

Assuming, however, that the transfer to Poulin by Cunningham is not proved, this by no means disposes of the case. In the absence of a deed, the plaintiff takes peaceable possession of the property and occupies it by his tenants for years—he, being in such possession, is the owner as against all but one having a better right, and is entitled to eject him: *Allen v. Rivington*, 2 Saund. 111 (in Williams's edition many cases are cited in the note to this leading case); *Asher v. Whitlock*, L.R. 1 Q.B. 1. In the Privy Council in *Mussammatt Sundar v. Mussammatt Parbati*, L.R. 16 Ind. App. 186, at p. 193, this is cited with approval as deciding “that a person in possession of land, without active title, has a devisable interest, and that the heir of his devisee can maintain ejectment against any person who has entered upon the land and cannot connect himself with some one having title or possession prior to the testator.” And, of course, the rule will be, if anything, a fortiori in the case of the possessor having such devisable interest.

And he does not lose this right by setting up a title which he fails to establish in proof. In *Davison v. Gent*, 1 H. & N. 744, at p. 750, Pollock, C.B., says: “A plaintiff in ejectment is not deprived of the right to rely on his prior possession . . . because he has brought forward documents . . . which on account of some defect in proof do not establish his title to the property in question.” See also per Bramwell, B., at p. 751; *Watson B.* at p. 752.

The kind of possession, actual or constructive, required is well known; and I do no more than refer to 15 Cyc. 30 (4). This does not seem to have been present to the mind of the learned County Court Judge, for there is no finding as to the possession of the plaintiff—evidence which, if believed, would justify a finding in favour of the plaintiff has been given—but it may be met or discredited. I think there is enough to call upon the defendants for their defence; and there should be a new trial.

The plaintiff may be advised also, by amending his pleading, to claim in the alternative (1) by the Statute of Limitations and (2) upon the ground that the defendants came in under his tenants O'Brien and (or) Koehler.

Leave should be reserved to the plaintiff to amend as he may be advised, and also to the defendants.

Costs of this motion and of the last trial should be to the plaintiff only in the cause, so that if, in the end, he succeeds, he should get them, but, if he fails, he should not have to pay them.