

Possession of Land

Recovery of possession by self-help

- McPhail v Persons Unknown

1. The law as to squatters

Squatter: one who, without any color of right, enters on an unoccupied house or land, intending to stay there as long as he can.

- **The remedy of self-help**

The owner is not obliged to go to the courts to obtain possession.

He is entitled to take the remedy into his own hands, viz, to turn off a trespasser before he has gained possession, with no more force than necessary
not recommendation of courts because of the possible disturbance of peace.

- **The remedy by action**

The courts should provide a remedy which is speedy and effective, and thus make self-help unnecessary

Order for possession--enforceable immediately, either by sheriff or by the plaintiff his own. **But in NSW, courts have the power to suspend the operation of the owner.**

- **The remedy by summons**

A summons can be issued for possession against squatters even though they cannot be identified by name and even though, as one squatter goes, another comes in.

2. The position of tenants

Before the tenancy expires or is terminated, the landlord can by no means recover his possession.

After the expiration or termination of **a commercial tenancy**, the tenant has become a trespasser, and therefore the landlord can turn him off the land.

BUT In terms of residential property---Self-help unavailable: The owner is not entitled to take the law into his own hands and remove the tenant by force.

Order for possession-fixed a date.

3. Forcibly re-entry

- Hemmings v Stoke Poges Golf Club Ltd.

Despite the existence of the offence of forcible entry, a person wrongfully retaining possession of land **has no civil action for damages against the rightful owner** who forcibly enters the premises unless more force is used than is **reasonably necessary** or unless the owner fails to exercise reasonable care in removing the goods of the wrongful possessor.

Title in Actions to Recover Possession of Land

- Doctrine of relativity of titles: no such concept as an absolute title to land, but only relatively good and bad rights to possession.
- Possession of land creates an interest in the possessor enforceable against the whole world, except someone with a superior right to possession.
- The immediate right to possession arose by the virtue of previous possession is better than D, as long as the rights had not been voluntarily surrendered on terms that would result in P having lost his/her right to immediate

Asher v Whitlock (Williams enclosed some land—leave it by will to Asher—Whitlock takes the possession—sues for recovery of possession)—**rejected the Doe d Carter v Bernard**

Judgment:

- Possession is good against all the world except the person who can show a good title
- Williamson's **earlier possession** is the better title in the present case.

Commentary:

- The fact of **possession is prima facie evidence of seisin**.
- The **core question** as to raising an action of recovery the possession of land was never 'who had the best title to the land in the whole world', but 'which litigants can show him/herself the **better** right to possession'.
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Perry v Clissold (P took possession and fenced the land without title—gov. takes it back for erecting school)

Judgment:

1. A person in possession of land in the assumed character of owner and exercising peaceably the ordinary rights of ownership has a perfectly good title against all the world **but the rightful owner**
2. If the rightful owner does not come forward and assert his title by process of law within the period prescribed by the Statute of Limitations, his right is forever extinguished and the possessory owner acquires an absolute title.

Jus Tertii

P has had the earlier possession which gave him the right to immediate possession.

Jus tertii cannot defend the D unless D is using it to defend the authority of the third person who has the better right to possess than P.

Adverse Possession

Definition:

Adverse possession is the principle that permits the documentary title-holder's interest to be statute-barred, in favour of the possessory interest, after the effluxion of a specified period of time.

Limitation Act 1969 (NSW) s 27(2): 12 years.

Commencement of The Limitation Period

1. General: from when B takes possession of the land adversely to A.
2. B used to be tenant OR A was a remainder

The period would not run until A was entitled to take immediate possession/bring an action.

The Criteria for Adverse Possession

elements	criteria	Note
Factual possession	Principle: conduct exhibiting such a degree of physical control over the land as might generally be expected from an owner of land of the type in question (<i>Whittlesea City Council v Abbatangelo</i>) Note: <ul style="list-style-type: none">- single and exclusive—only one person can have factual possession- without consent	Generally: factors need to be considered: <ul style="list-style-type: none">- the character of the land- the nature of the squatter's acts- the apparent intent with which such acts were done. Specifically: <ul style="list-style-type: none">- KNOWLEDGE of the owner is irrelevant.- ENCLOSURE itself prima facie indicates the requisite animus possidendi;- don't need to be inconsistent with the owner's PRESENT OR FUTURE USE.
Intention to possess	Principle: whether her acts indicated a manifest unequivocal intention to exclude the world at large (including the owner, so far as was reasonably possible) (<i>Whittlesea City Council v Abbatangelo</i>) Sub-rule: <ul style="list-style-type: none">- different: intention to possess exclusively v mere deprivation of special benefits from land- an intention to possess exclusively, not to own; don't need to believe that her is the owner..- cannot be open to more than one interpretation(exclusively possess)	EG: <ul style="list-style-type: none">- building on the property (<i>Mulcahy v Caramore Anore</i>)- residing on the land (<i>ibid</i>)- Paying rates and taxes (<i>Newington v Windeyer</i>)- Fencing it (<i>Mulcahy</i>)- Maintaining trees and gardens (<i>Newington</i>)- Blocking access (<i>Newington</i>)- Keeping cattle on the land (<i>Mulcahy</i>)

Pye v Graham (2003)

Facts

- Graham entered into a grazing license on rural land
- When the license expired the Graham's sought to extend it by Pye refused, Graham stayed in possession regardless
- Graham used the land for rural purposes without paying rent, and without receiving a request from Pye to vacate
- Graham's requested another grazing agreement but got no reply
- Subsequently remained in possession for statutory period and physically excluded Pye by hedges and locked gate

Held

- Factual possession
 - Use of land
- Intention to posses
 - Used land & excluded Pye by way of hedges and gate
- Acts of squatter be inconsistent with the intentions of paper owner?
 - 'The suggestion that the sufficiency of the possession can depend on the intention not of the squatter but the true owner is heretical and wrong'
- Squatters' willingness to pay if asked
 - Lord Browne-Wilkinson: An admission to this effect 'does not indicate an absence of intention to possess.'
 - Lord Brown-Wilkinson: 'Once it is accepted that the necessary intent is an intent to possess not to own and an intention to exclude the paper owner so far as is reasonably possible, there is no inconsistency with a squatter being willing to pay if the paper owner asks and his being in the meantime in possession.'