SUSAN HAMILTON AND OTHERS (DEFENDANTS) ..... } APPELLANTS;

AND

HIS MAJESTY THE KING (PLAINTIFF) ..... } RESPONDENT.

1916
*Nov. 16, 17, 29.
1917
*Feb. 6

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA.

Title to land—Adverse possession against Crown—"Nullum Tempus Act" —Interruption of possession—Information of Intrusion—Judgment by default—Acknowledgment of title—"Real Property Limitations Act" (Ont.).

A judgment by default, on information of intrusion against persons in possession of Crown lands, which was never enforced did not interrupt such possession and prevent it ripening into title under the "Nullum Tempus Act."

"The Real Property Limitations Act" of Ontario (C.S.U.C. ch. 88, sec. 15; R.S.O. [1914] ch. 75, sec. 14) providing that an acknowledgment of title in writing shall interrupt the adverse possession does not apply to possession of Crown lands and such acknowledgment is not an interruption under the "Nullum Tempus Act."

The provision in the "Ontario Limitation of Actions Act" of 1902, making an acknowledgment apply to interrupt possession of Crown lands is not retroactive or, if it is, it cannot apply to a case in which the adverse possession had ripened into title before it was passed.

Per Duff J.—As intrusion does not, in itself, deprive the Crown of possession the occupation required to attract the benefit of the first section of the "Nullum Tempus Act," 9 Geo. III., ch. 16, is not technically possession; but lands are "held or enjoyed" within the meaning of that section where facts are proved which, in litigation between subject and subject, would constitute civil possession as against the subject owner.

The judgment of the Exchequer Court (16 Ex. C.R. 67) in favour of the Crown on information of intrusion was reversed, Fitzpatrick C.J. holding that the Crown had failed to prove title, Idington, J., that the claim was barred by the negative clause of the first section of the "Nullum Tempus Act," and the other judges that the defendants had obtained title by operation of the "Nullum Tempus Act."

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*PRESENT:—Sir Charles Fitzpatrick C.J. and Davies, Idington, Duff, Anglin and Brodeur JJ.

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APPEAL from the judgment of the Exchequer Court of Canada(1) in favour of the Crown on information of intrusion.

The information of His Majesty the King was filed in the Exchequer Court for the purpose of recovering possession of a piece of land situated at the south-east corner of Rideau Street and Mosgrove Street in the City of Ottawa. The land was portion of the ordnance lands of the City of Ottawa, the title being vested in Her late Majesty's Officers of Ordnance and was partly occupied at one time by what was known as the By-Wash or Waste-Weir Reserve extending from the Rideau Canal Basin to Rideau street through which the overflow or surplus waters of the canal found their way from the canal basin as it existed many years ago. The appellants' grandparents went into possession of this land in the year 1832 without having acquired a title from the Officers of Her Majesty's Ordnance. In the month of February, 1890, an information was filed in the Exchequer Court of Canada against the parties then in possession thereof, including the parents of the defendants in the present action. No defence was filed and judgment was obtained by default, and entered for possession of the lands and premises in the information mentioned, and upon that judgment a writ of possession was issued to the sheriff of the County of Carleton and placed in his hands. Subsequently an order was obtained for the issue of a new writ of possession which writ was duly issued on the 16th day of January, 1902, and placed in the hands of the sheriff.

The said defendants were not evicted under the judgment and writs of possession above mentioned,

(1) 16 Ex. C.R. 67.

but continued in possession of the land, and as they had died it was considered advisable by the Crown to exhibit a new information against the defendants in this action, who claimed, and were in occupation of the land. They entered a defence in which they denied the title of the Crown and further pleaded that the title to the lands was vested in them inasmuch as they and their parents had been in uninterrupted, actual, visible and continuous possession and enjoyment of the lands and premises since the year 1832, and were still in full possession and enjoyment thereof.. To this defence the respondent replied setting up the former proceedings and the judgment which was obtained against the persons under whom the appellants claim, and further pleaded that the defendants either as defendants in the present action or as claiming under the defendants in the former action, were estopped from denying the Crown's title.

The action came on for trial before Mr. Justice Cassels in the Exchequer Court on the 11th May, 1915. In support of the information the Crown placed in evidence all the proceedings in the former action of intrusion, and also produced a letter written by Susan Cousens and Sarah Cousens to the then Minister of Public Works. The former of these persons, Susan Cousens, was afterwards Susan Hamilton and mother of the appellants in this action, and one of the defendants in the former action. That letter is as follows:—

"Ottawa City,
"17th October, 1871.

"Sir,—We the undersigned (being sisters) beg to inform you that having understood that the small property or lot situated on the southern side of Rideau street and adjoining the by-wash (leading from the

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Canal) on the west side of it, on which there is a wooden building, has been applied for by the St. George's Society for the purpose of erecting a hall thereon. We would hope that the same might not be sold, as we consider our right to it cannot be alienated from the length of time said lot has been possessed by our family, namely, 39 years. Our father the late James Cousens in his lifetime settled upon this lot in 1832 with permission of the Ordnance Department, our mother outlived our father and resided upon this property for a number of years and at her decease bequeathed it to us, and we have continued upon it ever since. Our father's name was entered upon the books of the Department at the time of his settling down here which was then called By-town, these facts are known to many of the citizens.

"The corporation taxes levied from time to time have been duly paid all along to this date, and we most urgently and respectfully solicit that the aforesaid lot be sold to us, as we consider we have the prior right and are willing to pay any reasonable amount for a deed of the same.

"We remain,
"Your most obedient servants,
"SUSAN COUSENS.
"SARAH COUSENS.

"Hon. H. L. Langevin, C.B."

The judgment delivered by Mr. Justice Cassels held that His Majesty was entitled to recovery of possession of the said lands.

Fripp K.C. for the appellants. The Crown did not prove title. The "sixty feet around the basin and by-wash" reserved to the Crown by 7 Vict. ch. 11, when

the unused lands were restored to former owners, must mean to refer to the junction of the basin and by-wash and so does not include our land.

And title must be proved: *Doe d. Fitzgerald* v. *Finn*(1); *The Queen* v. *Sinnott*(2); *Tuthill* v. *Rogers*(3).

The letter to Sir H. Langevin in 1871 was no acknowledgment of title. See *Doe* d. *Curzon* v. *Edmonds*(4).

The appellants were never dispossessed during the sixty years; *Day* v. *Day*(5); and the provisions of the Ontario "Limitation of Actions Act" cannot affect them.

Hogg K.C. for the respondent. The judgment obtained by the Crown in 1890 and the letter to Mr. Langevin in 1871 are, and either of them is, sufficient to uphold the judgment appealed against.

Where an effectual claim is made by the Crown within the sixty years, its remedy is not barred: *Attorney-General for British Honduras* v. *Bristowe*(6), at pages 155-6.

As to the acknowledgment see Halsburys Laws of England, vol. 19, page 132.

THE CHIEF JUSTICE.—The Attorney-General for the Dominion of Canada brought this suit by information claiming possession of certain lands and premises therein described and which now are, and for the past eighty-four years have been, in the possession of the defendants or their predecessors in title.

The matter comes before the courts in a rather curious fashion because in the year 1890 the Attorney-General brought a similar suit to recover possession of those, amongst other lands, and obtained judgment in

(1) 1 U.C.Q.B. 70.
(2) 27 U.C.Q.B. 539.
(3) 1 Jo. & Lat. 36.
(4) 6 M. & W. 295.
(5) L.R. 3 P.C. 751.
(6) 6 App. Cas. 143.

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default of pleading. Possession, however, was never had under this judgment and no writ of possession has been issued or applied for in the name of His present Majesty. The defendants then interested in the lands now in question are dead, and the Attorney-General has thought it necessary to take these proceedings in which he must prove the title of the Crown in right of the Dominion. The defendants have been in possession for more than twenty years since the judgment of 1890.

Whether the Crown could have relied simply on the judgment by default of 1890 as establishing the title of the Crown is a question which I think we are not called on to decide, because in the present proceedings counsel for the Crown set up a title which he stated at the opening of the trial, as follows:—

HIS LORDSHIP:—How did the Crown get title to it?

Mr. Hogg:—The Crown got title under the original statutes. The canal was constructed under the statute of 8 George the Fourth, and by 7 Victoria, ch. 11. That statute vested the property in the principal officers of Her Majesty's Ordnance in Great Britain: that the Rideau Canal and all its appurtenances became vested in the Principal Officers of Ordnance, and remained in that way until Confederation, and became part of the property of the Dominion of Canada under the "Confederation Act." That is the short history of the title, so far as the Crown is concerned.

This is clearly erroneous. If the canal and all its appurtenances remained vested in the Principal Officers of Ordnance until Confederation, there is nothing in the "British North America Act, 1867," which would have made it the property of the Dominion of Canada.

The "British North America Act" by section 108 provides that

the Public Works and Property of each Province enumerated in the third schedule to this Act shall be the property of Canada;

the third schedule is headed

Provincial Public Works and Property to be the Property of Canada;

the first item in this schedule is

Canals with Lands and Water Power connected therewith

and the ninth is

Property transferred by the Imperial Government and known as Ordnance Property.

Now there is no doubt that the Rideau Canal was Ordnance Property and as such it appears to this day in the schedule to the "Ordnance and Admiralty Lands Act" (R.S.C. [1906], ch. 58). If, therefore, it passed to the Dominion under the "British North America Act 1867," it was as Ordnance Property. The legal advisors of the Crown have evidently supposed that it passed like ordinary canals the Property of the Province under the first enumeration in the third schedule of

Canals with Land and Water Power connected therewith.

This is the only item of the third schedule which is printed in the extract from the "British North America Act" 1867, given in the printed

Schedule of Statutes and Parts of Statutes to be referred to on argument of this Appeal.

But whether the canal passed to the Dominion under the first or the ninth item in the third schedule it would be, of course, an essential link in the title to prove that it was at Confederation the property of the Province of Canada, and not only has no attempt been made to shew this, but counsel, as appears from his statement above quoted, has set up that it then remained vested in the Principal Officers of Ordnance.

It does not follow, of course, that because the title which the Crown has set up in this suit is bad it has not really a good title. I am certainly aware that there are a number of statutes dealing with the Rideau Canal but I do not think it is incumbent on the court to search amongst pre-Confederation statutes and other evi-

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dences of title for the purpose of seeing if a good title can be made out. Moreover, there may be points of difficulty and doubt arising on these statutes and documents. It would, indeed, seem absurd to suppose that the court should have to deduce the title and decide upon its validity independently of either of the parties to the suit.

The statute of the Province of Canada, 19 Vict. ch. 45, can scarcely be looked upon as a model of clearness or accuracy. If it is to be held to establish that the Ordnance properties of which it purports to dispose had been transferred to the province, it would seem that this could only be by implication; there is no recital to that effect such as we find in the Dominion statute, 40 Vict. ch. 8, whereby certain other Ordnance property transferred directly to the Dominion was disposed of. In the provincial statute, on the contrary, there is only a recital of the intention that they should be transferred whilst the second schedule to the Act, which alone can be material here, is headed

Military Properties in Canada *proposed* to be transferred to the Provincial Government.

The description in the schedule is, however, of the most meagre description; indeed it does not seem to deal with the canal at all. The schedule is in the following form:—

THE SECOND SCHEDULE.

Referred to in this Act being the Schedule of Military Properties in Canada proposed to be transferred to the Provincial Government.

Situation	Approximate Quantity of Land. A. R. P.	Description of Buildings or Military Works.
	(Amongst the Properties enumerated are)	
Rideau and Ottawa Canals	....	City of Ottawa, Barracks. Blockhouses and Adjuncts of the Canals.

The canal, it will be seen, is only mentioned as giving the "situation" of the properties mentioned in the third column. Again are we to suppose that the lands on either side of the canal and round the basin and by-wash are to be considered "adjuncts of the canal"? Even if they are included in this expression may not the Province of Ontario have some claim to these lands?

I am, of course, giving no opinion on any of these points and merely mention them as possible difficulties arising on the title of the Crown; it is unnecessary to pursue their consideration further since I hold that it was for the respondent to shew title which has not been done. I think as I have already intimated that the respondent having set up in this suit a title which is defective cannot be heard now to say that the judgment given by default in 1890 establishes that the title of the Crown is a good one.

If the lands now claimed are Dominion property they are apparently subject to the "Ordnance and Admiralty Lands Act," and this might be of importance to the defendants even if the judgment appealed from were upheld since the Act reserves special privileges to persons in actual occupation of such lands with the assent of the Crown. With this, however, we are not immediately concerned.

The Crown permitted the defendants or their predecessors in title to remain in undisturbed possession for fifty-eight years before taking action in 1890 and took no steps to enforce the judgment then obtained during the ensuing twenty-four years. During this long lapse of time all parties concerned have died. The form of government of the country has been repeatedly changed, and the then newly founded and insignificant By-town has become a great city, the

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capital of the Dominion of Canada. Under these circumstances, I think the courts need not hesitate to require the strictest proof of a claim to oust the defendants. Failing this, I think substantial as well as legal justice will have been done by leaving them undisturbed in the possession which they have so long held.

This is a case in which we may recall what the Privy Council has said concerning the difference in the relation between the Crown and the subject in this and in older settled countries. Such long periods of time as those prescribed in the "Nullum Tempus Act" seem to consort more with the slowly altering conditions in the latter, than with those in a country which has witnessed such phenomenal changes as Canada during the past century. Without encroaching on the functions of the Legislature we may endeavour to mitigate the hardships of a rigorous enforcement of rules which change of time and place render oppressive.

Holding the view above stated it is not necessary for me to deal with other points raised at the trial and dealt with in the judgment of the learned judge of the Exchequer Court. The plaintiff not having proved title cannot recover judgment on the claim for possession of the lands. The appeal must be allowed and the action dismissed with costs.

DAVIES J.—Several questions arose out of this appeal which, I confess, I have had some difficulty in solving.

A copy of a plan of a portion of the Rideau Canal, dated in 1847,

shewing the boundaries as marked on the ground of the land belonging to the Ordnance at Bytown (Ottawa) and the part of lot C, Concession C, in the Township of Nepean taken from N. Sparks

signed by Michael McDermott, C.E. and P.L.S., and also by the Lieutenant-Colonel and a number of officers of the Royal Engineers was apparently received in evidence at the trial, though objections were taken to its reception. A witness proved it to be a copy of the original plan on file in the Department of the Interior, Ottawa, Ordnance Branch, and I do not doubt it was properly received.

If properly in evidence, it would place beyond doubt the fact that the lands in question were part of the 60 feet around the basin and by-wash of the Rideau Canal.

The Ordnance stones X. Y. marked O. B. S. on the plan shew the by-wash to have extended to Rideau Street. There is no evidence whatever as to the date when these ordnance boundary stones were placed but they must have been so placed before the date of McDermott's plan, in 1847, and most probably before 1846, the date of the statute making clear what part of the canal and its adjuncts were retained by the Crown.

But apart from that plan I agree with the learned trial judge that the oral evidence given at the trial with respect to the locus and the by-wash of the canal in conjunction with the several written acknowledgments of title made by the defendants and their predecessors in title sufficiently establish the title in the Crown to the locus in question.

After quoting part of the evidence given by John Little a witness in his 84th year, the learned judge concludes, and I agree with him, that "the by-wash" in question is

no doubt the creek which was referred to by this witness and the cottage in question would be erected on the 60 feet.

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The learned judge, after referring to and quoting the "Ordnance Vesting Act" of 1843, 7 Vict. ch. 11, providing for the restoration to the parties from whom they were taken of the lands taken for the Rideau Canal and afterwards found not to be required and the subsequent statute of 1846, ch. 42, 9 Vict., making clear what was intended by the previous Act of 1843, namely, that its provisions should be construed to apply to all the lands at By-town set out and taken from Nicholas Sparks, except

(1) So much thereof as was actually occupied as the site of the Rideau Canal, as originally excavated at the Sappers' Bridge and of the Basin and By-wash, as they stood at the passing of the Ordnance Vesting Act; excepting also:

(3) A tract of 60 feet around the said Basin and By-wash.

concludes

That the Basin and By-wash and the 200 feet along the canal and the 60 feet along the By-wash were retained by the Crown.

I do not think there can be any reasonable doubt of the correctness of this conclusion.

Once that conclusion of fact is reached there cannot remain any doubt as to the title of the Crown. The statute, 19 Vict. ch. 45, of the late Province of Canada passed in 1856, recites amongst other facts that

the Ordnance lands of this province consist at the time of the passing of this Act of the several lands, estates and property comprised in the two schedules to this Act,

and that Her Majesty had signified Her gracious intention (*inter alia*).

that all such of the lands and other real property comprised in the said part recited Act (7th Victoria) as are comprised in the second schedule to this Act annexed, and all title, estate and interest therein respectively, should be transferred from the said Principal Officers and *become re-invested in the Crown, for the public uses of this Province.*

The enacting clause of this Act carries out specifically the expressed intention of the recital and vests

all the lands, etc., mentioned in the second schedule absolutely in Her Majesty for the benefit, uses and purposes of the province.

Amongst these lands so transferred from the principal officers of Her Majesty's Ordnance and vested in the Crown for the use of the province was the "Rideau and Ottawa Canals" and "adjuncts of the Canals."

I cannot doubt, therefore, that after the passage of this Act the by-wash, so called, of the Canal basin extending as far as Rideau Street and the reservation of 60 feet on each side of it being adjuncts of the canal were vested in the Crown for the use of the Province of Canada and were transferred by the "British North America Act" to the Dominion.

The Crown, therefore, may, under the evidence given and these statutes, be said to have proved title to the land sued for.

But the question at once arises out of the defence of over 60 years continuous possession set up by the defendants in themselves and their predecessors in title.

The fact of such continuous possession seems to have been sufficiently proved and would entitle the defendants to judgment, unless the acknowledgments of title made by them in their letters to the Honourable Hector Langevin, Minister of Public Works in 1871, the Honourable Alexander MacKenzie, Premier and Minister of Public Works in 1874 and to Sir John Macdonald, premier, in 1890, together with the judgment by default obtained by the Government on a writ of intrusion brought by the Crown for the recovery of these lands in 1890, together, or any one or more of them, operated as an interruption of such possession.

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I confess that upon this question I have had many doubts, not indeed as to the meaning and legal effect of these letters as an acknowledgment of title in the Crown, because I have no doubt whatever that they did so operate, but on the question whether such an acknowledgment is sufficient under the "Nullum Tempus Act" to interrupt a possession which the evidence shews was not as a fact interrupted.

The actual possession of the defendants and their predecessor in title was never interrupted. They remained in continuous possession for over the required sixty years and were never ousted nor disturbed by the Crown.

If it can be held that the provisions of the "Real Property Limitations Act" relating to acknowledgments of title and the effect of such acknowledgments extended to the Crown, and that the Crown could avail itself of such acknowledgments as interrupting defendants' possession of the lands, then the case for the Crown is made out, in my opinion, and the appeal should be dismissed.

I cannot, however, reach that conclusion. The "Nullum Tempus Act" does not contain any reference to acknowledgments of title as staying the running of the period of prescription, but it does provide that an interruption by entry and receipt of the rents and profits by the Crown shall stay the running of such period. It would seem a bold step for the Court to add yet another fact or incident to those the Nullum Tempus statute expressly mentions as interrupting possession against the Crown. After a good deal of hesitation I am unable to say that it should do so; and I agree with the argument that this section of the "Real Property Limitations Act" (now section 14 R.S.O. [1914] ch. 75) should not be construed as including adverse posses-

sion of *Crown lands* because that Act had no application to such possession, which is specifically dealt with by the "Nullum Tempus Act."

In the year 1902 the section of the "Real Property Limitations Act" providing for the effect of an acknowledgment in writing of the title of the person entitled to any land or rent by the person in possession was for the first time declared applicable to

> rights of entry, distress or action asserted by or on behalf of His Majesty.

The letters of the defendants on which the Crown relies as such acknowledgment, were written years before that statute of 1902 (2 Edw. VII. ch. 1, sec. 18) was passed; and at the time it was passed the prescriptive period of sixty years of uninterrupted and continuous possession by the defendants and their predecessors in title had elapsed.

The statutory title of the defendants under the "Nullum Tempus Act" was therefore complete years before the legislation was passed in 1902, unless, of course, it is held that the provisions of the "Real Property Limitations Act" relating to acknowledgments before they were expressly made applicable to rights of entry or action by the Crown can be invoked by the Crown. As I have already said, I incline to the opinion they cannot be so invoked. Nor can I construe the legislation of 1902 as having a retrospective operation upon possession which had already ripened into and become a statutory title. Whatever may be said in favour of a retrospective operation being given to the legislation of 1902 with respect to the possession of land which had not ripened into a complete statutory title in the possessors or claimants, I cannot yield to the suggestion that it can have such a retro-

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spective operation with respect to a possessory title which had so ripened.

It seems clear under the decided cases of *In re Alison*(1) and *Sanders* v. *Sanders*(2), that where a statutory title has once been acquired under the Statute of Limitations it cannot be defeated by any subsequent acknowledgment or even by any subsequent payments of rent unless these continue for such a period as creates a new statutory title.

The reasoning of the learned judges in these two cases in appeal would indicate that the statutory title so gained was, as stated by Jessel M.R.

a complete title which extinguished the other.

Assuming that to be so, then it would seem most unreasonable to give a retroactive effect to the statute of 1902 which would operate to destroy a complete statutory title gained years before, and resurrect an extinguished one. That certainly goes to destroy the argument that the statute is one relating to procedure only.

Then as to the effect of the recovery of the default judgment by the Crown before the prescriptive period had elapsed but notwithstanding which the defendants continued in possession and were not dispossessed I have also entertained some doubts.

I cannot find any direct authority which gives a different effect to a judgment recovered by the Crown on a writ of intrusion from that recovered in an ordinary ejectment between subject and subject, or which indicates that the former had the effect of interrupting the defendants' possession while the latter admittedly has not. The best consideration I have been able to give the question leads me in the absence of auth-

(1) 11 Ch.D. 284. (2) 19 Ch.D. 373, at p. 382.

ority to the conclusion that the mere obtaining of a judgment against the defendant on a writ of intrusion without further action dispossessing the defendant does not operate to interrupt the defendant's possession and that to do so there must be an actual dispossession under the judgment, or an attornment or payment of rent by the party in possession.

For these reasons, I concur in allowing the appeal.

IDINGTON J.—The information of intrusion herein is answered by a general denial of all the facts alleged therein and of any title in the Crown or possession by it of any of the lands in question, and by an assertion of title in appellants and possession since the year 1832.

The respondent replies, amongst other things, that an information of intrusion was filed against a number of persons including predecessors in title of the appellants and judgment got by default for the possession of the lands in question and other lands in the year 1890.

The respondent put in evidence a certified copy of the proceedings in said case including the judgment for default of appearance awarding possession to the respondent.

The claim of the respondent is rested thereon and upon an alleged statutory title. His counsel by way of proving the identity of the land in dispute with part of the whole included in said proceedings, called a surveyor who testified, according to certain plans, filed subject to objection, that the lands in question fell within the description therein, and in the information of intrusion, upon which the judgment for recovery of possession had been awarded.

There was no evidence adduced relative to the actual survey on the ground or to the authenticity of

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the said plans so filed, or that any of them were based upon or practically identical with, or in fact formed part of the evidence necessary to maintain the alleged statutory title (if any) of the respondent to the lands in question. That statutory title depends upon statutes which can only operate and be properly made effective by the production or proof of the documents therein referred to and especially the plan as that

> of those (lands) marked and described as necessary for the said purposes on a certain plan lodged by the late Lt.-Colonel By of the Royal Engineers, the officer then employed in superintending the construction of the said canal, in the Office of the Surveyor-General of the said late Province and signed by the said Lt.-Col. By, and now filed in the office of Her Majesty's Surveyor-General for this Province.

We have in the record a plan evidently made in 1847, after all the said legislation now relied upon, and after the settlement between one Nicholas Sparks and those acting for the Crown. We are asked to act upon this plan. But why? I am puzzled to understand, for the plan which the Legislature proceeded upon was that of Lt.-Col. By, thus referred to.

There is nothing I can discover identifying this plan in 1847 with said plan certified by Lt.-Col. By, which assuredly should be taken as the guide determining what land respondent might claim herein.

As already pointed out there is nothing in evidence identifying the work on the ground with that of Lt.-Col. By or his plan.

The case was evidently launched by the officers of the Crown in reliance solely upon the force and effect to be given the said judgment, for everything else seems to have been ignored.

Even the acknowledgment upon which the learned trial judge rests his judgment, was evidently considered of as little importance as I attach to it, for reasons to be assigned presently.

The counsel for the Crown at the trial after presenting the certified copy of the judgment, introduced it and other material thus:—

The only other evidence I have is the evidence that was taken on discovery. I do not know whether your lordship has looked at that.

* * * * *

Mr. Hogg:—There are one or two letters or petitions that are attached to this ancient fyle that I would put in, merely to shew the relations that were existing between the government and these people at that time.

The learned trial judge found himself unable to attach the importance counsel for the Crown evidently had attached to the said judgment and the effect thereof.

He therefore accepted as an answer to the claim of continuous possession for sixty years, the following alleged acknowledgment in writing:—

Ottawa City,
17th October, 1871.

Sir,—We the undersigned (being sisters) beg to inform you that having understood that the small property or lot situated on the Southern side of Rideau Street and adjoining the Bywash (leading from the Canal), on the west side of it, on which there is a wooden building, has been applied for by the St. George's Society for the purpose of erecting a Hall thereon. We would hope that the same might not be sold, as we consider our right to it cannot be alienated from the length of time said lot has been possessed by our family, namely, 39 years. Our father, the late James Cousens, in his lifetime settled upon this lot, in 1832, with permission of the Ordnance Department; our mother outlived our father and resided upon this property for a number of years and at her decease bequeathed it to us, and we have continued upon it ever since our father's name was entered upon the books of the department at the time of his settling down here which was then called Bytown, these facts are known to many of the citizens.

The corporation taxes levied from time to time have been duly paid all along to this date, and we most urgently and respectfully solicit that the aforesaid lot be sold to us, as we consider we have the prior right and are willing to pay any reasonable amount for a deed of the same.

We remain,
Your most obedient servants,
SUSAN COUSENS.
SARAH COUSENS.

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Even if the only statute invoked by the appellants had contained a provision excepting its application and operation in the case of such acknowledgments in writing as are given effect to by many statutes of limitation, I should much doubt the efficacy of this writing which clearly points to some agreement or grant conditionally binding the Crown, in honour at least, to give the ancestor of the signers a right to purchase at some price to be fixed, and which has never been fixed, and appeals to a record in the department at the time of "his settling down here" which I take it means, upon the lands in question.

I asked in the course of the argument if any inquiry or search had been made relative to said entry or record of the import thereof, and was answered by counsel on either side that no such search or inquiry had been made.

If respondent ever seriously intended to rely upon this or other letters as acknowledgments falling within any conceivable exception to the operation of the statute we should have been told in evidence what the official relation respectively was, of each of those to whom such letters were addressed, to the land in question so that thereby we might have been enabled to understand how either one of them could be held an agent of respondent to receive such letters of acknowledgment.

I should be loathe to attach much (if any) importance to such a document without the fullest information at least on the part of the Crown relative to the import of what such a claim as made therein implied, and how it could be treated as an acknowledgment taking away the rights acquired by the statute.

There are in the record two other letters from one of the same parties, and a descendant, and others,

addressed respectively in 1874 and 1890 to the Premier of Canada for the time being, upon the question. Strange to say there does not appear according to the record to have been any reply made to any of these letters.

It is to me inconceivable that these several letters should go unanswered and if answered that there is no copy of record of reply thereto.

The only reason I can assign for the non-production of the replies, is that counsel did not think it conceivable at the trial that the Crown could properly rest its case upon either that I have quoted, or the others I refer to.

With the greatest respect for the learned trial judge I am unable to give that effect which he has given to the letter above quoted.

I understand how easy it would be for him and those arguing, accustomed to the consideration of acknowledgments as a usual part of statutes of limitations, to overlook the fact that their utility in the way of answering any statute of limitation is dependent upon whether or not the statute of limitations in question has made any acknowledgment a bar to the operation of the statute or an exception therefrom.

The statute invoked in this case is the "Nullum Tempus Act" of 1769, 9 Geo. III. ch. 16, of which the first part of the first section thereof seems in itself complete, and reads as follows:—

Whereas an Act of Parliament was made and passed in the Twenty-first year of the Reign of King *James* the First, intituled, *An Act for the general Quiet of the Subjects against all Pretences of Concealment whatsoever;* and thereby the Right and Title of the King, His Heirs and Successors, in and to all Manors, Lands, Tenements, Tythes, and Hereditaments (except Liberties and Franchises) were limited to Sixty years next before the Beginning of the said Session of Parliament; and other Provisions and Regulations were therein made, for securing to all His Majesty's Subjects the free and quiet enjoyment of all Manors,

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Lands, and Hereditaments, which they, or those under whom they claimed, respectively had held, or enjoyed, or whereof they had taken the Rents, Revenues, Issues, or Profits, for the Space of Sixty Years next before the Beginning of the said Session of Parliament: And whereas the said Act is now by Efflux of Time, become ineffectual to answer the good End and Purpose of securing the general Quiet of the Subject against all Pretences of Concealment whatsoever: Wherefore be it enacted by the King's Most Excellent Majesty, by and with the Assent and Consent of the Lords Spiritual and Temporal, and the Commons, in this present Parliament assembled, and by the authority of the same, That the King's Majesty, His Heirs, or Successors, shall not at any Time hereafter, sue, impeach, question, or implead, any Person or Persons, Bodies Politick or Corporate, for or in anywise concerning any Manors, Lands, Tenements, Rents, Tythes, or Hereditaments whatsoever (other than Liberties or Franchises) or for or in any wise concerning the Revenues, Issues, or Profits thereof, or make any Title, Claim, Challenge, or Demand, of, in, or to the same, or any of them, by reason of any Right or Title which hath not first accrued and grown, or which shall not hereafter first accrue and grow, within the Space of Sixty Years next before the filing, issuing, or commencing, of every such Action, Bill, Plaint, Information, Commission, or other Suit or Proceeding, as shall at any Time or Times hereafter be filed, issued or commenced for recovering the same, or in respect thereof; unless His Majesty, or some of His Progenitors, Predecessors, or Ancestors, Heirs, or Successors, or some other Person or Persons, Bodies Politick or Corporate, under whom His Majesty, His Heirs, or Successors, any Thing hath or lawfully claimeth, or shall have or lawfully claim, have or shall have been answered by Force and Virtue of any uch Right or Title to the same, the Rents, Issues, or Profits thereof, or the Rents, Issues, or Profits of any Honour, Manor, or other Hereditament, whereof the Premises in Question shall be Part or Parcel, within the said Space of Sixty Years; and that the same have or shall have been duly in charge to His Majesty, or some of His Progenitors, Predecessors, or Ancestors, Heirs, or Successors, or have or shall stood *insuper* of Record within the said Space of Sixty Years.

There would seem no exception to this taking away of any right of action except those specified therein of which neither such like acknowledgment as relied upon nor any former action for mere recovery of possession is one.

The judgment in question was merely for possession and nothing else was prayed for except the costs of suit.

It was entered 14th April, 1890, and a writ of *hab. fac. pos.* was issued thereon the same day. Nothing further was done till the 16th January, 1902, when an order was made by the late Mr. Justice Burbidge, then judge of the Exchequer Court, directing that a writ of possession do issue out of said court.

That is followed by a præcipe for a writ of possession. Whether issued or not does not appear.

The record is thus completed so far as we know.

Now assuming the foregoing quotation from the Act to be as it seems self-contained, how can the said judgment and such acts as done thereunder (which in no way interrupted the adverse possession of those under whom the appellants claim) be said to answer the clear and imperative language of the section so far as barring any right to bring an action?

The statute makes no provision for an acknowledgment of any kind save in the way and form expressed in the specified exceptions in the Act.

The "Real Property Limitations Act of Ontario" in force at that time and in all subsequent re-enactments or revisions thereof down to 1902, contained in a section thereof a distinct provision for an acknowledgment in writing being

> deemed according to the meaning of that Act to have been the possession of the person to whom given,

but that cannot be presumed to be available for use under the "Nullum Tempus Act." That section in R.S.O. 1897, was numbered "13."

The whole of the said "Real Property Limitations Act" is clearly intended to apply only to cases as between subject and subject, except some provisions dealing with some easements and profits. Its various editions, as it were, throughout all the time in question

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down to 1902, remained as regards these exceptions, and I think in other respects relative to the effect of acknowledgments in writing, exactly the same. The sections 34 to 39 inclusive in R.S.O. 1897, and what is referred to in the section 42 thereof, shew what these exceptions cover.

These exceptions fail to touch such land as in question herein.

These sections are, moreover, instructive as shewing how the acknowledgments in writing which have been relied on must be conceived and framed. The language which might meet the requirements of section 13 in R.S.O. 1897, might fall far short of being useful under these sections 34 and 35, or section 42.

The language of the Act as to acknowledgments enlarging or preserving the rights of mortgagees or mortgagors is again of a different nature and illustrates the intention to confine such kind of legislation strictly to that being dealt with and the relation between those thus specified.

The fact that it was found thus necessary to define wherein the Crown should and should not be affected seems, if anything needed, to exclude all else having relation to the Crown as beyond the scope of the Act.

I shall revert presently to the later development in legislation and to the question of acknowledgment in this regard.

I, meantime, submit that as the said acknowledgment could have no effect when given, it could not be made effective after the full sixty years had run which gave appellants an absolute bar to this action, we are not much concerned with such development.

The truth is that a statute of limitations is nothing more or less than a definition of circumstances

under which the courts are forbidden to aid him who otherwise would be entitled to seek their assistance to recover for him his money or his property.

And what one Act of that kind may provide is of little help in the case falling under another such Act unless clearly intended to be read together.

There is, as the result of legislative development, now usually added to that negative conception, some provision for vesting in him who has enjoyed possession of land for the time specified, the title thereto which is to be recognized by the courts.

The ideas I am suggesting and seeking to give expression to are perhaps better and certainly more concisely expressed and illustrated by Lightwood in his work on "Time Limit of Actions," chapter 1, as follows:—

> Prior to the year 1833 a right to recover land might be barred either by the Statute of Limitations (32 Hen. 8, c. 2, which barred real actions, such as the writ of right and novel disseisin, and 21 Jac. 1, c. 16, which barred ejectment), or by the operation of the Statute of Fines (4 Hen. 7, c. 24).
>
> The Statute of Fines both barred the remedy and extinguished the right; the Statutes of Limitation only barred the remedy: *Hunt* v. *Burn* (1702), 2 Salk. 422.

Bearing all these considerations in mind and the fact as proven and found by the learned trial judge and indeed not seriously disputed, that the appellants and those under whom they claim have been in undisturbed possession since some time in 1832 the part of section 1 of the "Nullum Tempus Act" which I have quoted above, and the author already referred to at page 143 of his said work aptly calls the negative or limiting clause of the Act, seems a complete bar to the respondent's claim to relief herein.

That bar was complete I take it by the end of 1892. What possible right can the court have to rely on something not expressed in the statute?

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I might let the matter rest there by concluding with the result that the appeal should be allowed with costs. But it is due to the learned trial judge's opinion on the point of acknowledgment that I should present a number of considerations, which have occurred to me, more or less bearing thereupon. I have already pointed out why I think acknowledgments in 1871 could not fall within the "Ontario Real Property Limitations Act."

Ten years after the sixty years in favour of the appellants had run, the Ontario Legislature, by 2 Edw. VII. ch. 1, sec. 2, enacted as follows:—

> 2. The enactments described in the schedule to this Act are hereby repealed, but as regards the Imperial statutes if, and, so far only as the same are in force and within the legislative authority of this Province.

The "Nullum Tempus Act," 9 Geo. III. ch. 16, is one of those mentioned in the schedule referred to and the note therein is

substituted for this. See sections 17-20 of this Act.

In the sections thus referred to is contained a new code as it were relative to the lands of the Crown and actions to recover same.

In the 4th subsection of section 18 provision is made for an acknowledgment in writing taking lands out of the statute and giving a new point from which time is to run.

That legislation was in turn superseded and repealed. In the process of the revision of the Ontario Statutes sometimes such tentative legislation appears and disappears.

The final result would seem to be that in preparing the "Limitations Act" the revising commissioners in 1910 seem to have incorporated into that Act the substance of that legislation of 1902, by enacting by section 2 the provision that in this Act "action" shall

include an information on behalf of the Crown and in section 4, subsection 2, the section providing for an acknowledgment in writing and many others of the Act are made applicable to the Crown.

I cannot imagine that it ever was intended by anyone that this provincial legislation was intended not only to be retroactive, but also to affect the rights of any one in his relations to the Crown on behalf of the Dominion.

Nor can I think that, even if any one so intended it should affect the said relations, it would be successful unless adopted by Parliament.

Of course so far as the Crown on behalf of the Province of Ontario was concerned, or may now be concerned, and the relations between it and Ontario subjects of the Crown in that behalf, I assume it was quite competent for the Ontario Legislature to repeal the "Nullum Tempus Act" so far as it had any force and effect in Ontario.

I cannot find that the Dominion Parliament in any way ever meddled with the "Nullum Tempus Act" or enacted anything to make that local legislation applicable in the relation between Crown and subject.

Hence I am of the opinion that any Ontario legislation giving the Crown the right to receive acknowledgments in writing, as if efficacious to affect the "Nullum Tempus Act" independently of the Dominion Parliament, would be *ultra vires*.

But it seems to me that all that legislation is by 3 & 4 Geo. V. ch. 2, sections 6, 7, 8 and 9, expressly rendered inoperative so far as it concerns the rights of such parties as these appellants, whose rights to plead in bar herein the sixty years possession, had matured before any such legislation as Ontario's Legislature had in any of these ways enacted.

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The case of *Gauthier* v. *The King*(1), illustrates wherein provincial law is to be administered in the Exchequer Court and when discarded.

Another question of some difficulty to me is the effect of the recovery of the judgment in 1890 in its bearing upon the rights of the appellants when we consider the effect of the affirmative clauses of section 1 of the "Nullum Tempus Act."

Although holding, for the reasons already given, the first clause of said section conclusive as to this action, yet there may be something arguable in the effect of the words

> no verdict, judgment, decree, judicial order upon hearing or sentence of Court shall hereafter be had or given, in any action, bill, plaint, or information in any of His Majesty's courts at Westminster,

etc., etc., which appear at the end of the last clause of the whole section, on their bearing upon the validity of the title supposed to have been transferred by the second clause.

The question arises whether these words imply that the title of the Crown must have been tried and found by such court. I submit that no mere default judgment for want of appearance according to modern practice could ever have been in the contemplation of the Parliament which a hundred and fifty years ago framed this enactment.

In the case of *Attorney-General* v. *Parsons*(2) it was objected that the title could not be proved in a case of Information of Intrusion but first found by inquest of office when the defendant had been for twenty years in possession. The court held not, but seems to have assumed that under 21 Jac. 1, ch. 14,

(1) 15 Can. Ex.R. 444. (2) 2 M. & W. 23.

sec. 4 (*c*), the title must be proved in such a case as it was. And Alderson B. referred to Manning's Exch. Prac. 198.

See the case of *Attorney-General* v. *Mitchell*(1) and case on page 88.

The possession is theoretically assumed at common law to be in the Crown as exemplified by the authorities: Co. Litt. 41 b. 57 b.; Vin. Abr. Prerog. 2, 4; Bac. Abr. Prerog. E. 6; *Elvis* v. *Archbishop of York* (2) which were relied upon in argument in the case of *Doe dem. Watt* v. *Morris*(3), and apparently conceded but contended the King is put to his office found, citing Com. Dig. Prerog. D., *Reynel's Case*(4).

The case decided nothing touching what I am concerned with here but its argument and view of the courts is suggestive of much to be borne in mind here.

Brown in "Limitations as to Real Property," page 90, says:—

> On an intrusion upon the Crown the actual possession is acquired by the intruder (Plowd. 546) and after twenty years, continues in him "until the title has been tried, found or adjudged for the King" (21 Jac. 1, c. 14 (E); 15 Car. 1, c. 1 (1)), but in point of law the possession with respect to the nature of the remedy, is still considered to be in the Crown (*Doe d. Watt* v. *Morris*(3) and a grantee from the Crown after the intrusion is in no better or more favourable position than the Crown itself, and must recover such possession by a similar remedy through and in the name of the Crown, and cannot recover by ejectment in his own name (*ib.*).

Lightwood on Time Limitations, wherein is contained almost the sole attempt at any analysis of section 1 which I have found among the many text writers I have consulted, at pp. 147 *et seq.*, says:—

(1) Hayes Ir. Reps. 551.
(2) Hob. 315, at p. 322.
(3) 2 Bing. N.S. 189, at p. 193; 2 Scott 276.
(4) 9 Rep. 95*a*.

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There follows in the English Act a third clause which, like the first two clauses, was copied from 21 Jac. 1, c. 2, and was intended to secure the possessor who had held adversely to the Crown for sixty years against persons claiming under the Crown under grants of pretenced titles, or, to use Lord Coke's words, "against patentees and grantees of concealments, defective titles, or lands not in charge, and all claiming under them." A beneficial law, he calls it, both for the Church and the Commonwealth, in respect of the multitude of letters patent and grants of these natures and qualities, but it had become obsolete before the date of the English Act, in which it was needlessly introduced. It is not found in the corresponding Irish enactment (48 Geo. 3, c. 47).

The first clause of section 1 is negative and exclusive of the right and title of the King; the second is affirmative and establishes the estate of the subject (3 Inst., p. 190). In effect, the second corresponds to sec. 34 of the R.P.L.A., 1833, which extinguishes the title against which the statute has run. "These distinct clauses," said Blackburn, M.R., in *Tuthill* v. *Rogers*(1) "had objects perfectly different.

The first was a limitation to the suit, and barred the remedy of the Crown; the second, by confirming for all time thereafter the estate had *or claimed* by the subject and enjoyed for sixty years, against the Crown's title, barred and extinguished that title and transferred it to the subject.

It seems to me that these and other indications as well as the nature of the proceedings in such an action—and for that matter in any other action—at the time of this enactment—forbid the thought that such a proceeding taken, and ended in the record before us, as result thereof in 1890, was something quite foreign to what is required by the words I have quoted from the third clause of the first section of the "NullumTempus Act."

Indeed the language used in many of the authorities I cite, and to be found suggested by others cited therein, indicates that the use of an information of intrusion for the mere purpose of a recovery of possession would formerly have been considered an improper proceeding and suggests a doubt, if the proceedings leading up to the alleged judgment by default were not entirely misconceived if intended to fulfil

(1) 1 Jo. and Lat. 36 at p. 62.

such a purpose as that now in question, or as having anything to with what was contemplated by said section.

In *Friend* v. *Duke of Richmond* in 1667(1) at page 461, it was said by Hale C.B., that:—

> The judgment in intrusion is not in the nature of a seisin or possession, but only "*quod pars committatur et capiatur pro fine,*" And upon that an injunction issues for the possession against the party himself and all claiming under him. And though a petition of right lies against the King in this case, yet when the King has granted the land over, an entry may be made upon his patentee. * * * Nor does an information of intrusion suppose the King out of possession, for that would be contrary to the purport of the writ, which supposeth that the party intruded upon the King's possession.

See Robertson's "Civil Proceedings by and against the Crown," page 177, under head of "Information of Intrusion" to end of chapter, page 185.

Chitty on Prerogatives also has on page 380, the following:—

> These lands shall be held on the usual tenures, etc. Usual fee-farm rents confirmed. Putting in charge, standing *insuper*, etc., good only when on verdict. Demurrer or hearing, the lands, etc., have been given, adjudged, or decreed to the King.

See also Burton's Exchequer Practice, page 223 of vol. 1; Brown's Ex. Prac., page 10, and cases cited; and the cases of *Greathead* v. *Bromley*(2); *Langmead* v. *Maple* (3), and especially the dictum of Willes, J., p. 270 and top 271, that:

> It is not sufficient to constitute *res judicata* that the matter has been determined on; it must appear that it was controverted as well as determined upon;

and *Thorp* v. *Facey et al.*, in 1866(4), judgments by Erle, C.J., Willes, J., and Smith, J., not as printed in case herein, and see Manning's Practice, pages 98 *et seq.*

(1) Hardres, 460,
(2) 7 T.R. 455.
(3) 18 C.B.N.S. 255.
(4) 1 H. & R. 678.

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I submit that a careful consideration of all implied in the authorities referred to in the said several text writers, and cases I cite, leads to the conclusion that the judgment relied upon does not fall within the meaning of that section.

The judgment therein referred to is one to be recovered in Westminster Hall. Without pressing that unduly, it is to be observed that in the case of *Attorney-General for New South Wales* v. *Love*(1) when the court above held the statute to be in force in New South Wales against the contention that there was no such office as contemplated by the language of the exception, that court said (p. 686) that the only result would be that there is nothing upon which the exception preserving the Crown's right could operate, but certainly would not cut down the enacting part of the statute.

Without pressing that too far it may be held that the judgment contemplated is one resulting from proof, not given in the proceedings in question in 1890, but which would become inevitably necessary before a judgment could have been entered as herein, not only twenty years but fifty-eight years after the statute had begun to run against the Crown.

I think the cases relied upon by Mr. Justice Cassels as to the effect of a judgment in ejectment are conclusive as against a proceeding which was nothing but one for default of appearance in ejectment. Changing the name of a thing has no legal effect or at least should have none. The information in question was nothing but an ejectment suit.

I desire to make that position clear for an information of intrusion has been, when properly brought for

(1) [1898] A.C. 679.

the recovery of damages, or of rents and profits, aptly compared to an action of trespass *quare clausum fregit*. It may be conceivable that such an action might be proceeded with by such *ex parte* proceedings as to prove the title and bind. Possibly the same might take place in the proceeding to judgment in an information of intrusion and it appearing there had been no adverse possession for twenty years, a judgment by default might stand good.

I gravely doubt the efficacy thereof in face of the dictum of so great a lawyer as Willes J. quoted above, as to the necessity for the issue being controverted.

But in any event if possession had run for over twenty years, I think it should not stand unless some proof adduced of the title even if the proceedings *ex parte*.

It must be understood I am speaking of something that may operate under or as against the "Nullum Tempus Act."

I repeat all this does not touch the right of appellants in this case to have this information dismissed but merely the question of what their rights may be when that has been (if ever) done.

Another question has weighed much upon me by reason of the stress laid both in the court below and before us on the case of *Magee* v. *The Queen*(1) when the late Mr. Justice Burbidge gave judgment for the Crown.

A perusal of that case suggests that we should have had the facts there proven gone into and proven here. Of course we cannot accept or act upon what appears therein as statement of fact, yet when one has been invited to read such a recital of fact it becomes painful to suspect therefrom that if we had been as fully supplied with facts as the court was in that case and a

(1) 3 Can. Ex.R. 304.

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trifle more suggested thereby, we might be induced to conclude that the title if still outstanding in any one but appellants had passed to the Crown on behalf of Ontario.

It does seem a very remarkable thing that though the only reason alleged for this land having (if ever) been acquired on behalf of the Crown, was that it was intended to serve the purposes or uses of a canal, yet no one has ever felt under the necessity of using it for that purpose during all the long period it has been supposed to be the property of the Crown.

It is quite clear that under section 108 of the "British North America Act" all that passed to the Dominion was what could fairly be said to be then part of that in the schedule referred to therein, and described as

canals with land and water power connected therewith,

If lands had been ninety years ago supposed to be needed perhaps for contractors building the canal, but in truth useless for the canal as such, I cannot think they passed to the Dominion.

Indeed I am of the opinion that lands acquired by the Crown on behalf of any of the confederated provinces for purposes of any canal, but which had obviously always been or become useless in that connection, remained at Confederation the property of the Crown on behalf of the province so concerned.

It requires some straining of the imagination to discover how lands that had remained for thirty-three years before the "Confederation Act" in the possession of people who never had anything to do with the canal in question, could then, in 1866, be properly described as lands connected therewith.

And as bearing upon the suggestion that these lands never had any connection in fact with the canal,

it may be observed that the letter treated by the judgment below as an acknowledgment seems to have been prompted by some proposition to acquire them as a site for a St. George's Hall within five years after Confederation. What had happened their use for the purposes of the canal? Is this in a letter so much pressed on us not rather suggestive that those concerned had applied to the wrong Crown?

And when we are told nothing more than we find in evidence herein I am unable to understand how such a claim can be maintained.

I cannot in face of these and many other peculiarities of this case, assent to the proposition that the lands described in the information are part of those belonging to the respondent, or that they ever belonged to the Crown, on behalf of the Dominion, if at all.

We have put forward in the 9th Vict. ch. 42, sec. 1, something to indicate that the lands round the canal basin and by-wash intended to be of use for the canal had been "freely granted by Nicholas Sparks" but when or how has not been shewn.

Time had run in favour of the first adverse possessor of the land in question (under whom appellants claim) at least fifteen years before then.

The words "freely granted" are of very doubtful import and may mean much or little when the story of the surrounding facts and circumstances are forthcoming to give them a clear, vivid meaning.

If Sparks had the fee simple then vested in him when adverse possession first taken by the predecessors of appellants, or thereabout, then there was an adverse title as against him started running which for aught we know may have ripened long before anything done on the part of the Crown to stop its running.

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It is not necessary I should try to follow this further for the necessary material is not before us.

I suggested in the course of the argument that the words

Provided no buildings be erected thereon

in the first section I have just now referred to, might well have been used as words of description and designed for the express purposes of protecting such people as Cousens.

Evidently there were others possessed of buildings on land squatted on, left undisturbed till the growing city needed a new street, and basin and by-wash had long disappeared.

The meagre evidence in the way of historical inquiry falls far short of what I imagine might have been adduced, as it seems to have been, in the case of *Magee* v. *The Queen*(1), and might have lightened up much.

There are some conclusions reached by Mr. Justice Burbidge which on the facts as presented in the report of that case, do not appear to me self-evident.

The suggestion that the acknowledgment in 1870 or the judgment in 1890 might well furnish some evidence of a title independently of their value under the statute, seems to me quite untenable. In regard to the former there is theoretically, in one view, if the evidence had been adduced, no doubt of the title of the Crown, or in the other case of its possession.

They add nothing in either way. The question is simply whether the "Limitations Act" applicable has been stopped running thereby which I say it has not, because neither one of these things which might so operate has been proven.

(1) 3 Ex. C.R, 304.

Mr. Hogg very properly as counsel abstained from entering upon a part of the later history relative to the judgment which does not appear in evidence and possibly, if I understood him correctly, he only surmised a probable explanation.

Yet I cannot understand why we should be asked to permit a recovery upon a judgment (for that is what it comes to) which, for some mysterious reason, if ever worth anything, cannot now be enforced in the ordinary way.

Appellants submit it has in law become spent. I am curious to know if it ever was in law worth anything.

I think the appeal should be allowed with costs throughout.

DUFF J.—I do not think it is necessary to decide the question whether or not there is sufficient evidence that the property in question is within the area acquired by the Crown under the authority of 8 Geo. IV. ch. 1, or vested in the Crown by force of 7 Vict. ch. 11, sec. 29. I shall assume that at the time the appellant's predecessor in title went into possession and erected a log hut upon the lot in 1832, a tract including this lot had been "set out and ascertained" in compliance with the provisions of the first mentioned statute as land required as a site for the Rideau Canal and its accessories. The question of substance is whether the appellants are now entitled to succeed in the litigation on the ground that the suit instituted by the Crown is barred by the "Nullum Tempus Act," 9 Geo. III. ch. 16. In that enactment by the preamble it was recited that certain provisions and regulations had been made by 21 Jac. I. ch. 22:—

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For securing to all His Majesty's subjects the free and quiet enjoyment of all manors, lands, and hereditaments which they or those under whom they claimed respectively had, held, or enjoyed, or whereof they had taken the rents, revenues, issues, or profits for the space of sixty years next before the beginning of the said session of Parliament; And whereas the said Act is now by efflux of time become ineffectual to answer the good end and purpose of securing the general quiet of the subjects against all pretences of concealment whatsoever.

The statute then proceeds to enact that:—The Crown shall not sue any person for or in any wise concerning any lands or hereditaments (other than liberties or franchises), or the rents and profits thereof, by reason of any right or title which has not first accrued within 60 years next before the commencement of the suit, unless the Crown or its predecessors in title have been answered by force of any such right or title, the rents or profits thereof (or the rents or profits of any honour, manor, or other hereditament whereof the premises in question are part) within the said space of 60 years (or that the same have been duly in charge to the Crown or have stood *insuper* of record within such space); and then follows a clause definitely establishing the title of the subject who shall have "held or enjoyed" any lands in respect of which His Majesty claims any title which did not first accrue within the space of 60 years before the commencement of the proceedings.

It is undisputed that the appellants and their predecessors have in fact been in actual occupation and in fact have used and "enjoyed" the land in question since the year 1832. To all appearance they have during that period acted in respect of the land as if they were the owners. They have, for example, made improvement as they have seen fit and have paid all the taxes. *Primâ facie*, therefore, there is a clear case of sixty years' holding and enjoying attracting the benefit of the "Nullum Tempus Act." Certain acts of the appel-

lants and their predecessors are, however, relied upon as shewing that this occupation is not of such a character as to entitle them to the benefit of the statute.

First it is argued that a letter written in 1871 and a petition filed in 1890 constitute acknowledgments of title which are said to interrupt the running of the statute. As to the letter of 1871, with great respect to the learned trial judge, I think it does not amount to an acknowledgment of title in the Crown. The letter contains a declaration that the rights of the writers "cannot be alienated" and in view of that I do not think the letter can be regarded as an acknowledgment of title. The petition of 1890 goes further and if I had considered it necessary to pass upon the question I should have had some difficulty in deciding whether or not that petition read alone contains an acknowledgment of title within the meaning of the "Real Property Limitations Act" (C.S.U.C. ch. 88, sec. 15; R.S.O. 1887, ch. 3, sec. 13). I do not find it necessary to decide this point because first, the petition of 1890 must be read with the letter of 1871, and the petition of 1874, in both of which documents the petitioners asserted they were entitled to possession of the property and, secondly, because, in my opinion, a mere acknowledgment of title was not, at the time these alleged acknowledgments were given, sufficient to interrupt the running of the "Nullum Tempus Act."

The provision of the "Real Property Limitations Act" above mentioned, is a provision enacted in 4 Wm. IV. (ch. 1, sec. 26) with reference to the limitations established by that statute. That statute effected various changes in the older law; for example, the doctrine of "adverse possession" was so much modified that it might almost be said to have been abrogated; and the right to preserve title by "continual

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claim" was abolished. Acknowledgment of title in writing, however, it was explicitly declared should interrupt the running of the limitations thereby established. The limitation created by the "Nullum Tempus Act" was not within the contemplation of the enactment by which this was accomplished, and I do not understand upon what ground it can be held that this provision is available in the present proceedings.

Counsel relied upon sections 17 and 18, ch. 1 of the Ontario Statutes, 1902. Section 17 is in effect a re-enactment of the first section of the "Nullum Tempus Act." Section 18, sub-sec. 4, is a provision the effect of which is to interrupt the running of the statute in the case of acknowledgment of the title of the Crown in writing. The argument is that by force of sec. 18, sub-sec. 4, the so-called acknowledgments are an answer to these proceedings. That argument must be rejected because the effect of the second clause of the first section of the "Nullum Tempus Act" taken together, is to establish the title of the subject on the expiry of the prescribed period, and there is nothing in the Ontario Statute of 1902 to indicate an intention on the part of the legislature that this statute should operate to divest a title acquired before it was passed—the statutory period having in this case expired ten years before, in 1892.

These so-called acknowledgments, however, have some relevancy in relation to another question which must be dealt with, and that is the broad question whether or not the land was "held or enjoyed" by the appellants and their predecessors in such a character as to attract the benefit of the "Nullum Tempus Act." The question is: Have the appellants and their predecessors "held or enjoyed" the land as contemplated by

the statute for a period of 60 years since the right of the Crown to take proceedings by information of intrusion which is now asserted first commenced?

The Crown cannot be disseized by a mere intrusion. The occupation, the holding or enjoying, therefore, contemplated by the statute as attracting the benefit of its provisions cannot be technically possession; but it seems reasonable to read the statute as contemplating such occupation as, if the question arose between subject and subject would constitute civil possession as against the subject-owner. On this assumption two elements are involved in the occupation required, exclusive occupation, in the physical sense, "detention," and the *animus possidendi*, that is the intention to hold for one's own benefit which, be it observed, is presumed to exist from the fact of "detention" alone. Given an occupation possessing these features the statutable conditions are, I think, fulfilled.

The first element is admittedly present. Are there circumstances disclosed by the evidence which rebut the presumption of the existence of the *animus possidendi?* The answer to this last question turns upon the point whether or not the land was "held or enjoyed" in a character inconsistent with the existence of the intention on the part of the occupants to hold for themselves? The circumstances to be considered are chiefly those disclosed by the letters and the petitions of the appellants and their predecessors.

The following relevant facts may be inferred from the statements in these letters which, of course, are properly in evidence as admissions against the appellants. First, that Cousens, under whom the appellants claim, went into possession by the permission of Colonel By, in 1832. Secondly, that a dwelling was

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erected by Cousens which he and his family occupied until the time of his death, and afterwards by his descendants, and various improvements were made by him. Thirdly, that applications from time to time were made, whether before or after Cousens's death does not appear, to purchase the property and that the answers were to the effect that the property was required for the purposes of the canal. Fourthly, that in 1871 a letter was written by the appellant Susan Hamilton requesting a deed of the property and explicitly laying claim to a right to retain it on the ground of possession. Fifthly, a petition was presented to the Government on the 10th August, 1874, by the same appellant asking in view of certain contemplated Government improvements that her "right" in the property be protected and that a legal title be granted to her. Sixthly, that in 1890 the Crown having commenced proceedings by an Information of Intrusion, the same appellant presented to the Government another petition throwing herself, as she said, upon the clemency of the Government but making no claim to any right sufficient to afford a legal defence to the proceedings taken by the Crown.

With regard to the circumstances under which possession was taken by Cousens, one must not overlook the fact that the statutes above referred to and particularly the Act of 7 Vict., shew unmistakably that the title to this property, which *ex hypothesi* formed a part of certain land owned by one Nicholas Sparks, was in dispute between Sparks and the officers having charge of the construction of the canal a very short time after possession was taken by Cousens; a dispute which was not settled finally for something like ten years. The bare facts that Cousens went into possession with the permission of Colonel By and that the

lands subsequently, by force of 7 Vict. became vested in the Crown for the purposes of the canal are not sufficient to shew that Cousens' occupation was an occupation on behalf of the Crown. They are not sufficient in themselves to repel the presumption arising from the character of the occupation as indicated by the conduct of Cousens himself in erecting a house, making improvements and paying taxes. There is the additional circumstance to be considered in connection with this, that section 29 of the Act 7 Vict., in confirming the grant from Sparks of a strip of 60 feet "around the basin and by-wash" explicitly annexed the condition that no building should be erected upon the land so ceded to the canal authorities. I am not now touching the point whether or not this was a condition subsequent by force of which erection of buildings would defeat the grant. The point is that *primâ facie* the continued occupation of this land for the purposes of a residence is not in these circumstances entirely consistent with the assumption that the property was held by the resident on behalf of the public authority which had bound itself and upon which the legislature had imposed the duty to see that no buildings were placed upon it.

The letter and the petitions of 1871, 1874 and 1890, respectively, contain nothing supporting the theory that the land had been held on behalf of the Crown; on the contrary, they are almost demonstrative that in the eyes of the persons who signed those documents they and their predecessors had occupied the property solely for their own behoof.

On the whole I am unable to find anything in all these circumstances which counterbalances the *primâ facie* case established by the evidence touching the nature of the occupation in fact.

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The point is raised, however, that a judgment having been pronounced in proceedings commenced by Information of Intrusion in the year 1890 declaring that the lands in question were in the possession of the King and awarding judgment of *a moveas manus*, stayed the operation of the "Nullum Tempus Act." I am unable to agree with this. The occupation of the appellants' predecessors was not interrupted in fact by that judgment, nor had it the effect of so changing the character of it as to make it an occupation on behalf of the Crown.

ANGLIN J.—In the suit of the Crown to recover possession of a lot of land on the south side of Rideau Street, in the City of Ottawa, claimed as part of the Ordnance lands held with, and for the purposes of, the Rideau Canal, the defendants plead two distinct defences—denial of the Crown's title and the acquisition of an adverse title under the "Nullum Tempus Act," (9 Geo. III. ch. 16, sec. 1).

Probably actually out of possession of the property for eighty-two years before the Information now at bar was filed—from 1832 to the 3rd December, 1914—admittedly out of possession and having had no acknowledgment of its title during more than twenty years, the Crown properly assumed the burden cast upon it by the statute, 21 Jac. I., ch. 14, of proving a subsisting valid title.

Counsel representing the Attorney-General sought to establish that the land in question formed part of a tract of 60 feet "round the Basin and By-wash" of the Rideau Canal at Ottawa reserved to the Crown out of unused lands acquired from Nicholas Sparks and to be returned to him under the statute 7 Vict. ch. 11, as defined by the statute 9 Vict. ch. 42; that these lands

had been transferred to the late Province of Canada and vested in the Dominion of Canada on Confederation; and that the claim of title by possession set up by the defendants was answered by a judgment for possession recovered by the Crown in 1890 against their predecessor in occupation and by written acknowledgments of the Crown title.

In view of the conclusion that I have reached as to the defence under the "Nullum Tempus Act," I shall merely state the result of a somewhat prolonged and critical investigation of the title preferred on behalf of the Crown. The references in the letter of 1871 and the petition of 1874, respectively written and presented by the defendants' predecessors in occupation, and in the testimony of the defence witnesses, Little and Maloney, to the house in question as situated on the west side of the by-wash, establish as against the defendants, at least *primâ facie*, that the by-wash extended past the property in question and that that property was included in the reservation to the Crown under 7 Vict. ch. 11, as explained by 9 Vict. ch. 42, of a 60 foot tract "round the Basin and By-wash." It should be noted, however, that on the plan of 1847, produced from one of the public departments and put in evidence on behalf of the Crown, the western limit of the 60 foot tract reserved appears to pass through the house occupied by Cuzner. It may well be, therefore, that a portion of the land on which the house stood was not within the reserved tract.

I do not question the transfer to the Province of Canada of whatever land was comprised in this 60 foot tract as part, or an "adjunct" of the Rideau Canal (19 Vict. ch. 45, sec. 6, and last item of the second schedule) or that it became the property of the Dominion of Canada under sec. 108 of, and item 1 or

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item 9 of the third schedule to, the "British North America Act" 1867.

It has been stated by very high authority that the purpose of the statute, 21 Jac. I., ch. 14, was to place defendants to informations of intrusion laid by the Crown, in cases to which it applies, on the same footing with regard to proof of title as that held by defendants in ordinary actions of ejectment: *Emmerson* v. *Madison*(1), at page 576. The procedure upon such informations is also assimilated to that in actions of ejectment. Shelford's Real Property Statutes, (9 ed.) p. 111. The judgment obtained by the Crown in 1890 was never executed. Possession of the land was never taken under it. In this respect resembling a judgment in ejectment, as to the effect of which the cases are cited by Mr. Justice Cassels, the judgment on the information of 1890 does not afford any proof of the Crown title now available by way of estoppel, admission or otherwise and does not operate as an interruption of possession such as would defeat the prescriptive claim of the defendants under the "Nullum Tempus Act." It is at the highest evidence that the defendants' predecessor in possession had not at the date of the information laid in 1890 a right to possession good as against the claim of the Crown, as in fact, upon the evidence before us, she probably then had not, the adverse possession having up to that time lasted only fifty-eight years. If an acknowledgment of title in the Crown would suffice to defeat a prescriptive claim under the "Nullum Tempus Act," the judgment of 1890, in my opinion, would not amount to such an acknowledgment. Why this judgment was never executed we are left to surmise. No explanation has

(1) [1906] A.C. 569.

been vouchsafed of this extraordinary feature of a peculiar case.

Though for a time disposed to think that the letters of 1871 and 1890 written by the defendants' predecessors in occupation, one to the Minister of Public Works (see 31 Vict. ch. 12, sec. 10) and the other to the Prime Minister, might be regarded merely as offers to pay for "a paper title" by way of further assurance of a title by length of possession asserted by the writers, on further consideration I am unable to place that construction upon them. They contain admissions of title in the Crown and otherwise satisfy the requirements of acknowledgments under the "Real Property Limitation Act."

But the appellants maintain that acknowledgments of title sufficient for the purposes of the "Real Property Limitations Act" do not interrupt the running of the period of prescription under the "Nullum Tempus Act," because, while the latter Act provides for such an interruption by receipt of rents or profits, etc., it contains no reference to acknowledgments of title written or verbal.

For the respondent it was contended that in answer to the claim of title under the "Nullum Tempus Act" the Crown may avail itself of the provision for acknowledgments made in the "Real Property Limitations Act," to be found in ch. 88 of the C.S.U.C., 1859, sec. 15, and in the subsequent revisions of the same statute. But this section on its proper construction, in my opinion, is limited in its application to cases within the purview of the statute of which it forms part and cannot be extended to cases of adverse possession of Crown lands, to which the "Real Property Limitation Act" has no application. Although the rule under which the Crown is entitled to claim that it is not bound by a

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statute in which it is not named does not prevent its taking advantage of a statute though not named in it, that fact cannot justify extending the application of a provision such as that with which we are dealing, even at the instance of the Crown, to cases that it was never intended to cover.

Apparently to remedy the omission from the "Nullum Tempus Act" of any provision for the interruption of the prescriptive period under it by an acknowledgment of title, the Legislature of Ontario, in 1902, introduced for that province, as an amendment to the "Nullum Tempus Act," a provision similar to the acknowledgment section of the "Real Property Limitation Act" (2 Edw. VII. ch. 1, sec. 18 (iv.)). At that time, however, the prescriptive period under the "Nullum Tempus Act" in regard to the land in question had already been completed for about ten years; and the letters relied upon as acknowledgments had also been written many years before.

Assuming that such an amendment to the "Nullum Tempus Act" enacted by a provincial legislature may be invoked in a proceeding involving the title of the Crown to property claimed in right of the Dominion, it seems to me inconceivable that it can affect the case now before us. There might have been an argument for giving a retrospective operation in this proceeding to the legislation of 1902 had the effect of the "Nullum Tempus Act" been merely to bar the remedy of the Crown, leaving its title and estate in the land untouched. It might then have been deemed an enactment for the regulation of a course of procedure (*The Ydun*) (1), in which there can be no vested right: *Republic of Costa Rica* v. *Erlanger*(2), at page 69. But the

(1) [1899] P. 236.

(2) 3 Ch.D. 62.

"Nullum Tempus Act" does a great deal more. Although the fact that the Crown has been sixty years out of actual possession of land adversely occupied does not establish title in a person who had occupied the land for a period which had begun when the actual occupation of the Crown had ceased but had lasted for less than the sixty years as against a stranger who has subsequently obtained possession; *Goodtitle* v. *Baldwin*(1); sixty years' adverse possession continuously held by one person, or by several persons successively claiming one under the other extinguishes the title of the Crown and as against the Crown establishes the title of the person, or the last of the persons, so in possession (3 Inst. 190). The effect of the several clauses of section 1 of the "Nullum Tempus Act" is that the remedy of the Crown is first barred and then its title is extinguished and transferred to the subject holding adverse possession: *Tuthill* v. *Rogers*(2), at pages 62, 72. To vested rights so acquired it would be contrary to sound construction to apply legislation couched in terms such as those of clause (iv.) of sec. 18 of the statute, 2 Edw. VII. (Ont.), ch. 1, which is not in its form or nature declaratory and does not contain a single word indicative of an intention that it should have a retroactive application. I am, therefore, of the opinion that the attempt to meet the defendants' claim of title as against the Crown under the "Nullum Tempus Act" by invoking the letters of 1871 and 1890 as acknowledgments of title, fails because the "Nullum Tempus Act" prior to 1902 did not provide for an interruption by an acknowledgment of title of the prescription which it enacts.

After counsel for the defendants had called several witnesses to testify to the occupation of the property

(1) 11 East 488.

(2) 1 J. & LaT. 36.

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in question by James Cuzner and his wife and their descendants down to the time of the trial, counsel for the Crown admitted the sufficiency of the proof of possession already adduced, as appears by this passage in the record:—

> *Mr. Fripp*:—I think my learned friend will admit—he does not require me to call any more witnesses—as to our possession.
> *Mr. Hogg*:—No, I think not.
> HIS LORDSHIP:—Continuous possession for more than sixty years.
> *Mr. Fripp*:—Yes,

The learned trial judge accepted the proof of possession given by the defendants as sufficient. In finding against them on this branch of the case he proceeded solely on the acknowledgment of title contained in the letter of 1871.

I am, for the foregoing reasons, with respect, of the opinion that the defendants are entitled to succeed under the "Nullum Tempus Act." I would, therefore, allow this appeal with costs and would dismiss the information with costs.

BRODEUR J.—I concur in the result.

Appeal allowed with costs.

Solicitors for the appellants: *Fripp & Magee.*
Solicitors for the respondent: *Hogg & Hogg.*