buxton* (1), *Fry* J. said that dispossession occurs "where a person comes in and drives out the others from possession, the other case (discontinuance) is where the person in possession goes out and is followed into possession by other persons" (2). The fact that nothing is done to improve or work a piece of land, particularly bush land, is not evidence that a person who has purchased the land has abandoned the possession of it. In *Leigh* v. *Jack* (3), *Cockburn* C.J. said: "If a man does not use his land, either by himself or by some person claiming through him, he does not necessarily discontinue possession of it" (4). *Bramwell* L.J. said: "But, after all, it is a question of fact, and the smallest act would be sufficient to shew that there was no discontinuance" (5). In deciding whether there was a discontinuance of possession of Hyland's land after the death of the testator by those claiming under his will it is impossible to separate the use to which the homestead block and this land were put. For the purposes of working they were really one property. The defendant was never, except whilst William was in New Zealand, in exclusive occupation of either block. Before William went to New Zealand

(1) (1880) 14 Ch. D. 537.
(2) (1880) 14 Ch. D., at pp. 539, 540.
(3) (1879) L.R. 5 Ex. D. 264.
(4) (1879) L.R. 5 Ex. D., at p. 271.
(5) (1879) L.R. 5 Ex. D., at p. 272.

and after he returned he was living on Hyland's land from time to time. He lived more at the homestead than on this land, but presumably that was because as a bachelor he found it more convenient to be looked after by his sister than to have to look after himself. Two applications were made to bring the land under the *Real Property Act* 1900. William made the first application, it would seem, about 1921 and requested that the certificate of title should issue to the defendant as his nominee. This application was withdrawn on 11th February 1924. The notice of withdrawal is in evidence and was signed by William as applicant and the defendant as nominee. The joinder by the defendant in this application not as the applicant but as the nominee of William is quite inconsistent with his present case. It points strongly to a desire on the part of William to transfer his life estate to the defendant. But William could not do this nor let the defendant into possession of the land so that the defendant, by remaining in possession for twenty years, could defeat the title of any of the persons, other than William, claiming under the will of the testator. The defendant, by remaining in possession for twenty years, could get a good possessory title under the Act against the whole world, except those persons, because s. 34 of the *Real Property Limitation Act* provides that at the determination of the period limited by the Act to any person for making an entry, the right and title of such person shall be extinguished. But the defendant would be estopped from setting up any title adverse to the will and any title the defendant derived from such possession would be subject to the trusts of the will. Under those trusts, on William's death, the trustees held the land on trust for sale and to distribute the proceeds of sale among the beneficiaries. Time would not run under s. 3 of the Act against the trustees under this trust until they became entitled to the possession of the land on the death of William in 1942, so that the defendant could not have acquired a good title against them by twenty years' possession until 1962 even if it was possible for him to acquire such a title after he had become a trustee of the will in 1937 : see *Bolling* v. *Hobday* (1); *Board* v. *Board* (2); *Dalton* v. *Fitzgerald* (3). In the last-mentioned case *Lopes* L.J. put the position succinctly when he said : " Not only is a person who enters under a will or a deed estopped from setting up a title adverse to the will or deed, but anyone who gains possession through a person interested in the land under the will or deed is bound by the same principle of estoppel " (4). Later in 1931 the defendant

(1) (1882) 31 W.R. 9.
(2) (1873) L.R. 9 Q.B. 48.
(3) (1897) 2 Ch. 86.
(4) (1897) 2 Ch., at p. 94.

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applied to bring the land under the Act himself and William swore a statutory declaration in support of this application on 6th March 1937 in which he said he had never asserted any right to the land by having it cleared or fenced or taken any steps to have his brother-in-law ejected from the land. But this statutory declaration could not be evidence against the plaintiffs. In any event, its evidentiary effect is slight and it is for the Court to attach the proper legal significance to the evidence as a whole.

There can be no doubt that a person who is in possession of land without a good documentary title has, whilst he continues in possession, a devisable interest in the property (*Asher* v. *Whitlock* (1); *Calder* v. *Alexander* (2); *Perry* v. *Clissold* (3); *Wheeler* v. *Baldwin* (4)). The testator was, therefore, entitled to devise the land in dispute to his trustees on the trusts of the will. One of these trusts was a trust, on William's death, to sell the land and divide the proceeds among the beneficiaries. For this purpose the trustees required to have the legal estate and the possession of the land on William's death. As the legal life tenant William was entitled to possession during his lifetime, but on his death the trustees became entitled to possession. The testator was in possession of the land at his death and his executors and trustees succeeded to that possession. The fact that the testator by his will had created trusts for life and in remainder of the land tends strongly against any inference other than the inference that William entered into possession as life tenant under the will and the defendant was in occupation by William's permission. The testator, at the date of his death, had been in possession of the land for fifteen years. It therefore only required possession for a further five years by those claiming under the testator for the estate of the testator to acquire a good possessory title to the land, that being a title which leaves the person in possession with a title gained by the fact of possession and resting on the infirmity of the right of others to eject him. Such a title gained by the operation of the statute is a good title both at law and in equity, and will be forced by the court on a reluctant purchaser: *Tichborne* v. *Weir* (5); *Re Atkinson and Horsell's Contract* (6); *Taylor* v. *Twinberrow* (7). In these circumstances the suggestion that a positive inference should be drawn that the possession of the land was deliberately abandoned at or soon after the testator's death by William and the trustees,

(1) (1865) L.R. 1 Q.B. 1.
(2) (1900) 16 T.L.R. 294.
(3) (1907) A.C. 73.
(4) (1934) 52 C.L.R. 609, at pp. 632, 633.
(5) (1892) 67 L.T. 735.
(6) (1912) 2 Ch. 1, at pp. 9, 17.
(7) (1930) 2 K.B. 16, at pp. 23-28.

in which event the inchoate possessory title would have been destroyed and, with it, on the eve of fruition, all the interests created by the will of the testator, so that all the defendant did was to occupy vacant land is, in all the circumstances, quite hopeless.

For these reasons I would dismiss the appeal.

FULLAGAR J. This is an appeal from an order of *Roper* C.J. in Eq. in a suit in equity in the Supreme Court of New South Wales. The plaintiffs in the suit were three in number. The plaintiff Oliver Edwin Roughley is one of the two trustees of the will of Henry Cusbert, formerly of Dural in the State of New South Wales, who died on 15th February 1895. The other two plaintiffs are the personal representatives of a daughter of Henry Cusbert. The defendant in the suit was Edmund Ambrose Allen, who was from 1937 until his death the other trustee of the will of Henry Cusbert. Edmund Ambrose Allen died after the making of the order in the Supreme Court and before this appeal came on for hearing. His personal representatives, Reginald Edmund Allen and Winifred Elsie Boyle, were substituted as appellants.

The subject matter of the suit consisted of two pieces of land near Dural in New South Wales. One of these has been briefly referred to as "Martin's land". This is a piece of land of about twenty acres, and is part of an area of about sixty acres originally granted by the Crown to one Charles Martin. The other, which comprises an area of about fifty acres, has been briefly referred to as "Plunkett's land" or "Hyland's land". It will be convenient to refer to this latter land as Plunkett's land. The defendant, E. A. Allen, was in possession of both pieces of land at the date of commencement of the suit. The plaintiffs claimed that he had no right title or interest in or to either piece of land otherwise than as a trustee of the estate of Henry Cusbert. The defendant claimed that neither piece of land was part of the estate of Henry Cusbert, and that he was the legal owner of both, or at least entitled, as against the estate, to retain possession of both. The claim of the defendant in respect of both pieces of land was rejected by *Roper* C.J. in Eq. The appeal is brought in respect of the decision only so far as it affects Plunkett's land. Martin's land was the subject of an original Crown grant to one Charles Martin, and it was clearly established that Henry Cusbert had at his death a legal estate in fee simple in this land. This being so, the defendant could only succeed if he established that he had been in possession of it for a period sufficient to extinguish that legal estate. In the view of *Roper* C.J. in Eq. he failed to establish this, and this view is not

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now challenged. On the other hand, so far as Plunkett's land is concerned, it is said that Henry Cusbert, when he died in 1895, had no title to Plunkett's land, and that the position with respect to this land is entirely different. The case is one of some complexity and difficulty, and it seems convenient to begin by setting out the relevant facts in chronological order.

It appears that on 30th June 1823 there was a Crown grant to James Turner of the whole of Plunkett's land. On 10th September 1877 one James Crawford Plunkett and Hannah Plunkett his wife mortgaged the land to Catherine Hyland to secure repayment of the sum of £58 12s. 0d. The evidence discloses no conveyance or will or other transaction whereby the Plunketts ever acquired any interest in the land originally granted to James Turner. On 15th September 1880 the Plunketts and Mrs. Hyland conveyed, or purported to convey, to Henry Cusbert an estate in fee simple in the land. Henry Cusbert entered into possession of the land, and retained possession of it until he died on 15th February 1895. By his will made on 24th August 1894 he devised, or purported to devise, both Martin's land and Plunkett's land to the use of his son William Ephraim Cusbert during his life and from and after his decease to the use of his eldest living child, but, should his said son die without such lawful issue, then he directed his trustees to sell the land and divide the net proceeds equally among all his children.

The defendant Edmund Ambrose Allen said that he "took control" of the land in the year 1898, when he came from Pennant Hills with his wife (who was a daughter of the testator) to live in the "homestead", which stood on Martin's land. He says that about this time he took and sold timber and soil from the land, some of the soil being sold to William. Between 1902 and 1906 he fenced Plunkett's land, and cleared two acres and planted it with citrus trees. In or about 1908 he cleared a further two to three acres up to Kenthurst Road, which forms the southern boundary of the land. In or about 1912 he cleared a further four to five acres and planted it with lemons. There were further plantings about 1938 and again about 1951. Timber from the land was sold from time to time by him to various persons from 1899 to 1930. In addition, he used the land for grazing cattle and maintained a stud bull on the property. From all sales of produce from the land he, Edmund Ambrose Allen, received the full proceeds, and he himself had the full benefit of all use made of the land. From 1898 up to the present time he has paid rates every year on the property. He said that he always had full and complete control of the land and

that nobody else ever interfered with him in any way in connection with the land.

The testator's son William appears to have lived at the homestead with his sister and brother-in-law for two or three years after 1898. He then went to New Zealand. It is not possible to fix very definitely either the time of his departure or the period of his absence. *Roper* C.J. in Eq. thought it probable that he left at some time between 1900 and 1903 and returned about the year 1915. I am disposed to think that he went away a little earlier. The defendant says that he was away about fourteen years. His son, Reginald Edmund Allen, went to the war in 1915, and he says that William had come back before he left. He then lived at the homestead for two or three years, after which he took positions working for various people. He would then be away for periods of three or four months, after which he would " come home " for a few days and then go away on another " job ". After a time he seems to have fallen out with Allen and with Allen's children, and Allen says that, wanting to get him away from the home, he built him a hut of wood and iron on Plunkett's land. Allen says that he paid the whole expenses of the erection of the hut and gave William permission to live in it, and that William never, either before or after going to live in the hut, played any part in the management or control of the property or made any other use of it apart from residing in the hut. The son says that he returned from the war in 1920, went home for a short period, and was then away for about six months. When he returned, he found William living in a hut that his father and brother had erected on Plunkett's land. He says that, if William " got off-colour ", he would live for the time being at the homestead but, subject to that, he lived in the hut. In 1923 William was ill in hospital for about four months. When he came out of hospital he lived at the homestead as before, and never went to the hut again.

On 13th August 1937 a deed was executed whereby the then trustees of the will of Henry Cusbert retired and appointed the plaintiff Roughley and the defendant Allen to be trustees in their stead. By s. 9 of the *Trustee Act* 1925-1942 (N.S.W.) it is provided that where a new trustee is appointed the execution and registration of the deed of appointment shall without any conveyance vest in the persons who become and are the trustees for performing the trust as joint tenants and for the purposes of the trust the trust property for which the new trustee is appointed. The deed, however, in this case contained an express provision purporting to assign to the new trustees the trust property. It provided that the

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retiring trustees "do hereby alien grant release and convey unto the said Allen and the said Roughley their heirs and assigns all those the lands and premises comprised in and assured by the said recited will or such of the same as are now subsisting undetermined and capable of taking effect". Neither the statute nor the express provision in the deed could, of course, operate to vest in the new trustees any property which was not at that time part of the testator's estate.

William Cusbert died on 14th August 1942 without ever having married. Whatever may have been the position up to the date of his death, there seems to be no doubt that from that date Edmund Ambrose Allen was in possession of Plunkett's land up to the date of his own death.

The only other matter which it seems necessary to mention is that certain applications to bring both Martin's land and Plunkett's land under the *Real Property Act* 1900 (N.S.W.) were made at different times during the lifetime of Edmund Ambrose Allen. I mention this, but it does not appear to me that these applications have any bearing on the argument presented to us by counsel for the appellant.

The suit was commenced on 1st December 1950. The plaintiffs, as has been said, were one of the trustees of Henry Cusbert's will and the personal representatives of a deceased beneficiary under that will, who would, if the trusts of the will relating to Plunkett's land are effective and subsisting, be entitled to share in the proceeds of the sale of that land. The plaintiffs allege that Plunkett's land was subject to the trusts of Henry Cusbert's will and formed part of his estate, that the defendant refused to sell the same and distribute the proceeds of sale in accordance with the will, that he had contrary to his duty as a trustee used the land for his own benefit and retained the produce, profits and income therefrom and that he had been requested to retire from the trusts. The plaintiffs claimed—(1) an order removing the defendant from his position as trustee of the will; (2) a declaration that the lands in question were assets in the estate of Henry Cusbert and subject to the trusts of his will; (3) a declaration that the defendant had no estate or interest in the lands in question; (4) a declaration that he had been since 13th August 1937 a trustee of the lands in question for the persons entitled thereto under Henry Cusbert's will; (5) accounts; and (6) if and so far as might be necessary, general administration.

The order under appeal declared: (1) that the lands in question were assets in the estate of Henry Cusbert and subject to the trusts of his will; (2) that the defendant had no estate or interest in those

lands adverse to the estate of Henry Cusbert; and (3) that the defendant had been since 13th August 1937 a trustee of those lands for the persons entitled under Henry Cusbert's will.

Roper C.J. in Eq. treated the case as one in which the defendant Allen could not succeed either as to Martin's land or as to Plunkett's land unless he established that, before he became a trustee of the estate of Henry Cusbert in 1937, he had acquired a legal title to the land in question. The only way in which it could be suggested that he had acquired a legal title was by possession. The relevant statute in this regard is the *Real Property Limitation Act* 1833 (Imp.) which became part of the law of New South Wales by virtue of Act 8 Wm. IV. No. 3 (N.S.W.). The English Act of 1874 has not been adopted in New South Wales. The provisions of the Act of 1833, so far as material, are as follows. Section 2 provides that no person shall make an entry or distress or bring an action to recover any land but within twenty years next after the time at which the right to make such entry or distress or bring such action shall have first accrued to himself or to some person through whom he claims. By s. 3 it is provided that when the estate or interest claimed shall have been an estate or interest in reversion or remainder or other future estate or interest and no person shall have obtained the possession or receipt of the profits of such land in respect of such estate or interest, then such right shall be deemed to have first accrued at the time at which such estate or interest became an estate or interest in possession. Section 7 provides that, where the possession is that of a tenant at will, the right to make an entry or bring an action shall be deemed to accrue at latest at the expiration of one year from the commencement of the tenancy: see *Lightwood*, *The Time Limit on Actions* (1909), p. 97. Section 25 provides that when any land is vested in a trustee upon any express trust the right of the *cestui que trust* or any person claiming through him to bring a suit against the trustee or any person claiming through him to recover such land shall be deemed to have first accrued at and not before the time when such land shall have been conveyed to a purchaser for value. Section 34 provides that at the determination of the period limited by the Act to any person for making an entry or distress or bringing an action the right and title of such person to the land shall be extinguished.

Taking the view which he did take of the defendant's position, and holding, as he did, the view that the burden of proof was on the defendant, *Roper* C.J. in Eq. stated two reasons for deciding against the defendant. They amounted really, I think, to three distinct reasons, any one of which—assuming the correctness of

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his Honour's primary analysis of the case—was sufficient to defeat the defendant. I will state them in a different order from that in which his Honour stated them.

His Honour said that the evidence did not satisfy him that the defendant was in possession either of Martin's land or of Plunkett's land adversely to William for any uninterrupted period of twenty years. This view is open to the comment that since the Act of 1833 it has not been necessary for a person claiming a title by possession to show that his possession was adverse in the old sense of being inconsistent with the title of the true owner. It is enough if actual possession was taken and continued, even though it be with the consent of the true owner : the case of a tenant at will is covered by s. 7 of the Act. And there is, in my opinion, much to be said for the view that the defendant here did have actual possession for the necessary period. William appears to have been in New Zealand for a long period—from about 1903 to about 1915, as *Roper* C.J. in Eq. thought. During that period it would seem clear that the defendant was in possession, and it is very difficult to find any justification for saying that William resumed possession on his return : his position seems to have been more or less analogous to that of a lodger. However, I did not understand the finding of *Roper* C.J. in Eq. to be challenged by the appellants. Perhaps they regarded his Honour as meaning that he was not satisfied that the defendant had had actual possession for the necessary period. If this is what his Honour meant, then, since his view may have depended in part on the credibility attached by him to witnesses, it would probably have been difficult to challenge it successfully.

But, even if he had regarded possession by the defendant for more than twenty years as established, his Honour found two other reasons for deciding against the defendant. In the first place, he said that, even if William's right were extinguished, yet, by reason of s. 3 of the Act, time did not begin to run against the remaindermen until William died on 14th August 1942, and the necessary twenty years had not expired since then. This view again, as it seems to me, may be open to question. For the will says merely that on William's death the trustees are to sell the land and divide the proceeds, and it might be said that no right to make an entry or distress or bring an action to recover the land could ever accrue to them. On this view, if—at any rate before 1937—the defendant had been in possession for twenty years, the estate and interest of the trustees would have been extinguished, and with

it the trust for sale to which it was subject : see *Bolling* v. *Hobday* (1); *Preston and Newsom, Limitation of Actions*, 2nd ed. (1943), p. 129. Again, however, I did not understand the view of *Roper* C.J. in Eq. to be challenged, and, if his finding as to possession stood, it would not have availed the appellants to challenge it.

The other reason given by the learned judge for deciding against the defendant, even on the supposition that twenty years' possession were proved, was that any possessory legal title which could have been acquired by the defendant must have been subject to all equities of which he had notice. And it has never been disputed that he had notice of the provisions of the testator's will. Again the appellants have not challenged the view taken by his Honour, which is founded on *Scott* v. *Scott* (2) ; see also *Re Nisbet and Potts' Contract* (3). The latter case has been criticised, notably by Mr. *T. Cyprian Williams* in (1906) 51 S.J. 141, 155, but "it is not likely to be overruled" (*Lightwood, The Time Limit on Actions* (1909), p. 81).

So far as Martin's land is concerned, the testator, Henry Cusbert, was shown to have had a legal estate in fee simple at his death, and it was conceded by the appellants in this Court that the defendant could not succeed unless he established that he himself had acquired by possession a legal estate in fee simple since the testator's death. It was accordingly conceded further in respect of Martin's land that, for some one or more or all of the reasons given by *Roper* C.J. in Eq., the defendant must fail. It was said, however, that the position with regard to Plunkett's land was altogether different. With regard to this land, the argument attacked the whole *substratum* of the judgment by denying that it was necessary for the defendant to prove that he had been in possession for twenty years. The argument assumed that, although the proceeding took the form of a suit in equity, because it was necessary to claim equitable remedies, yet the rights put in issue were legal rights, and the defendant was in the same position as if he had been the defendant in a common law action of ejectment brought by Henry Cusbert's trustees. He was in possession of the land, and "the plaintiff must recover . . . by the strength of his own title, . . . not by the weakness of the defendant's title" (per Lord *Ellenborough* C.J. in *Goodtitle d. Parker* v. *Baldwin* (4)). The defendant, it was argued, must succeed, unless legal ownership of the land is proved to lie in some person other than himself. The

(1) (1882) 31 W.R. 9.
(2) (1854) 4 H.L.C. 1065 [10 E.R. 779].
(3) (1906) 1 Ch. 386.
(4) (1809) 11 East 488, at p. 495 [103 E.R. 1092, at p. 1095].

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title might, of course, be either a documentary title or a possessory title, but (1) no documentary title in the testator was proved, because there was no evidence that the conveyance of 1880 to the testator was made by persons who had any title, and (2) no possessory title in the testator or his representatives was proved, because in 1898, when the defendant entered into possession, the testator and his representatives had had possession for eighteen only of the necessary twenty years.

This argument ignores the fact (which may well itself be fatal to it) that the defendant became in 1937 a trustee of a will which purported to devise Plunkett's land. It rests simply on the fact of possession and a denial that Plunkett's land was ever part of Henry Cusbert's estate. Accordingly, the defendant says it is a mere begging of the question to say that he was not in actual possession for any continuous period of twenty years, or to say that he became in 1937 a trustee of his father-in-law's will, or to say that he had notice of equitable interests in the land, or to say that, even if William's claim was barred, there are remaindermen whose claim is not barred. The answer made, however, to the argument of the appellants is that, although a plaintiff in ejectment must succeed on the strength of his own right, this does not mean that he must show a legal title good against all the world. Here, the respondents say, the testator was in possession from 1880 to 1895, and he had a possessory interest, which was devisable by will, and which (although his will contained a direct devise of that interest to William) vested at his death (by virtue of what is now s. 44 of the *Wills Probate and Administration Act* 1898-1947) in his executors in trust for William for life and after William's death upon other trusts. It is then said that the prior possession of the testator, the rights attaching to which devolved upon his executors, gives rights which are superior to those of any subsequent possessor unless and until the former are extinguished under s. 34 of the Act through some person or persons being in possession for twenty years at least. If this view is correct, the defendant must fail, because *Roper* C.J. in Eq. has found that there was no such extinguishment, and, as I have said, I did not understand this finding to be challenged.

One would certainly expect to find such a fundamental and everyday question answered clearly by authority, and I think that there is a strong preponderance of modern authority against the defendant in the present case. The position was treated as being clear enough in *Whale* v. *Hitchcock* (1) where *Cleasby* B. merely

(1) (1876) 34 L.T. 136.

said :—" *Prima facie* the plaintiff's is the better title " (1), although that title rested only on possession prior to the defendant's.

In approaching the question at the present day it does not seem to me to be necessary to consider how it would or might have been approached in the eighteenth century, or to examine the technicalities of the " beatitude of seisin ", of disseisin and remitter, the action of novel disseisin and the tolling of entries, or the process by which the real actions became practically superseded by trespass and ejectment. The *Real Property Limitation Act* (by s. 37) abolished the real actions, and it made everything depend on the accrual of a " right to make an entry or distress or bring an action for the recovery of land ". Mr. *Charles Sweet*, writing in the *Law Quarterly Review* said : " The statute was passed for the express purpose of getting rid of the doctrines of seisin, disseisin, and remitter " (2). *Challis* may have regarded this view as a heresy worthy of bell, book and candle (see *Challis*, *Law of Real Property*, 3rd ed. (1911), p. 436), but it seems to me that *Sweet* correctly stated the effect, if not the purpose, of the statute. It is to be noted that the long title of the statute mentions the simplification of remedies as one of its objects.

Mr. *Stonham*, for the defendant, founded himself primarily upon a passage in *Cole*, *The Law and Practice in Ejectment* (1857), p. 212, and a passage in Sir *William Holdsworth's A History of English Law*, 2nd ed. (1937), vol. 7, at pp. 64, 65. The latter passage (in the course of which *Cole* is quoted by *Holdsworth*) is as follows :— " The fact that a plaintiff, who relies solely on his own possession, must show a possession for twenty years—the period fixed by James I.'s statute of limitation—seems clearly to involve the consequence that possession for any less period will not do. We have seen that the necessity for showing a possession for twenty years was laid down by *Holt* C.J., in 1699 ; (*Stokes* v. *Berry* (3)) but it was apparently not till the beginning of the nineteenth century that it was clearly ruled that possession for a less period was insufficient. In 1829, in the case of *Doe d. Wilkins* v. *Cleveland* (4) it was held that ' no possession short of twenty years was sufficient to warrant the jury in presuming the fact of livery of seisin ', per *Littledale* J. (5) ; and this was approved by *Parke* B., in 1837—' if,' he said, ' the fact of livery of seisin is sought to be inferred from *possession alone*, such possession ought to have existed for twenty years.'—*Doe d. Lewis* v. *Davies* (6). The reason for this

(1) (1876) 34 L.T., at p. 137.
(2) (1896) 12 L.Q.R. 239, at p. 249.
(3) (1699) 2 Salk. 421 [91 E.R. 366].
(4) (1829) 9 B. & C. 864 [109 E.R. 321].
(5) (1829) 9 B. & C., at p. 871 [109 E.R., at p. 324].
(6) (1837) 2 M. & W. 503, at p. 516 [150 E.R. 856, at p. 862].

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rule is obvious. The defendant is in possession, and therefore presumably entitled in fee simple. Though prior possession for twenty years does raise the inference that the person so possessed had an absolute right by virtue of the statute, possession for a less time can raise no inference at all. Therefore the presumption in favour of the defendant stands. As *Cole* says (*Law and Practice in Ejectment*, p. 212) 'proof of mere possession by the plaintiff, or of the person through whom he claims, within twenty years before action, is not generally sufficient to support an ejectment, because the defendants in such action *are sued as tenants in possession*; and their possession is presumed to be lawful, in the absence of proof of title in the claimants.'"

The passage cited above from *Holdsworth* does, in my opinion, support the defendant's claim in the present case. It is to be observed that the learned author, in a passage following immediately upon what has been quoted, says that the principle does not apply in an action of ejectment brought against *a trespasser*, or in a case where the defendant's possession is not *adverse* to that of the plaintiff, so that the possession of the defendant is really the possession of the plaintiff, and, "the defendant being estopped from disputing this fact", the plaintiff is entitled to succeed. (It is apparently only on the basis that it fell within the latter class of case that *Holdsworth* would approve of the decision in the well-known case of *Asher* v. *Whitlock* (1)). But in the present case it does not appear to me that the defendant was a "trespasser" or "disseisor". The inference is rather that he entered with the consent of William, the person entitled to immediate possession. On the other hand, his possession (if he really had possession) was "adverse" in the sense that time would run in his favour (which is all that that word really means nowadays) and his possession could not be regarded as the possession of anybody else. It is impossible, in my opinion, to bring the case within either of the exceptions stated by *Holdsworth*.

With the greatest respect, however, I have come to the conclusion that the passages in *Cole* and *Holdsworth*, on which the appellants rely, do not correctly state the law applicable to the present case. *Lightwood*, to whom *Holdsworth* refers in a note, and to whom I will refer in a moment, takes a different view in his work *The Time Limit on Actions* (1909).

It does not appear to me that either of the two cases cited by *Holdsworth* supports the general view which he expresses. Each decides, or assumes, that possession for less than twenty years is

(1) (1865) L.R. 1 Q.B. 1.

no evidence of livery of seisin, but that proposition of itself is of no assistance to the defendant here. In *Doe d. Wilkins* v. *Cleveland* (1) the plaintiff's lessor claimed as the heir-at-law of one John Wilkins, and it was therefore necessary for him, as Lord *Tenterden* said, "to shew a freehold interest in himself or his ancestor" (2). He tendered documentary evidence of his title, which was held to be inadmissible, and possession for less than twenty years was insufficient to prove the necessary freehold title. In *Doe d. Lewis* v. *Davies* (3) the plaintiff's lessor established a clear legal title as heir-at-law, as to part of the land, of A., and, as to the rest of the land, of B. The defendant sought to establish life estates in the land created by A. and B. respectively in their lifetimes. The defendant succeeded on the ground that the document on which he relied operated as a covenant to stand seised, the opinion being expressed that possession for less than twenty years would have been insufficient to establish a legal freehold estate in himself.

In *Asher* v. *Whitlock* (4) W. had in 1842 inclosed some waste land; in 1850 he inclosed more land adjoining, and built a cottage; he occupied the whole till 1860, when he died, having devised it to his wife, so long as she remained unmarried, with remainder to his daughter in fee. On his death, the widow and daughter continued to reside on the property, and in 1861 the defendant married the widow, and came to reside with them. Early in 1863 the daughter died, aged eighteen years, and the mother died soon after. The defendant continued to occupy the property, and in 1865 the daughter's heir-at-law brought ejectment against him. This case arose before the English Act of 1874, and the limitation period was still twenty years. It was held that the plaintiff was entitled to recover the property. The dilemma posed by *Cockburn* C.J. is possibly not perfect, but, whether it is or not, it would seem to me that it was on what is put as the second horn that the defendant really came to grief. He was claiming a right as against the daughter's heir, and time was running under the statute in his favour. The learned Chief Justice said:—"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 devisor might have brought ejectment: his right of possession

(1) (1829) 9 B. & C. 864 [109 E.R. 321].
(2) (1829) 9 B. & C., at p. 868 [109 E.R., at p. 323].
(3) (1837) 2 M. & W. 503 [150 E.R. 856].
(4) (1865) L.R. 1 Q.B. 1.

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being passed by will to his daughter, she could have maintained ejectment, and so therefore can her heir, the female plaintiff" (1).

The decision in *Asher* v. *Whitlock* (2) was expressly approved by the Privy Council in *Perry* v. *Clissold* (3). *Lightwood, The Time Limit on Actions* (1909), p. 124, says: "Probably the principle of *Asher* v. *Whitlock* (2) goes beyond the case of a disseisin, and applies whenever there is a possession in favour of which the statute is running. This is now known as an adverse possession, and it corresponds to the possession of a disseisor under the old law. In *Asher* v. *Whitlock* (2) the court (*Cockburn* C.J. and *Mellor* J.) do not seem to have concerned themselves with technical disseisin, and it is not clear that A.'s inclosure from the waste was a disseisin of the lord of the manor. The judgment of *Cockburn* C.J. was apparently an extension of the doctrine of disseisin to dispossession, and the principle of the judgment was that mere possession gives a good title against subsequent wrongdoers. 'On the simple ground,' said *Cockburn* C.J. (1), 'that possession is good title against all but the true owner, I think the plaintiffs entitled to succeed.'" A little later, after referring to *Dixon* v. *Gayfere* (4), and to criticisms made of the decision in that case, *Lightwood, The Time Limit on Actions* (1909), p. 125, says:—"Each possessor, whether under the old law he would have been a disseisor or not, gains at once a possessory title which is good against a subsequent possessor."

In *N.R.M.A. Insurance Ltd.* v. *B. & B. Shipping & Marine Salvage Co. Pty. Ltd.* (5) *Jordan* C.J., speaking for himself and *Davidson* and *Street* JJ. said:—"The plaintiff could make out a *prima facie*, although rebuttable, case by proving possession at a date earlier than the defendant's possession, because *de facto* possession is *prima facie* evidence of seisin in fee and right to possession: *Doe d. Hall* v. *Penfold* (6). It was once thought that a plaintiff who relied on possession must prove possession for at least twenty years; but it is now well established that proof of anterior possession for any period is sufficient to make a *prima facie* case: *Asher* v. *Whitlock* (2); *Whale* v. *Hitchcock* (7); *Dawson* v. *Pyne* (8); *Hawdon* v. *Khan* (9). The statement in *Richards* v. *Richards* (10) that 'The plaintiff must remove every possibility of title in another

(1) (1865) L.R. 1 Q.B., at p. 6.
(2) (1865) L.R. 1 Q.B. 1.
(3) (1907) A.C. 73.
(4) (1853) 17 Beav. 421 [51 E.R. 1097].
(5) (1947) 47 S.R. (N.S.W.) 273; 64 W.N. 58.
(6) (1838) 8 C. & P. 536, at p. 537 [173 E.R. 607, at p. 608].
(7) (1876) 34 L.T. 136.
(8) (1895) 16 N.S.W. L.R. 116; 11 W.N. 179.
(9) (1920) 20 S.R. (N.S.W.) 703; 37 W.N. 279.
(10) (1731) 15 East 293 (note a) [104 E.R. 855].

person before he can recover' was made in a case in which the plaintiff appears to have relied solely on proof of actual title. As a general proposition, it is clearly not the law: *Davison* v. *Gent* (1)" (2). This passage is supported by the authorities cited, and I think that it correctly states the general rule.

It is, of course, true that there may be cases in which it will not be enough for a plaintiff in ejectment to prove possession for less than the statutory period. Suppose A. to be the legal owner of land. B. enters into possession, but later abandons possession. Two years afterwards C. enters into possession. B. has no right whatever against C. unless his possession continued for the statutory period or he has in the meantime otherwise acquired a legal estate from A. This is because, when B. abandoned possession, A. was replaced in exactly the same position as before B. entered, and B. after abandonment had no right whatever to make an entry or bring an action: see *Agency Co.* v. *Short* (3). *Jordan* C.J. in the passage quoted above was not, of course, thinking of such a case as this. On the other hand, it is possible that *Holdsworth* was thinking only of such cases, but it is difficult, I think, so to regard the passage on which the defendant relies.

One other point should be mentioned. If the defendant's argument is sound, then, in a case where there have been two or more successive possessions at the time when the statutory period expires, the title must vest in the person in possession at that time. But this view cannot, I think, be supported: see *Pollock & Wright—Possession in the Common Law* (1888), p. 95, quoted by *Lindley* L.J. in *Dalton* v. *Fitzgerald* (4). So *Lightwood, The Time Limit on Actions* (1909), pp. 125, 126, points out that a possessor in whose favour the statute is running has an interest which he can alienate or devise and which, if not devised, will descend according to the law of succession: (cf. *Wheeler* v. *Baldwin* (5)). He proceeds (pp. 125, 126):—" This will be so whether he is strictly a disseisor or not, inasmuch as a possession in favour of which the statute is running is now equivalent, for the purpose of founding a possessory title, to adverse possession or tortious seisin under the law prior to the *Real Property Limitation Act* 1833. And the possessory title thus gained is good against all subsequent possessors without title. Thus, suppose A. to be the true owner, and B., C., D., and E. to be successive possessors in whose favour the statute runs—either as disseisors, or trespassers, or tenants at will or on sufferance. If E.

(1) (1857) 1 H. & N. 745 [156 E.R. 1400].
(2) (1947) 47 S.R. (N.S.W.), at p. 279; 64 W.N., at p. 60.
(3) (1888) 13 App. Cas. 793.
(4) (1897) 2 Ch. 86, at pp. 90, 91.
(5) (1934) 52 C.L.R. 609, at p. 633.

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is in possession at the time when A.'s title is extinguished by the statute, he does not gain thereby a right to retain the land against the preceding possessors. The title vests first in B., and, when he is barred, it vests successively in C. and D. Only when the statute has barred all these, does E. gain an indefeasible title to the land." I do not think that *Parke* B. in *Doe d. Jukes* v. *Sumner* (1) was thinking at all of a case involving the rights of successive possessors as such, and I think that the case of *May* v. *Martin* (2) so far as it is inconsistent with the view expressed by *Lightwood*, was wrongly decided.

The argument for the defendant, in my opinion, fails, and the appeal should be dismissed.

KITTO J. This appeal calls into question so much of a decree made by *Roper* C.J. in Eq. in the Supreme Court of New South Wales as decided that certain land known as Plunkett's land, which is portion 140 in the parish of Nelson and County of Cumberland, forms part of the assets subject to the trusts of the will of one Henry Cusbert deceased.

Plunkett's land was granted by the Crown in fee simple to one James Turner in 1823. Nothing has been proved as to the history of the title between that year and 1877, when one James Plunkett and his wife purported to convey the land by way of mortgage to one Catherine Hyland. In 1880 Catherine Hyland by direction of the Plunketts executed a conveyance to the testator. He had possession of the land during the next fifteen years, and he died in 1895. By his will, he purported to devise the land to his executors and trustees, to the use of his son William Ephraim Cusbert for life, and from and after his decease to the use of his eldest living child; but should the son die without such lawful issue then the will directed and empowered the trustees to sell the land and divide the net proceeds equally between all his, the testator's, children. The son William Ephraim Cusbert died in 1942. He died a bachelor, so that if the land then formed part of the estate the trust for sale and for division of the net proceeds amongst the testator's children took effect.

The executors and trustees appointed by the will were one James Roughley and one William Henry Allen. They took probate and completed their executorial duties. James Roughley died in 1919; and William Henry Allen, who remained thereafter and until his death the sole trustee, died in 1936. In 1937 William Henry

(1) (1845) 14 M. & W. 39, at p. 42 [153 E.R. 380, at p. 381].

(2) (1885) 11 V.L.R. 562.

Allen's executors purported to retire from the trusts of the will and to appoint as new trustees in their place one Edmund Ambrose Allen and one Oliver Edwin Roughley. The new trustees joined in the deed and consented thereby to their appointment. The deed contained a conveyance by the appointors to the new trustees of " all those the lands and premises comprised in and assured by " the testator's will. Doubts arose as to the effect of the deed (perhaps because it appointed the new trustees in place of the appointors and not of the last surviving trustee), and in 1945 William Henry Allen's executors executed a deed of confirmation by which they constituted nominated appointed released and confirmed Edmund Ambrose Allen and Oliver Edwin Roughley to be trustees of the testator's will in the place and stead of James Roughley and William Henry Allen.

In 1950 the equity suit out of which this appeal arises was commenced. The plaintiffs were one of the new trustees, Oliver Edwin Roughley, and the executors of a deceased beneficiary under the trust for division of the proceeds of sale of Plunkett's land. The defendant was the other new trustee, Edmund Ambrose Allen. It was admitted on the pleadings both that the defendant denied that Plunkett's land was subject to the trusts of the will and also that he claimed to be beneficially entitled to it himself.

The defendant endeavoured to establish that he had acquired a title to the land by twenty years' continuous adverse possession in the interval between the testator's death in 1895 and his own appointment as trustee of the will in 1937. A body of evidence was directed to this issue, and the learned judge decided it in favour of the plaintiffs. The defendant was in physical occupation of the land at the time of the trial and had occupied it for a long time ; but William Ephraim Cusbert, the life tenant under the will, had also had some occupation of it during certain periods and the learned judge was not satisfied that during those periods the defendant was in possession adversely to the life tenant rather than by his leave and licence. But apart altogether from this, his Honour held that even if the defendant had established an uninterrupted possession for twenty years such as to extinguish the legal title of the trustees and the equitable interest of the life tenant, the title he thereby acquired must be held to be subject to the equitable interests of the remaindermen. This conclusion was based upon *Scott* v. *Scott* (1) which was regarded as establishing that if a trespasser who has notice of equities to which the land is subject acquires, as against a trustee, a title to land by virtue of the *Real Property Limitation*

(1) (1854) 4 H.L.C. 1065 [10 E.R. 779].

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Act 1833 (Imp.) he holds subject to the equities unless they too are barred, and, since the *cestuis que trust* have an independent remedy against him which does not accrue until their interests become interests in possession, time does not begin to run against them until that event occurs. It was common ground that at all material times the defendant knew of the interests of the testator's children under the trusts contained in the will for the sale and division of the proceeds. Accordingly the learned judge held that as the preceding life estate did not fall in until 1942 any legal title the defendant might have proved would have been subject to those interests.

The defendant died after the decree was pronounced and the appeal to this Court has been prosecuted by his executors. The argument presented on their behalf conceded that if the fee simple in Plunkett's land was vested in the testator at his death the correctness of the decision below could not be denied. But it was said that the evidence did not establish that the testator had the fee simple at his death. The documentary title, of course, was incomplete, for the gap between 1837 and 1877 remained unbridged; and a possessory title was not proved, because the testator's possession had lasted for only fifteen years when he died. The plaintiffs therefore had to depend for their success, according to the defendant, upon a presumption of title arising from the fact of the testator's possession of the land at his death; and it was submitted that as a matter of law no such presumption could be held to arise from a past possession of less than twenty years' duration.

If the defendant was right as to this, there was no need for him to prove, as he endeavoured to do, that after the testator's death he, the defendant, acquired a title to the land by twenty years' adverse possession. In this, as I have said, he failed, and he does not challenge here the decision against him on the point. He now presses only the legal submission that proof of the testator's possession of Plunkett's land for the fifteen years preceding his death affords no evidence that the fee simple in that land was in the testator when he died.

The argument in support of the appeal was based largely upon a statement of Sir *William Holdsworth's A History of English Law*, 2nd ed. (1937), vol. 7, pp. 64, 65, that "the fact that a plaintiff, who relies solely on his own possession, must show a possession for twenty years—the period fixed by James I.'s statute of limitation—seems clearly to involve the consequence that possession for any less period will not do." The learned author refers in support of

this statement to *Stokes* v. *Berry* (1); *Doe d. Wilkins* v. *Cleveland* (2) and *Doe d. Lewis* v. *Davies* (3) and proceeds: "The reason for this rule is obvious. The defendant is in possession, and therefore presumably entitled in fee simple. Though prior possession for twenty years does raise the inference that the person so possessed had an absolute right by virtue of the statute, possession for a less time can raise no inference at all. Therefore the presumption in favour of the defendant stands. As *Cole* says, 'proof of mere possession by the plaintiff, or of the person through whom he claims, within twenty years before action, is not generally sufficient to support an ejectment, because the defendants in such action *are sued as tenants in possession*; and their possession is presumed to be lawful, in the absence of proof of title in the claimants.'" Then two cases are mentioned in which it is said that the rule does not apply, namely the case where the defendant got into possession as a trespasser disturbing the possession of the plaintiff, and the case where the defendant's possession is in law the possession of the plaintiff so that the defendant is estopped from disputing the plaintiff's right to possession.

This passage cannot assist the defendant in the present case unless it means that where the issue is whether X was entitled to an estate in fee simple in possession in Blackacre at a particular date the fact that X was in possession of Blackacre at that date is no evidence in his favour unless at that date his possession had lasted for twenty years. I doubt whether that is the meaning of the passage, and the authorities are overwhelmingly the other way.

The passage forms part of a commentary upon the proposition that in an action of ejectment the plaintiff had to show that he had a right of entry. The discussion commences (at p. 61) thus: "The plaintiff in ejectment is a person out of possession, who claims to have a better right to the property than the defendant in possession. Unless the defendant has got his possession by a trespass committed by him against the plaintiff, unless, in other words, he is a mere wrongdoer, the plaintiff must prove his right. *Prima facie* the man in possession is the owner in fee simple . . . It is for the plaintiff to disprove that presumption by showing that he has a right to get possession." Then the learned author goes on to maintain that the right which the plaintiff must show is not only a better right than the defendant's but a right good as against all the world. That this thesis should be accepted was denied by Mr.

(1) (1699) 2 Salk. 421 [91 E.R. 366].
(2) (1829) 9 B. & C. 864 [109 E.R. 321].
(3) (1837) 2 M. & W. 503 [150 E.R. 856].

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A. D. Hargreaves in a learned article in (1) to which *Holdsworth* replied (2). The discussion is instructive, but the point need not be pursued here. Assuming that the plaintiff must establish an absolute right, *Holdsworth* goes on to say that it follows that he cannot recover in an action of ejectment if his title depends on his possession alone and he can only show a possession for a less period than the twenty years fixed by James I.'s statute of limitation. In this statement, which is elaborated in the passage now relied upon by the defendant in support of his appeal, the words " if his title depends on his possession alone " are evidently important. So are the words " who relies solely on his own possession " in the passage appealed to by the defendant. There is little difficulty in accepting the view expressed, if the words quoted are read quite literally, so as to apply only to a plaintiff who relies on bare proof of his earlier possession, unaccompanied by any evidence explaining its origin or its termination or tending to support the inference which the plaintiff seeks to draw from it, and unaccompanied by any evidence explaining the defendant's possession as not being supported by a fee simple estate. But the reason why such a plaintiff would fail to establish a right to possession where his possession was of less than twenty years' duration cannot be that such a possession " can raise no inference at all." It must be true of the plaintiff no less than of the defendant that his possession raises a prima facie inference of seisin in fee simple and therefore of a right to possession. If authority for this be needed it may be found in abundance ; one need only cite, in addition to other cases referred to in this judgment, *Peaceable d. Uncle* v. *Watson* (3) *Doe d. Daniel* v. *Coulthred* (4) ; *Doe d. Hall* v. *Penfold* (5) ; *Metters* v. *Brown* (6) ; *Re Atkinson and Horsell's Contract* (7); *Gatward* v. *Alley* (8). The reason why *Holdsworth's* proposition is literally correct is, I think, that if you have only a presumption arising from possession that the defendant had a fee simple at the time relevant for the purposes of the action, and a presumption, also arising from possession, that the plaintiff had a fee simple at an earlier date, clearly the latter cannot suffice to rebut the former. So in *Jayne* v. *Price* (9), *Chambre* J. said it would be mischievous if, because a simple possession is shown to have existed at a remote period,

(1) (1940) 56 L.Q.R. 376.
(2) (1940) 56 L.Q.R. 479.
(3) (1811) 4 Taunt. 16 [128 E.R. 232].
(4) (1837) 7 A. & E. 235 [112 E.R. 460].
(5) (1838) 8 C. & P. 536, at p. 537 [173 E.R. 607, at p. 608].
(6) (1863) 1 H. & C. 686 [158 E.R. 1060].
(7) (1912) 2 Ch. 1, at p. 9.
(8) (1940) 40 S.R. (N.S.W.) 174, at p. 178 ; 57 W.N. 82, at p. 84.
(9) (1814) 5 Taunt. 326, at p. 328 [128 E.R. 715, at p. 716].

without any account of the title, all the succeeding adverse possession should therefore be put out of consideration. The learned judge added that to allow the earlier possession to outweigh the later would be to treat the earlier as conclusive evidence of seisin unless the contrary could be shown by production of deeds. Holding that this was not so, he proceeded to inquire where was the stronger presumption in the particular circumstances of the case before him. Similarly in *Brest* v. *Lever* (1), which was a case of trespass in which the defendant, admitting his invasion of the plaintiff's possession, sought to prove a title in himself by relying only upon proof of an earlier possession for less than twenty years, it was held that there was nothing more than a longer against a shorter possession—a mere priority of possession—and that therefore there was no prima facie case made out of a title in the defendant.

But it must be a rare case in which not only is there no explanation of the defendant's possession which displaces the presumption of a title in fee simple in him, but neither is there any evidence to support the plaintiff's claim to possession except the bare fact of his former (and discontinued) possession. Of the two cases which *Holdsworth* treats as exceptions to his general proposition that a plaintiff in ejectment must prove a right to possession good as against all the world, one is a case in which a presumption of title in the defendant is precluded by proof that he got his possession wrongfully, and the other is a case in which the presumption is precluded by estoppel arising from a special relationship between the defendant and the plaintiff. But what these cases seem really to illustrate is that even where the possession upon which the plaintiff relies was for less than twenty years, he may succeed on the strength of the presumption arising from that possession where it appears that the defendant's possession is to be explained on grounds which prevent a competing presumption of title arising from it. *Asher* v. *Whitlock* (2) may be taken as an illustration in point. The plaintiff proved a title as heir-at-law of the devisee under the will of a person who was in possession at his death. The defendant's possession at the time of the action was explained by proof that he had entered when he married the testator's widow, who then was in enjoyment of an estate devised by the will to her during widowhood, and that he had remained in occupation with his wife after the termination of her estate and alone after her death. The plaintiff's title was held sufficiently proved because the presumption arising from his possession had not been displaced. As *Mellor* J. said:

(1) (1841) 7 M. & W. 593 [151 E.R. 904].

(2) (1865) L.R. 1 Q.B. 1.

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"The fact of possession is *prima facie* evidence of seisin in fee. The law gives credit to possession unless explained; and (counsel for the defendant), in order to succeed, ought to have gone on and shewn the testator's title to be bad . . . but this he did not do" (1). As for the defendant's possession, he was shown clearly enough to have entered and remained without any title at all; no inference of title could possibly be drawn, for the possession was proved to have been without rightful origin.

If this be so, it must also be true that the plaintiff may succeed by relying on a former possession of his own, though it lasted for less than twenty years, when the proved circumstances add such weight to the presumption which the possession raises that the evidence in favour of the defendant is, on the whole case, outweighed.

It is of fundamental importance to recognize that the presumption of title from the fact of possession does not rest upon an artificial rule arbitrarily adopted by the courts, and that the question before us is not whether such a rule is subject to an equally artificial qualification that the possession must have lasted for twenty years. The presumption is one of fact, and the reason for it is simply that "men generally own the property they possess": *Taylor* on *Evidence*, 11th ed. (1920), p. 130. The law recognizes the probability which common experience suggests. In a particular case, if there is nothing to the contrary, the probability remains and the tribunal of fact is entitled to act upon it. But the whole of the evidence must be weighed, and consideration of the proved circumstances, particularly the origin, character and duration of the possession, may suffice to satisfy the tribunal that what is probable in the generality of cases is not probable in the particular instance. When that occurs, the inference of seisin in fee simple will not be drawn. This was lucidly stated by *Ferguson* J. in *Hawdon* v. *Khan* (2); "If A, then, is possessed of land, to say that is evidence of his seisin in fee means that his possession tends to prove in fact that a grant of the land has been made to him or his predecessors or that it has come to him or them by virtue of twenty or sixty years' possession. There is necessarily implied the further presumption that if anyone else has been in possession as owner within twenty years, then by conveyance or some other lawful means his title has been transferred to A. Of course, possession does not necessarily establish any of these things. It merely gives rise to a presumption—a rebuttable presumption. It supplies evidence with which, like other evidence, the jury must deal in the light of the surrounding circumstances,

(1) (1865) L.R. 1 Q.B., at p. 6.

(2) (1920) 20 S.R. (N.S.W.) 703; 37 W.N. 279.

the probabilities, the common experience of human affairs. Presumptions of this kind are not something substituted by law for the actual facts; they are intended, as evidence, to aid the jury in ascertaining what the actual facts are. If a witness testifies that A was in possession of land ten years ago, the jury may believe or disbelieve his evidence. If they accept it, it establishes the fact of A's possession. From that they may go on to infer that he was the owner; but they are not bound to do so. The surrounding circumstances may confirm the inference; they may weaken it; they may be such that no reasonable man could possibly draw the inference at all. The nature and extent of the acts of ownership accompanying the possession, the presence or absence of persons who might be concerned in challenging A's title, the existence of facts suggesting something other than ownership to account for his possession, the absence of documents or evidence which one would expect to find, his unexplained abandonment of possession—any of these things might help the jury in determining whether they ought to draw the inference that he was there as owner of the fee simple" (1). See also *Nolan* v. *Thompson* (2).

It may be asked, what is the difference which many judgments appear to assume between the position of a plaintiff who proves a possession for twenty years and the position of one who proves only a possession for a shorter period? The answer, I think, is that the former has the benefit of a presumption which is different from and stronger than the presumption from mere possession. It is the presumption of continuance in respect of a fee simple proved to have been acquired by one person and not proved to have passed to another person or become extinguished. The common case is that in which the plaintiff proves that he acquired at some stage a complete paper title; if, in such a case, there is nothing to show the tribunal of fact that the title so acquired has been lost, any presumption arising from the defendant's possession is clearly displaced. And the position is necessarily the same where a plaintiff proves that up to a particular date he had uninterrupted possession for more than twenty years; for unless it appears that a right to recover possession accrued to someone within that period or that a relevant disability existed, the inference is that by force of the *Real Property Limitation Act* 1833 (adopted in New South Wales by 8 Wm. IV No. 3) the right and title of every person who might challenge the plaintiff's possession is extinguished; and the result of the statutory extinguishment of all competing titles is that the

(1) (1920) 20 S.R. (N.S.W.), at pp. 712, 713; 37 W.N. 279.

(2) (1928) 28 S.R. (N.S.W.) 479; 45 W.N. 141.

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prima facie evidence of seisin in fee which would arise from proof of mere possession becomes absolute: *Re Atkinson and Horsell's Contract* (1); *Taylor* v. *Twinberrow* (2). But while possession for more than twenty years raises for this reason a strong presumption of seisin in fee, it is nevertheless true that the presumption from possession for a less period, relatively weak though it be, is of nothing less than seisin in fee. This was recognized by *Holdsworth* himself at the beginning of his discussion at p. 61; and it is therefore not easy to see why he considered that his general thesis, that a plaintiff in ejectment must prove a title good as against all the world, should lead to his maintaining that if the plaintiff relies solely on his possession he must prove that it lasted for twenty years.

In the present case the plaintiffs have not proved that the testator acquired a possessory title, and there are two questions to be answered. The first is whether the possession which the testator had up to the time of his death affords evidence from which it is legitimate to conclude that he had the fee simple which Hyland purported to convey to him in 1880; and if so, the second question arises, whether on the whole of the evidence it is more probable than not that the testator in fact had the fee simple at his death. The whole course of authority seems to favour an affirmative answer to the first question. So *Jordan* C.J. held in *N.R.M.A. Insurance Ltd.* v. *B. & B. Shipping & Marine Salvage Co. Pty. Ltd.* (3). The cases he cited are to that effect, and I have not found any case which can be regarded as anything like a clear decision the other way. *Stokes* v. *Berry* (4) is not: all it appears to decide is the affirmative proposition that proof of twenty years' possession gives a good title in ejectment. *Doe d. Wilkins* v. *Cleveland* (5) and *Doe d. Lewis* v. *Davies* (6) deal with a different problem altogether. All that appears from those cases is that if a plaintiff in ejectment relies for proof of his title upon a deed of feoffment with livery of seisin and, having no direct evidence of livery, relies upon his subsequent possession of the land to raise a presumption that livery was made, the courts adopted a rule that they would not recognize such a presumption unless the possession had lasted for twenty years. In such a case, it will be noticed, the plaintiff cannot rely upon the ordinary presumption of seisin which arises from possession however brief, because he has explained his possession as having been taken under the deed of feoffment, and so has shown that it

(1) (1912) 2 Ch. 1, at p. 9.
(2) (1930) 2 K.B. 16, at p. 23.
(3) (1947) 47 S.R. (N.S.W.) 273, at p. 279; 64 W.N. 58, at p. 60.
(4) (1699) 2 Salk. 421 [91 E.R. 366].
(5) (1829) 9 B. & C. 864 [109 E.R. 321].
(6) (1837) 2 M. & W. 503 [150 E.R. 856].

could not have been a possession to which he had any right, unless in fact the conveyance to him was completed by livery of seisin.

In the present case, the position simply is that the prima facie presumption, arising from the proof which was given of possession of the subject land by the testator for the fifteen years up to his death, has not to compete with any presumption in favour of the defendant, for he admittedly had no title at the testator's death, admittedly has acquired no documentary title since, and has failed in an attempt to prove the acquisition of a possessory title. Nor is there anything whatever in the evidence to throw doubt upon the presumption in the plaintiff's favour. On the contrary, what is known of the documentary title lends to that presumption the support of much added probability. I am clearly of opinion that the plaintiffs were entitled to have both the questions I have stated answered in the affirmative. Accordingly the decree they obtained in regard to Plunkett's land should in my opinion be upheld, even if there were nothing more in the plaintiff's favour to be gathered from the evidence than I have already mentioned. But there were, in addition, certain admissions on the part of the defendant which by themselves would have sufficed to support the decree.

It appears that in 1937 the defendant made an application to bring Plunkett's land under the provisions of the *Real Property Act*—an application, by the way, which he later withdrew—and in connection with that application he made a statutory declaration in which the following statements appear : " I believe myself entitled (to the land) by reason of long possession against the legal representative of the estate of the late Henry Cusbert my father-in-law . . . probate of his will . . . being granted by the Supreme Court on the twenty-seventh day of March One thousand eight hundred and ninety-five. I say that by the said will my brother-in-law who is still living William Ephraim Cusbert . . . I believe was therein entitled to the estate for life and at his decease the property was to be divided equally among the daughters of the testator . . . I can truthfully say that since my brother-in-law became entitled to a life estate in the property he has never asserted any rights to my knowledge . . . I recollect . . . when the said Henry Cusbert first had the property to my recollection the land was vacant then and unfenced . . . and I know as a fact that after he passed out the son the said William Cusbert never took any step to assert his right or title to the land nor effected any improvements. I have discussed the matter of having this land brought under the Act with my said brother-in-law and he informed me that he would not place any obstacle in my way towards acquiring the land as the land was

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never fenced in in his father's time and as far as he was personally concerned he realised he has lost all right to the land as a life tenant under the will of his late father by reason of the fact that he has never taken any steps to oust me off the land or assert any right to it. In point of fact my said brother-in-law brought an application but by informing him that I had been in possession of the land ever since the death of his father Henry Cusbert on my request he withdrew the application."

There is, it is true, nothing to show that the defendant, in attributing to the testator's estate the title which it was necessary for him to prove that he had extinguished by adverse possession, had knowledge of any other facts than those which the evidence in this case discloses. Presumably he was expressing no more than his belief. But he expressed it positively, in a statutory declaration, and on an occasion and for a purpose which required careful deliberation on the point. It is impossible to doubt that his words disclose an intention to acknowledge, and indeed to affirm, the existence of a good title in the testator at his death. From this it follows that whatever was his source of information or belief, and whatever was the degree of certainty or doubt in his mind, his statements amount to admissions receivable in evidence against him : *Lustre Hosiery Ltd.* v. *York* (1). In the circumstances, their probative force is by no means inconsiderable, and there is not a tittle of evidence to the contrary.

And that is not all. About a year before the testator died, a conversation occurred in which the testator told the defendant that he had willed Plunkett's land to his sons, but one of them had died, and he asked the defendant whether he thought the daughters were as much entitled to the land as the sons. The defendant said he thought that they were, and the testator replied "Very well", and arranged with the defendant to go to Parramatta to make his will. According to the defendant, the testator told him that his title to the land was not good, and that "he had not had it long enough to make a claim". As he clearly considered that the land was his to dispose by his will, this must have been a reference to the fact that the deeds were missing which would be necessary to trace the title from Turner to the Plunketts. It does not suggest a belief on the part of the testator that the Plunketts had in fact no title at the time of their mortgage to Hyland, and the defendant, who knew that the testator had acted as owner of the land ever since 1880, did not suggest at any stage that he attributed any other meaning to the testator's words or that he himself had a belief or

(1) (1935) 54 C.L.R. 134.

even a suspicion that the testator's title, as distinguished from his means of proving title, was defective. In the light of all this, what inference is to be drawn from the defendant's action in 1937 in accepting the trusts of the testator's will? He knew that the will declared trusts with respect to Plunkett's land, and the whole trusts of the will so far as still subsisting he took upon himself, accepting, as incidental to his appointment, a conveyance of "the lands and premises comprised in and assured by" the will. The inference surely is that he was content to accept the position that Plunkett's land was the testator's at the date of death, and to rely upon his own possession to defeat the title of those who claimed under the will. A court of equity in these circumstances must inevitably have held that he became a trustee of Plunkett's land, unless he could establish that he had acquired a beneficial title in the interval between the date of the will and his appointment as trustee.

For these reasons I am of opinion that the decision of *Roper* C.J. in Eq. was right and that the appeal should be dismissed.

TAYLOR J. The argument of the appellants in this case was mainly concerned with a proposition which, in my view, has little, if any, relevance to the issues to be decided between the parties. In the main it was concerned with the right of a person in possession of land to which he has no legal title to resist a claim to re-enter based upon an earlier *de facto* possession which, in itself, had been of insufficient length to give a title by prescription. No doubt there is a good deal to be said for the general proposition that a claimant who has had possession for such a length of time and who has abandoned it has no right against any person who, subsequently thereto, enters into and remains in possession. But this was not such a case. The respondents' case by no means entirely depended upon the assertion that the testator, in his lifetime, or, thereafter, the life tenant was in possession of the land in question; the assertion of the respondents was that the testator, in his lifetime, became seised in fee of the subject land and the manner in which it is alleged that he became so seised is also alleged. In particular, it is alleged that on or about 10th September 1877 one James Crawford Plunkett and Hannah Plunkett, his wife, mortgaged the land to one Catherine Hyland to secure repayment to her of certain moneys then advanced by her to them and that on or about 15th September 1880 the said Catherine Hyland, as mortgagee and by direction of the said James Crawford Plunkett and Hannah Plunkett who also joined in as vendors, conveyed the land to the testator. Evidence, no doubt, was given that the testator was in possession

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of the land from that time until his death in 1895, but this does not mean that the respondents were intending, merely, to assert a title by long possession, nor, in my opinion, was the evidence in the suit such that it was bound to fail unless they adopted and succeeded in that course.

The first problem, as I see it, is whether the evidence was sufficient to give rise to the inference that the testator was, in his lifetime, seised of the subject land. As I have already said the evidence was that in 1877 James Crawford Plunkett and his wife purported to convey the land to Catherine Hyland by way of security and that in 1880 these three persons joined in purporting to sell and convey the fee simple to the testator. Thereafter and, no doubt, pursuant to this last-mentioned dealing the testator entered into possession and, for the fifteen years which preceded his death, conducted himself, without question, as the owner of the land. These facts were, in my opinion, quite sufficient to make out a prima facie case that the testator was seised in fee. It is true that the evidence would not have been sufficient to satisfy a contractual stipulation as between vendor and purchaser to show a good title, but I confess that I am unable to appreciate that considerations which would be relevant in such a case have any relevance to the initial problem in this case. I have mentioned the obligation which arises under a contract of sale merely because reference was made during the course of argument to such cases and it was suggested that there is some parallel between the manner in which an obligation of that nature may be fulfilled and the means by which a prima facie case of ownership of land may be made out in a case such as the present. The issue, in this case, is not whether the respondents have made out a title which could be forced upon an unwilling purchaser, but whether sufficient facts were proved to justify the inference that the testator, in his lifetime, was seised in fee of the land in question. There is abundant authority for the proposition that evidence of acts of ownership in relation to land is receivable to make out a prima facie case of ownership though the probative value of such evidence may often be found to be affected by the attendant circumstances and events which have subsequently occurred. Evidence of the receipt of rents and profits has many times been received to make out a prima facie case of ownership though the presumption to which such evidence gives rise may sometimes become dissipated upon examination and consideration of subsequent events. *Jayne* v. *Price* (1) illustrates the full extent of this proposition. In that case the plaintiff sought to recover possession of lands the rents and profits of which, it was established, had been

(1) (1814) 5 Taunt. 326 [128 E.R. 715].

received by his predecessor in title for a period of many years which expired upon the latter's death some forty years before, when the defendant's predecessor had entered into possession. The presumption arising from the subsequent long possession was held in the circumstances of that case to outweigh the prima facie presumption arising from the earlier receipt of rents and profits.

In the present case there was, in my opinion, abundant evidence, taken by itself, to make out a prima facie case of ownership in the testator. There were, however, one or two matters which, it is said, indicate that the testator did not have an effective title and which, accordingly, should induce the Court to refrain from acting upon this presumption. In the first place the appellant points to the fact, which was proved by evidence in the defendant's case upon the hearing of the suit, that the land in question was the subject of a Crown grant to one James Turner in 1823 and, it is said, the fact that there is nothing to indicate that the land devolved from this source to the Plunketts by the year 1877 is quite inconsistent with the notion that the testator had a good "paper" title. There is, however, no such inconsistency. The evidence is quite consistent with intermediate dealings with the land and subtracts nothing from the effect of the evidence given on behalf of the respondents. Another matter referred to by the appellant was an admission alleged to have been made by the testator concerning his title. This evidence has already been referred to and I agree with the observations made by my brother *Kitto* with respect to it. Even if accepted at its face value it is not, in my view, sufficient to displace the presumption of ownership which springs from the other facts proved in the case. Since the appellant did not challenge the finding of the learned trial judge that the defendant was not in possession of the subject land for any uninterrupted period of twenty years these observations are sufficient to dispose of the appeal. But even if the views which I have expressed are wrong there are other reasons why the appeal should be dismissed.

It is not disputed that the testator was in possession of the land in question for a period of fifteen years, nor that the inchoate interest which resulted from this circumstance was an interest which might have been assigned or, as actually occurred, devised by the testator (*Asher* v. *Whitlock* (1); *Perry* v. *Clissold* (2)). Upon his death, therefore, his interest in the land, whatever it may have been, vested in his executors upon the trusts declared by his will. Now it is conceded that if and when the defendant entered into

(1) (1865) L.R. 1 Q.B. 1.
(2) (1907) A.C. 73.