*Judgement of the Lords of the Judicial Committee of the Privy Council on the Appeal of the Trustees, Executors, and Agency Company, Limited, and William Templeton* v. *John H. Short, from the Supreme Court of New South Wales; delivered 1st August* 1888.

Present:

LORD MACNAGHTEN.
SIR BARNES PEACOCK.
SIR RICHARD COUCH.

[*Delivered by Lord Macnaghten.*]

On the 3rd of December 1885 the Appellants, as Plaintiffs, brought an action against the Respondent, as Defendant, to recover 50 acres of land situated in the district of Botany Bay, in the county of Cumberland, in the colony of New South Wales.

The defence was the Statute of Limitations, 3 & 4 William IV., ch. 27, which was adopted in the colony by the Act No. 3 of 1837.

The action came on for trial in September 1886 before the late Chief Justice Martin and a jury.

For the present purpose the facts of the case may be stated very shortly. The land in dispute was, until recently, waste open bush. The Plaintiffs at the trial proved a complete documentary title deduced from a Crown grant in 1810. But they failed to prove to the satisfaction of the learned Judge at the trial that they or any person through whom they claimed

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had been in actual occupation of the land at any time during the period of 20 years immediately preceding the commencement of the action. On the other hand the Defendant, who claimed to have purchased the land within the last few years, did not prove to the satisfaction of the learned Judge that he and the person or persons through whom he claimed had been in continuous possession during the statutory period.

The Chief Justice told the jury that when any person went into possession of another person's land, and exercised dominion over it, with the intention of claiming it, and the Statute of Limitations thereupon began to run as against the owner of the land, such running was never stopped, notwithstanding that the intruder abandoned the land long before the expiration of 20 years from his first entry, and no other person took possession of such land, and the right of the true owner to the land would not again arise without an entry by such true owner with the intention of repossessing himself of such land. The Chief Justice also told the jury that at the expiration of the 20 years after such taking possession of the land, as against the true owner, his right of action was defeated, notwithstanding there may not have been 20 years possession as against him.

A verdict was found for the Defendant.

On the 27th of October 1886 the Plaintiffs applied for a rule Nisi for a new trial on the ground of misdirection. The application was heard before the late Chief Justice, Faucett, J., and Windeyer, J., who refused the rule. The Chief Justice is reported to have said, "There is "no doubt that there was evidence sufficient to "justify the verdict of the jury as to the occu- "pation of the land more than 40 years ago, "which caused the statute to run against the "legal owner. That being so, there was no evi-

" dence whatever that the legal owner during " that time ever retook possession, or even " walked over the land. The statute having " been set running there was nothing to stop " it."

To this report Fawcett, J., has been good enough to append the following memorandum for the information of their Lordships:—

" This is substantially a correct note of the reasons given by the late Chief Justice for refusing the rule in this case. His judgement was given in very few words.

" I may add that it has been before held by this Court that when the rightful owner of land has been dispossessed, and the statute has once begun to run against him, the statute does not cease to run; in other words, the operation of the statute is not suspended until the rightful owner has exercised some act of ownership on the land; and that if the rightful owner allows 20 years to elapse, from the time when the statute so first began to run, without exercising any such act of ownership, he cannot recover in ejectment against any person who may happen to be in possession at the end of the 20 years, although there may have been an interval in the 20 years during which no one was in possession.

" To stop or suspend the operation of the statute there must be some new act of ownership on the part of the rightful owner. There must be, as it were, a new departure."

The doctrine appears to have had its origin in the case of Laing *v.* Bain, which was before the Supreme Court on a motion for a new trial in March 1876. Their Lordships were referred to a note of the case in Oliver's Real Property Statutes, p. 79. Martin, C. J., is there reported to have said that "it was clear law that if the statute " once commenced to run it would not stop ex-

" cept by the owner going into possession and so " getting, as it were, a new departure."

Their Lordships are unable to concur in this view. They are of opinion that if a person enters upon the land of another and holds possession for a time, and then, without having acquired title under the statute, abandons possession, the rightful owner, on the abandonment, is in the same position in all respects as he was before the intrusion took place. There is no one against whom he can bring an action. He cannot make an entry upon himself. There is no positive enactment, nor is there any principle of law, which requires him to do any act, to issue any notice, or to perform any ceremony in order to rehabilitate himself. No new departure is necessary. The possession of the intruder ineffectual for the purpose of transferring title ceases upon its abandonment to be effectual for any purpose. It does not leave behind it any cloud on the title of the rightful owner, or any secret process at work for the possible benefit in time to come of some casual interloper or lucky vagrant.

There is not, in their Lordships' opinion, any analogy between the case supposed and the case of successive disabilities mentioned in the statute. There the statute " continues to run " because there is a person in possession in whose favour it is running.

There is no direct authority on the point in this country. But such authority as there is seems to be opposed to the doctrine laid down by the Supreme Court. It is sufficient to refer to McDonnell *v.* McKinty, 10 Ir. Law Rep. 514; Lord St. Leonards' Real Property Statutes, p. 31; and Smith *v.* Lloyd, 9 Exch. (Welsby, H. & Gor.), 562. In the latter case, which was decided in 1854, Parke, B., giving the judgement of the Court, says:—" We are clearly of opinion that " the statute applies, not to want of actual pos-

" session by the Plaintiff, but to cases where he " has been out of, and another in, possession for " the prescribed time. There must be both " absence of possession by the person who has " the right, and actual possession by another, " whether adverse or not, to be protected, to bring " the case within the statute. We entirely concur " in the judgement of Blackburne, C. J., in " McDonnell *v.* McKinty, and the principle on " which it is founded."

Their Lordships have only to add that, in their opinion, there is no difference in principle as regards the application of the statute between the case of mines and the case of other land where the fact of possession is more open and notorious. It is obvious that, in the case of mines, the doctrine contended for might lead to startling results and produce great injustice.

In the result, therefore, their Lordships have come to the conclusion that the direction given to the jury by the learned Chief Justice was not law, and they think that there was substantial miscarriage in the trial.

They will, therefore, humbly advise Her Majesty that the judgement of the Supreme Court refusing the rule Nisi ought to be reversed, that a new trial ought to be directed, and that the costs in the former trial and of the application for the rule ought to be costs in the action.

The Respondent will pay the costs of the appeal.