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*Nov. 6, 7.

*Nov. 29.

JOHN R. HANDLEY AND OTHERS (DEFENDANTS) ..... APPELLANTS;

AND

CHARLES ARCHIBALD (PLAINTIFF)....RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF NOVA SCOTIA.

Partition of land—Tenants in common—Statute of limitations—Possession.

Under the Nova Scotia Statute of Limitations (R. S. N. S. (5 ser.) ch. 112) a possession of land in order to ripen into a title and oust the real owner, must be uninterrupted during the whole statutory period. If abandoned at any time during such period the law will attribute it to the person having title.

Possession by a series of persons during the period will bar the title though some of such persons were not in privity with their predecessors.

Where one of two tenants in common had possession of the land as against his co-tenant, the bringing of an action of ejectment in their joint names and entry of judgment therein gave a fresh right of entry to both and interrupted the prescription accruing in favour of the tenant in possession.

Judgment of the Supreme Court of Nova Scotia (32 N. S. Rep. 1) affirmed.

APPEAL from a decision of the Supreme Court of Nova Scotia (1) reversing the judgment at the trial in favour of the defendants.

To an action by the plaintiff, Charles Archibald, for partition of lands in Cape Breton, three of the defendants pleaded the following defence among others:

" 2. As to the said first and second paragraphs, these defendants say that by deed dated the 4th day of December, 1839, and recorded in the Registry of Deeds for the County of Richmond, the said land and premises were

*PRESENT :—Sir Henry Strong C.J. and Gwynne, Sedgewick, King and Girouard JJ.

(1) 32 N. S. Rep. 1.

conveyed to said Charles D. Archibald and George Handley, both since deceased, by Felix Calvert Ladbroke and John Wright, trustees of the said General Mining Association, Limited. That George Handley, upon the execution of said deed took possession of said lands and has continued in undisputed and exclusive possession of said lands thence until the time of his death, and from the date of his death until the commencement of this action the defendants herein, or some of them, as the heirs of said George Handley, continued in such undisputed and exclusive possession and plaintiff's claim to said lands and premises, or to the moiety or any part thereof, if he has any, which defendants do not admit is barred by the Statute of Limitations, chapter 112 of the Revised Statutes of Nova Scotia, fifth series, intituled 'Of the Limitation of Actions.'"

The action was tried out on this defence which was established in the opinion of Mr. Justice Henry, the trial judge, and judgment entered for the defendants thereon. This judgment was reversed by the full court and an order made for partition of the lands.

The evidence given on the issue above stated is fully set out in the judgment of His Lordship the Chief Justice.

Harrington Q.C. for the appellant. Neither the respondent nor any one through whom he claims, has ever been in possession, either actively or constructively, of any part of this property.

The distinction drawn by Mr. Justice Gwynne in *McConaghy* v. *Denmark* (1) at page 632, has been disregarded by the majority of the court below, and the two cases mentioned have been confounded. They required the defendant to make out the same case against the plaintiff, as if he himself were bringing

(1) 4 Can. S. C. R. 609.

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ejectment against the tenants whom he put in possession.

The Statute of Limitations (1) began to run as against respondent in 1861, when Charles D. Archibald was last in Nova Scotia. It has retroactive operation, and makes the possession of tenants in common a separate possession from the time they first became tenants in common, and not merely from 1886, the time of the passing of the statute. See *Culley* v. *Doe d. Taylerson* (2); *Doe d. Holt* v. *Horrocks* (3); *O'Sullivan* v. *McSwiney* (4).

The recovery in ejectment, in 1868, by George Handley and Charles Archibald, is irrelevant. John R. Handley, one of the present defendants, was a part owner along with his father, George Handley, of the land in dispute, but he was not a party to the ejectment suit and consequently it could not affect his rights. The lands cannot be identified from the descriptions given, and a recovery in ejectment (even if of the very land in dispute) is not equivalent to possession in Archibald. It is merely a declaration that the plaintiffs are entitled to the possession and enabled them to enforce such right by taking possession.

As to estoppel, the parties here are not the same as in the Exchequer Court, nor is the present action brought with respect to the same subject matter; Taylor on Evidence, sec. 1695; and the point decided in the Exchequer Court has nothing to do with the issue in the present action. No question of title was raised there, but the point decided was as to shares in a sum of money paid into court as compensation for land expropriated. See *Smith* v. *Royston* (5);

(1) R. S. N. S. (5 ser.) ch. 112, secs. 9 & 17.
(2) 11 Ad. & E. 1008.
(3) 1 Car. & Kir. 566.
(4) Longf. & T. 111.
(5) 8 M. & W. 381.

Hunter v. *Birney* (1); *Outram* v. *Morewood* (2). In the Exchequer Court action the present defendants did not appear. *Howlett* v. *Tarte* (3). A judgment by default cannot work an estoppel. *Attorney-General* v. *Eriché* (4); per Lord Hobhouse at page 523. See also *The Duchess of Kingston's Case*, (5) where it is laid down that in order to establish the plea of *res judicata*, the court, whose judgment is invoked, must have had jurisdiction and have given judgment directly upon the matter in question, but that if the matter came collaterally into question in the first court, or were only incidentally cognizable by it, or merely to be inferred, the judgment is not conclusive.

Newcombe Q.C., (*Kenney* with him), for the respondent. The plaintiff shows a good paper title to the interest of C. D. Archibald as tenant in common of the lands in question. The burden is on the defendants to establish that the Statute of Limitations is a bar to this title. They defend as to the whole of the land. If they intend to claim part only they should have limited their defence in the manner prescribed by the rules.

John R. Handley had no possession upon which to found the defence of the Statute of Limitations He was only two or three times at the place in all these years, and never lived there. He never received any rents or profits for the use of the land from any person. The possession by the tenant Matheson enured to the benefit of George T. Handley's heirs, not to the benefit of John R. Handley.

The proceedings in ejectment, in 1866, and judgment in 1868 in favour of C. D. Archibald and George Handley, for the recovery of the lands for which partition is sought herein, constitute an acknowledge-

(1) 27 Gr. 204.
(2) 3 East 346.
(3) 9 W. R. 868.
(4) [1893] A. C. 518.
(5) 2 Sm. L. C. 10 ed. 713.

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ment of C. D. Archibald's title. The declaration was an admission of the joint title of the plaintiffs, and the solicitor who signed it was the agent of both, to make it and to receive it; *Goode* v. *Job* (1). But even an unsigned acknowledgement may interrupt the operation of the statute; *Phillipson* v. *Gibbon* (2); and Handley could not have joined Archibald as plaintiff without his consent. See also *Dixon* v. *Gayfere* (3).

The ejectment proceedings are proof of a resumption of possession, and that there was, at that time, no dispossession of C. D. Archibald or discontinuance of possession by him. Handley could not say that he was in possession for his own benefit after joining Archibald as plaintiff. See also *McKeen* v. *McKay* (1).

Chap. 12, Nova Scotia Statutes, 1866, assimilates the law to that of England with regard to limitations of real actions, and sec. 9 makes the possession of tenants in common separate. Therefore, unless George Handley had a title to the common lands in 1866 by adverse possession, it was still open to C. D. Archibald to bring his action any time before 1871. No such title had been acquired in 1866; Handley had not been in possession; and, moreover, C. D. Archibald was under the disability of absence from the province down to 1861. C. D. Archibald's right of action therefore accrued in 1871. He was then under the same disability of absence from the province, which continued until his death between 1871 and 1875, when the right of action passed to his heirs, who would have ten years from his death within which to bring their action. R. S. N. S. (5 ser.) ch. 113, sec. 10. But the heirs were under the same disability, themselves, at this time as sec. 18 of the Imperial Act is omitted from the Nova Scotia Act, as well as sec. 34 of that

(1) 28 L. J. Q. B. 1.
(2) 6 Ch. App. 428.
(3) 17 Beav. 421.
(1) Russ. Eq. Dec. (N. S.) 121.

Act, barring the title of the person out of possession after the expiration of the statutory period. The disability of the heirs, tacked to the disability of the deceased, brings us down to the spring of 1877, and this action was begun in 1896, within the period of twenty years after the disability had ceased and their right of action first accrued.

Receipt of half of the award for the land expropriated by Archibald prevented the bar of the statute, and the decree of the Exchequer Court is a judgment *in rem* and also estops the defendants from setting up the Statute of Limitations as a defence to this action.

This is not an action for the recovery, but for the division of land, and therefore the Statute of Limitations does not apply.

THE CHIEF JUSTICE.—This appeal entirely fails. The Statute of Limitations is sufficiently pleaded by the second paragraph of the statement of defence. This mode of pleading is considered sufficient to entitle a defendant to set up the Statute of Limitations in an action for the recovery of real property in England (1); and I see no reason why it should not also suffice in Nova Scotia. Moreover, no objection as to the sufficiency of the pleading appears to have been raised either at the trial or on appeal to the Supreme Court, *in banc*, and under these circumstances I would not in any case at this stage give effect to such a point.

I assume in the appellant's favour, without meaning to decide it, that the Statute of Limitations is a good defence to an action for partition.

The question of the disabilities of Charles Dickson Archibald and his co-heirs need not in the view I take be considered, and we are therefore relieved

(1) See Bullen & Leake's Precedents, 5 ed. 1897, p. 921; Odgers on Pleadings, 3 ed. p. 200.

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from pronouncing any opinion on the important question alluded to in the argument regarding the effect of the Nova Scotia Statute of Limitations (R. S. N. S. 5 Ser. ch. 112), in the case of a succession of disabilities, the 19th section of that Act providing for the case of disabilities not being accompanied by any such provision as that contained in the 18th section of the English statute 3 & 4 Wm. 4 ch. 27, enacting that there shall be no succession of disabilities.

Nor is it requisite to adjudicate upon the effect of the omission from the statute governing this case, of any re-enactment of the 34th section of the English Act by which it is declared that at the end of the period of limitation the right of the party out of possession shall be extinguished.

Further upon the English and Irish authorities we may take it as established law that the 17th section of the statute has a retrospective application, that is to say, that it applies to non-adverse possession by one tenant in common to the exclusion of the co-tenants before the passing of the Act.

I merely refer to all these points which underwent more or less discussion at the argument to shew that they have not been overlooked but are considered irrelevant in the view now taken of the case.

This action was commenced in August, 1896. In 1868 there was a judgment in an action brought for the recovery of the land in question by Charles Dickson Archibald and George Handley against one Morrison whose defence was limited to a certain part of the lands. The entry of the judgment, however, appears to be general, but whether it is so or not makes no difference. It is clear that if Charles Dickson Archibald had at the date this judgment was signed on the 3rd July, 1868, actually entered into possession of any part of these lands, no one else being

then in actual possession of the residue, his entry and possession would be referred to his then existing title as a tenant in common with George Handley. The recovery in ejectment therefore conferred a right of entry, and the time from which to compute the running of the statute is therefore subject to what is said hereafter to be taken to be July, 1868. Whatever doubts there may have been having regard to the language of the Act, when the statute 3 & 4 Wm. 4 was first passed, it is now elementary law that the statute does not run against a party out of possession unless there is a person in possession; *Smith* v. *Lloyd* (1); *McDonnell* v. *McKinty* (2); and further, if there has been a series of persons in possession for the statutory term between some of whom and their predecessors there has been no privity in such case the bar of the statute is complete, but if there has been any interval between the possession of such persons then inasmuch as during that interval the law refers the possession to the real owner having title, the benefit of the former possession of a precedent wrongdoer is lost to a trespasser who subsequently enters, in whose favour the statute consequently runs only from the date of his own entry. *The Trustees Agency Co.* v. *Short* (3). And this rule is not affected by the old common law principle that in case of disseisin there could be no remitter without actual entry inasmuch as the statute does not deal with feudal possession or seisin but with actual or constructive statutory possession as distinguished from seisin.

Then what we are called upon to do here is to apply the statute to the undisputed facts as they appear in the record before us. In doing this it may be premised that the onus of proving that the possession has been

(1) 9 Ex. 562.
(2) 10 Ir. L. R. 514.
(3) 13 App. Cas. 793.

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such as to entitle them to the bar of the statute, is upon the appellants who have pleaded the defence.

There can be no question upon the concessions and admissions of the parties that George Handley senior, and Charles Dickson Archibald, were originally tenants in common of the land in question, and whatever their rights as between themselves and as affected by the statute of limitations might have been before 1868, as to which it is not material to inquire, Charles Dickson Archibald must be considered as having acquired a new right of entry on the 3rd of July, 1868, from which time at the earliest the statute could have begun to run against him. It is therefore incumbent upon the appellants to make out that for twenty years subsequently to that date Charles Dickson Archibald (who is said to have died in 1875) and his heirs at law were continuously out of possession, whilst the defendants who plead the statute either by themselves or those claiming under them, or those whose possession they were entitled to join to their own, were in continuous possession. Then what are the facts relating to this possession which we find in evidence? In 1868 George Handley, the younger, was in possession, and he died in that year, upon which his father, George Handley, senior, the co-owner with George Dickson Archibald, of the property, is said to have taken possession. In 1870, George Handley, the father, died intestate, leaving as his co-heirs at law his sons John R. Handley and William Handley, and the children of his two daughters Mary VanBuskirk and Theresa Jane Hay. The appellant, John R. Handley, does not pretend ever to have been in actual occupation of the property himself; the most that he can claim is that he was after his father's death in constructive possession by his tenant, one Matheson, who left in 1881, after, as John R. Handley says, having

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been in possession for ten years. In giving this evidence dates are loosely referred to, and there is no pretence of stating with accuracy the exact date of the lease for three years to Matheson, and the exact date at which the latter gave up his overholden possession. The party who relies solely on his own testimony to establish his case cannot complain if he is held strictly to what he says in reference to the dates. He says:

My father who died in 1870, occupied after George's death.

Then he adds:

After my father's death I gave Matheson a lease of the place for three years. My mother and sister were aware that I had taken control of the property. I continued to look after the place up to the present time. Matheson remained there about ten years paying rent; $100 expended on the property. When Matheson left in April, 1881, he gave the keys under my instructions to my brother William who has since till now lived in the house. I don't know that Matheson gave the keys to my brother William—William pays no rent—I just allow him to occupy.

This being the testimony of the appellant himself we must assume he states the facts in his own favour as strongly as the truth justifies.

Then on his own shewing there has been no such possession as is required to warrant the bar of the statute in his favour. First, there must have been an interval between the death of George, the father, in 1870, and the entry of Matheson as a tenant under the appellant John R. Handley, for Matheson after a holding of ten years gave up possession in 1881; his occupation must have commenced in 1871, and there was therefore a gap or interval between the father's death and Matheson's possession of one year or thereabouts during which no one was in possession, and whereupon the possession would have been attributed by the law to the parties having title, namely the co-heirs of Charles Dickson Archibald and the co-heirs of John R. Handley.

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Then the new date for the running of the statute would have been fixed on Matheson's entry in 1871. Is it then shewn that the appellant had twenty years possession from that date, the spring of 1871? The answer must be certainly in the negative. William Handley who was one of the co-heirs of his father and who is a defendant in the present action, is said by the appellant to have been in possession from the date of Matheson's departure until action brought; he had of course an interest in the land as one of the co-heirs of his father; his possession did not under the present law enure to the benefit of his co-heirs, and upon the evidence it is impossible to attribute it to any holding or tenancy under the appellant John R. Handley. The latter says first that the keys were given up by Matheson to William, afterwards he says he does not know whether Matheson did give William the keys or not. There is therefore nothing in this shewing privity between William and the appellant John R. Handley. Then he says William paid no rent, "I just allow him to occupy." This does not prove that William is a tenant under John R. Handley. We must therefore attribute William's possession to his own title as one of the co-heirs, and this being so there has been no possession which would entitle either the appellant John R. Handley or the VanBuskirks who alone have pleaded the statute to the benefit of that defence. The defendant William Handley has not set up the statute nor relied on it as a defence.

I forbear from saying anything about the evidence as to the area of possession inasmuch as in the view I take it is not necessary to refer to it.

I think the Exchequer proceedings have no bearing on the case. The money which represented the land taken by the Crown by way of expropriation, was not received until after this action was brought, and if a

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title had then accrued under the statute, a subsequent entry or receipt of profits (and the receipt of the money could have no greater effect than this) would not revive the statute-barred title if one there had been.

The appellants are entitled to an account of and allowance for the improvements made by them or any of them, but if they insist on such an account they must also themselves account for the rents and profits received by them or for an occupation rent and that at the improved value. The case for an account of the improvements is made by the added defence, and it is also claimed in the appellant's factum. The law on this head appears clear. An action cannot be maintained by one tenant in common against another for the value of improvements alone. But in a partition action in equity such an allowance was always made. *Pascoe* v. *Swan* (1); *Gibbons* v. *Snape* (2); *Crowther* v. *Crowther* (3); *Teasdale* v. *Sanderson* (4); *Griffies* v. *Griffies* (5).

The judgment must be varied accordingly if the parties elect to take the account. This however cannot be permitted to affect the costs. The whole contention has been upon the Statute of Limitations and upon that the appellants fail and must pay the costs. Therefore subject to the variation indicated (if insisted on) the appeal is dismissed with costs.

GWYNNE J.—This is an action instituted under the provisions of ch. 122 of the Revised Statutes of Nova Scotia, 5th series, for partition of an estate called the St. Peter's estate, situate in Cape Breton, whereof one Charles D. Archibald and one George Handley, in their lifetime, now deceased, were seized in fee, in equal

(1) 27 Beav. 508.
(2) 1 DeG. J. & S. 621.
(3) 23 Beav. 305.
(4) 33 Beav. 534.
(5) 8 L. T. N. S. 758.

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moities as tenants in common, the plaintiff claiming that the moiety whereof Charles D. Archibald in his lifetime was seized is now vested in the plaintiff, and that the moiety whereof the said George Handley was seized is vested in the defendants as his heirs at law. By the said ch. 122 it is enacted that a petition for partition shall be filed in the same manner as a declaration in ordinary cases, and that the defendants may plead thereto either separately or jointly

any matter tending to show that the petitioner ought not to have partition either in whole or in part and the replication and further proceedings shall be conducted as in other actions until issue is joined which shall be tried as in other actions.

And it is thereby further enacted that if a defendant shall make default in appearing and answering the petition

a rule that partition shall be made shall pass, but the court shall have the same right of setting aside defaults and of granting new trials as in other cases.

Now to the petition in this case all the defendants except John R. Handley and George E. VanBuskirk have suffered judgment to be entered against them for default, and the said John R. Handley who is one of the children and one of the heirs at law of the said George Handley and George E. VanBuskirk who is a son of a deceased sister of the said John R. Handley have joined in pleading the defence following:

These defendants say that by deed dated the 4th day of December, 1839, and recorded in the Registry of Deeds for the County of Richmond, the said lands and premises were conveyed to said Charles D. Archibald and George Handley, both since deceased, by Felix Culvert Sudbroke and John Wright, trustees of the said General Mining Association, Limited; *that George Handley upon the execution of the said deed took possession of said lands and has continued in undisputed and exclusive possession of said lands thence until the time of his death, and from the date of his death until the commencement of this action the defendants herein or some of them as the heirs of the said George Handley continued in such undisputed and exclusive possession,*

and they conclude this plea by insisting that by reason of the matters alleged therein the plaintiff's claim to the said lands and to the moiety or any part thereof is barred by the Statute of Limitations. The plaintiff joined issue upon the above plea and put the defendants pleading that defence upon the proof of the matters as therein pleaded, and the question is: Have they succeeded in establishing the truth of the plea? the only evidence in support of which was given by John R. Handley himself upon two occasions.

1st. In 1894 upon an information which had been filed in the Exchequer Court by the Dominion Government against the now plaintiff and defendants and others, such others being persons who claimed title adversely to the now plaintiff and defendants, for the purpose of determining the right and title of the Dominion Government to a piece of the said lands whereof the said Charles D. Archibald and George Handley in their lifetime were seized in fee as tenants in common and which had been in December, 1875, entered upon and taken by the Dominion Government for the enlargement of the St. Peter's Canal in Cape Breton and for the purpose also of determining what amount should be paid by the Government for the piece of land so taken, and to whom and in what proportions the same should be paid, the evidence given upon inquiries made by order of the Exchequer Court in the matter of the said information having by consent of the parties been taken and read as evidence in the present suit; and secondly, upon the oral examination of the said John R. Handley upon the issue joined between him and the plaintiff in the present suit.

In his evidence in the proceedings in the Exchequer Court taken in 1894 he stated that his brother George in 1840 settled where the land which was taken by the Government in 1875 for canal purposes was situate;

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that he carried on there a country store and ship-building business continuously from 1840 until some time in 1868 when he went to the West Indies where he died in that year; that he had a dwelling house, barn and store and a field of about four acres enclosed round the store and house which he occupied in addition to the 2½ acres which was taken for the enlargement of the canal in 1875. He also said that another brother (the defendant to this suit, named William) had in George T. Handley's lifetime a store on the piece taken by the Government in 1875, and that after the death of his brother George T. he continued in occupation thereof until the piece was taken by the Government in 1875, and that William also in 1872 or or 1873 erected another store on a site where his brother George T. Handley in his lifetime had a store which had been burned down. He further said that on the death of his brother George T., one Matheson who had been his brother George's clerk and who had been left in possession by George when he went to the West Indies continued in occupation of the premises which had been occupied by George in his lifetime; that he, John R. Handley was his brother George's administrator, and that Matheson occupied under him from 1868 to 1878; and he said finally that his father died in 1870 intestate.

In his evidence upon the trial of the issue in the present case he gave evidence to the like effect with the following differences however. He said that

his father who died in 1870 occupied the property after George's death.

The only evidence which he gave of the fact or of the nature of such occupation was that he said

his father lived in Halifax and went down nearly every summer.

He said further that after his father's death he gave

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Matheson a lease of the place for three years—but that Matheson remained there for ten years—that

he made his first agreement with Matheson intending to act as George's administrator which he was.

He said further that Matheson left in 1881 and that when he left he, John R. Handley, told him to give the keys to William Handley.

Here it may be observed that in his evidence in the proceedings upon the information in the Exchequer Court there is no mention made of their having been more than one agreement between John R. Handley and Matheson for the occupation of any part of the premises by the latter, nor of there having been any agreement or lease for three years, but John R. Handley then stated that after the death of his brother George, his clerk Matheson occupied the premises which George in his lifetime had occupied until 1878 under lease from him, John R. Handley, who was his brother George's administrator. Then as to his having directed Matheson to give the keys to William when leaving, that is wholly irrelevant for there is no evidence that they were so delivered. The only evidence of William having ever had possession of any part of the premises in question is that of the defendant Van-Bruskirk who said that he

saw William in possession of the house and property the winter before last,

that was the winter of 1896 and 1897, and the house and property alluded to, plainly to the house and property which George T. Handley had occupied in his lifetime, but there is no evidence whatever as to the time when William did enter upon such possession nor how long he continued therein. It may be true that William did at some time or other enter into possession of some part of the premises in question which might have matured into a title in himself in fee in the part

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so possessed by him by virtue of the Statute of Limitations, but there is no evidence upon such a point even if it were admissible under the issue joined, and we have evidence upon the record that William has suffered interlocutory judgment to go against him by default in the present suit. John R. Handley in his evidence given at the trial of this case also said that one R. G. Morrison, (but when he did not say,) disputed one of the boundary lines of the premises in question and erected a building thereon and was ejected under a suit brought by Archibald and Handley. The record in that suit has been produced in evidence and thereby it appears that on the 23rd day of August, 1866, Charles D. Archibald and George Handley as plaintiffs in an action of ejectment theretofore brought by them in the Supreme Court of Nova Scotia recovered a judgment against Roderick G. Morrison, the defendant in the said action for his withholding from the said plaintiffs therein the possession of the lands covered by a description specially set out in the declaration filed in the said action which description included within its bounds the whole of the lands aforesaid whereof the said Charles D. Archibald and George Handley were seized in fee as tenants in common and to recover possession of which from the said Roderick G. Morrison they brought their action.

The Nova Scotia Statute of Limitations which adopted the provisions of the Imperial Statute, 3 & 4 Wm. IV, ch. 27, was passed in 1866 and is now ch. 112 of the Revised Statutes of Nova Scotia, 5th series; and the 17th section of that Act is taken verbatim from the 12th section of 3 & 4 Wm. IV, ch. 27. Now by that Act to enable one tenant in common to divest his co-tenant in common of the latter's share of the estate held in common, he must be in actual pos-

session or receipt of the entirety or more than his own undivided share of the lands held in common, or of the profits or rent issuing therefrom either for his own benefit or for the benefit of some other person than his co-tenant in common. Thus if A. and B. be seised of an estate in fee as tenants in common in equal moieties, and A. enters upon and takes possession of a part or the rents and profits issuing therefrom, B.'s right to his undivided moiety in the residue remains undisturbed. *Murphy* v. *Murphy* (1).

Now there is not a particle of evidence that either the co-tenant, George Handley, in his life time, or any person as his heir at law or as one of such heirs or otherwise was since his death in possession of any part of the lands held by the common title, outside of the 6½ acres of which George T. Handley died possessed in 1868. No rents or profits of any kind whatever appear to have ever issued out of such lands outside of the said 6½ acres, and as to them the evidence is that George T. Handley was the person in possession of them from his entry in 1840 until his death in 1868, it may have been with his father's consent, but in the absence of any written title from his father, and drawing the proper inference from the facts stated in evidence, plainly for his own use and benefit and sufficient to make his possession such a one as would in progress of time mature into a title in him in fee by virtue of the Statute of Limitations. There is no evidence whatever that George's possession was merely that of the father who never appears to have interfered in the premises, or to have gone near them from Halifax, where he lived, more than "*nearly every summer*," and then probably to pay a visit to his son George, who was living there and carrying on the business there of a country store, and shipbuilding for his own benefit.

(1) 15 Ir. L. R. (N. S.) 205.

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The evidence certainly shows nothing to the contrary. John R. Handley's interference with these 6½ acres upon his brother George's death in 1868, (to draw a proper inference from his own evidence), is, I think to be attributed to his assuming to act as his brother George's representative, in which character also Matheson's possession of what George T., in his lifetime had occupied, less the 2½ acres taken for the canal in 1875, under John R. Handley until 1878, must I think be regarded.

This is the view which I take of the evidence apart from consideration of the action of ejectment brought against Morrison wherein judgment was recovered against him in August, 1866. That judgment however is, in my opinion, conclusive that the plea of John R. Handley and George E. VanBuskirk cannot be maintained for the foundation upon which the superstructure of a title by the Statute of Limitations is erected falling, the whole superstructure evidently falls to the ground. Upon the pleadings in that action it appears upon record that Charles D. Archibald and George Handley declared against Roderick G. Morrison as a person charged by them to be in possession of the whole of the lands in question in the present suit, and with withholding such possession from them, and that they claimed to be entitled to recover such possession and evict Morrison therefrom, and did by the judgment of the court recover judgment to that effect. The significance of that judgment in the present case is this that the heirs at law of George Handley cannot be permitted now to allege and contend that the admission on record made by both of the tenants in common joining in the said action that Roderick G. Morrison was in possession of the whole of the premises in question, and was withholding possession from the plaintiffs who

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claimed title thereto, and the judgment in the said action for the recovery of possession by the plaintiffs and the eviction of Morrison therefrom were altogether erroneous, and that in point of fact George Handley, one of the said plaintiffs, was himself then in actual possession of the whole of the said lands and premises for his own benefit to the complete exclusion of the co-tenant in common, and was then acquiring in himself an absolute title in fee simple in the premises in absolute defeasance of the title of his co-tenant.

There is no evidence whatever of an entry upon, or possession taken of, any part of the premises in question by George Handley, or indeed by any person whomsoever since the recovery of the judgment for the eviction of Morrison in August, 1866, upon which any title, as acquired by the statute, could be pleaded. Now the plea which has been pleaded, and which if not proved must wholly fail, is one of an absolute indefeas.ble estate in fee simple in the moiety admitted to have been formerly vested in Charles D. Archibald, but now alleged to be vested in the heirs at law of George Handley, deceased, of whom the defendant John R. Handley is one, in virtue of the Statute of Limitations having operated as is alleged upon an actual, undisputed, possession of the whole of the estate held in common, taken as is alleged by the co-tenant in common, George Handley, in 1839, and the constant continuance of that possession by the said George Handley until his death, which occurred in 1870, and the continuance of such possession in his heirs upon and ever since his death, until the commencement of this suit. That the defendants have failed to establish the truth of this plea, must in my opinion be held upon the same principle that the defendants in *McConaghy* v. *Denmark* (1) failed to establish their plea of *liberum tenementum*.

(1) 4 Can. S. C. R. 609.

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In that case to an action of trespass *quare clausum fregit* the defendants pleaded *liberum tenementum* in themselves by title derived from M. & L. McConaghy. Having failed to prove a paper title they insisted upon what they contended shewed continual visible possession by themselves and those with whom they claimed to be in privity for a period exceeding twenty years, but it was held that they could not succeed because the evidence failed to show a continuance of possession by persons holding in privity with each other for the necessary period, namely, for such a period as would entitle a plaintiff to recover in an action of ejectment under the provisions of the Statute of Limitations. There the difference is pointed out between the title of a person defending his possession in an action of ejectment and of a person bringing an action of ejectment to recover possession of land the title to which was acquired only by force of the Statute of Limitations. Now in a special plea of title as in the present case where the pleading defendants have assumed the burthen of proving title as pleaded, if they fail in any particular they must fail altogether, for the plaintiff has proved priority of estate with Charles D. Archibald, whose title is admitted on the record unless it has been extinguished and transferred to his co-tenant in common and his heirs in severalty by the title as pleaded. The pleading defendants have in my opinion for the reasons given wholly failed to establish their plea, and the appeal therefore in my opinion must be dismissed with costs.

SEDGEWICK, KING and GIROUARD JJ. concurred in the dismissal of the appeal.

Appeal dismissed with costs.

Solicitor for the appellants: *C. P. Fullerton.*

Solicitor for the respondent: *Joseph A. Gillies.*