Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of Emmerson v. *Maddison, from the Supreme Court of Canada; delivered the 27th July* 1906.

Present at the Hearing:

LORD MACNAGHTEN.
LORD DUNEDIN.
LORD ATKINSON.
SIR ARTHUR WILSON.
SIR ALFRED WILLS.

[*Delivered by Sir Alfred Wills.*]

The essential facts are very short and not in dispute.

The Appellant and those whom he represented in title had enjoyed uninterrupted occupation of a piece of land in the Province of New Brunswick, of about nine acres, from 1839 to 1895, a period of about 56 years. No rent had been paid and the occupation was open and unchallenged down to some time in 1895. This piece of land, described as a mill site in various conveyances under which it had passed, was and is land belonging to the Crown. The period of occupation was some three or four years short of the time necessary under the Nullum Tempus Act to give a right as against the Crown by length of occupation.

In 1895 the Defendant obtained a grant of this same piece of land from the Crown, and during the temporary absence of the Plaintiff or any one on his behalf, entered peaceably upon it and has continued in occupation. The judgment of Mr. Justice Landry, the trial Judge, was by agreement between the parties to be taken as an

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adequate statement of the facts. That judgment, to those who had not heard the trial, leaves it in some uncertainty whether he meant that the Plaintiff's occupation had or had not come to an end when the Defendant obtained his grant and entered into possession, an uncertainty which can have had no place in the minds of those familiar with the discussion which had taken place. Mr. Rowlatt, Counsel for the Plaintiff, stated that in fact his occupation had *not* ceased, and Mr. Powell for the Defendant did not seek to qualify this statement. There are expressions in the judgments below which suggest the same conclusion, and although they are not those of learned Judges who had listened to the evidence, it is clear that the subject must have entered into the discussion before them. There is no trace in the judgments of any doubt or difference as to the facts, and it is also clear from the importance attached to the case by the Government of New Brunswick that it must have been so. That Government has taken up the question and intervened in the matter, undertaking to bear the costs of the Appeal of both sides. It appears that it has been the practice of that Government to take into consideration, when Crown lands are applied for, the fact and circumstances of long occupation before exercising its discretion, and that upon the present occasion they were not aware of the circumstances which have been mentioned. No complaint was made before their Lordships of the action of the Defendant, and the reason why the case is of importance to the Department dealing with Crown lands is because the Courts of New Brunswick have taken a view (presently to be mentioned) of an enactment of Jac. I. which has not been adopted by the Supreme Court of Canada, and as to which the Government of the Province of New Brunswick is naturally anxious to have a final and authoritative decision.

The Plaintiff finding that the Defendant was in occupation of what he had looked upon as his land, brought his action of ejectment, the writ bearing date 16th September 1902. The trial Judge, Mr. Justice Landry, on the 5th February 1903, gave Judgment for the Plaintiff. The Defendant appealed, and on the 12th June 1903 the Supreme Court of New Brunswick unanimously affirmed his decision. The Defendant then appealed to the Supreme Court of Canada. The Judgment of that Court was delivered on the 27th April 1904. The Chief Justice Sir H. E. Taschereau, Mr. Justice Sedgewick, Mr. Justice Nesbitt, and Mr. Justice Killam were of opinion that the Appeal should be allowed. Mr. Justice Davies dissented. Judgment was accordingly entered for the Defendant. This Appeal has been brought by special leave of His Majesty in Council, granted on 10th August 1904.

On the facts stated, and apart from any question arising upon the statute 21 Jac. 1, c. 14, the case would seem to be a very plain one. The Plaintiff had no title to the land, and was a mere trespasser upon it. A Plaintiff in ejectment must recover on the strength of his title, and assuming in his favour that evidence of uninterrupted possession for many years, unanswered and unqualified by any other circumstances would have entitled him to succeed, the moment that it appeared that the land belonged to the Crown and had not been occupied adversely to the Crown for 60 years, the presumption of ownership from occupation was gone, and as occupation for a period of less than 60 years can avail nothing against the Crown, it would have been shown that the possession, as as well as the right, had always been in the Crown, notwithstanding the occupation of the Plaintiff and his predecessors in title. Still more was the Plaintiff's case answered when the grant

of the Crown to the Defendant and his peaceable possession were shown. Nothing can be better settled than that, if a person having title can get into possession of land in the actual occupation of a person having no title, he may continue such possession, and that the person who was in actual occupation cannot succeed in ejectment against him on the strength merely of his own former occupation. The presumption of title which arises from simple occupation or possession is answered, and the person who has no title cannot succeed against the person who has both title and possession.

Does the Statute 21 Jac. 1, c. 14 make any difference?

The Act is as follows :—

"An Act to admit the Subject to plead the General Issue "in Informations of Intrusion brought on behalf of the King's "Majesty and retain his Possession till Trial.

"1. Where the King out of his Prerogative Royal may "enforce the subject in Informations of Intrusion brought "against him to a special pleading of his Title, the King's "Most Excellent Majesty, out of His gracious Disposition "towards his loving subjects, and at their humble suit, being "willing to remit a part of his ancient and regal power, is "well pleased that it be enacted; and be it enacted by the "King's Most Excellent Majesty, the Lords Spiritual and "Temporal and the Commons, in this present Parliament "assembled and by the authority of the same, That when-"soever the King, his Heirs or Successors and such "from or under whom the King claimeth, and all others "claiming under the same Title under which the King "claimeth, hath been or shall be out of possession by the "space of twenty years, or hath not or shall not have taken "the profits of any lands, tenements or hereditaments within "the space of twenty years before any Information of "Intrusion brought or to be brought to recover the same: "that in every such case the Defendant or Defendants may "plead the general issue if he or they so think fit and shall "not be pressed to plead specially; and that in such cases the "Defendant or Defendants shall retain the possession he or "they had at the time of such Information exhibited until the "title be tried, found or adjudged for the King.

"2. And be it further enacted that where an Information "of Intrusion may fitly and aptly be brought on the King's "behalf, no *Scire facias* shall be brought whereunto the subject "shall be forced to a special pleading and be deprived of the "Grace intended by this Act."

This is the whole of the Act, and their Lordships cannot doubt that its natural construction is that it is an Act regulating procedure merely, and that its effect is to put a person against whom the Sovereign may file an information of intrusion on the same footing as a Defendant in an ordinary action of ejectment if the Crown has been out of occupation for 20 years, and to allow him, like a Defendant in an ordinary ejectment, to retain such possession as he had at the date of the filing of the information of intrusion until the title of the Crown has been tried and found or adjudged for the Sovereign.

No one, untroubled by any decision or supposed decision, could, their Lordships think, reasonably come to any other conclusion.

If this view be right, the statute does not help the present Plaintiff. No information of intrusion has been filed, and there is nothing for the statute to operate upon. Nor is there a word in the statute to prevent the Crown or its grantee from entering peaceably upon the land and then holding possession by virtue of its title. The possession guaranteed to the Defendant under the statute is such as he had at the time of the information exhibited, which shows that these words are confined to cases where an information is filed, and are not meant to give a general right to retain possession unless and until the Sovereign shall file an information, and obtain judgment.

But it is said that there is authority the other way, and the case upon which reliance is placed is *Doe* d. *Watt* v. *Morris*, 2 Bing. N. C. 189, which was decided by the Court of Common Pleas in 1835.

The head note is as follows:—

"Held, that the conveyance of a manor by the Commis-
"sioners of Woods and Forests on the part of the Crown did

" not entitle the purchaser to maintain ejectment against the " possessor of land inclosed from the waste of the manor, more " than twenty years before the conveyance, without leave of " the Crown."

The point thus decided certainly seems to have very little to do with the question in the present case. But as reliance has been placed on certain expressions in the Judgment delivered by Tindal, L.C.J., it is necessary to examine the case a little more closely.

By 57 Geo. III., c. 97, s. 2, the Commissioners of Woods and Forests were empowered to sell, amongst other things, manors belonging to the Crown within the ordering and survey of the Exchequer. In pursuance of this authority they sold to Watt the manor of Iscoed. Part of the waste of the manor had, more than 20, and less than 60, years before been enclosed and occupied, without title or permission from the Crown, and was at the time of the sale of the manor to Watt in the occupation of the Defendant Morris. The Court held that under the statute 21 Jac. I., c. 14, although the Sovereign could not be deprived of the legal possession by the unlawful act of the subject, yet the Crown, if desirous of regaining actual possession, would be put to an information of intrusion; that the statute of 57 Geo. III. contemplated and authorized the sale of such property only as was in the *de facto* possession of the Crown, and that the Commissioners had therefore no power, under the circumstances, to sell the enclosed portion of the waste, and that they had not by their certificate affected to sell a right to recover property held, in the sense contemplated by 21 Jac. I. c. 14, adversely to the Crown.

It is obvious that the decision does not touch such a case as the present. The right of the Crown to take peaceable possession, if that were possible, of the land in question, without information filed, was never discussed or considered.

It lay entirely outside the subject-matter then dealt with, and the case, therefore, has no bearing upon the matter now under discussion. The Court emphatically asserted the doctrine that the unlawful occupation, however adverse, for a period short of 60 years, of a subject, cannot affect the legal possession of the Crown; and only said that if the Crown desired to regain possession in fact, it would have to proceed by information, as undoubtedly it must under ordinary circumstances. It is not often that the circumstances of the present case could be repeated in an old country. It is plain that the Plaintiff in the present case was absent from the land in such a way and under such circumstances that it was supposed that he had given up possession, though it must be assumed, after what has been stated and admitted by Counsel, that he had not done so. Great stress has been laid upon the following words in the Judgment (p. 201): "The intruders, after 20 years' adverse "possession, were protected even against the "Crown itself until a judgment in intrusion"; but all such general expressions must be read with reference to the facts of the case to which they were applied, and the Court never meant to say that the Crown or its grantee, having undoubted title, would not be able to set it up, should actual possession have been obtained without force and without litigation.

The case really comes to this and no more. The conveyance was of the manor in general terms. The bulk of the manor was in the actual possession of the Crown, a small part had been occupied for over 20 years without leave of the Crown, and without payment of rent or acknowledgment. The conveyance was made under a statute, from the language of which the Court came to the conclusion that only property in the actual and *de facto* possession of the

Crown was intended to be dealt with by the Commissioners under that Act. Consequently they decided that the encroachment upon the waste was not included under the general word "manor," and that therefore the grantee of the manor from the Crown had no title to the encroachment.

No such question can possibly arise here where the grant from the Crown was of the one specific piece of land with which alone the ejectment was concerned, and of nothing else. In their Lordships' opinion it is quite correctly said, in the judgment of the Supreme Court of Canada, that in *Doe* d. *Watt* v. *Morris* "there "is no hint that the title of the Crown was gone, "or that, if an action was not necessary to "obtain possession, the Crown could not have "taken possession peaceably."

The view that the Statute 21 Jac. 1 c. 14 is one relating to procedure only is very clearly laid down by Lord Cottenham in *Attorney-General* v. *The Corporation of London*, 2 Macn. and G. 247. At page 258 his Lordship says :—

"Now, it was said that the Statute of James . . . gives a "party against whom the Crown is litigating an advantage dif- "ferent from that which belongs to every other Defendant. I do "not at all so understand it. The object of the Statute was to "put a party who was contesting with the Crown" (where the Crown had been out of *de facto* possession for 20 years, must be added to make the proposition absolutely correct) "in the "same situation as a party contesting with any other Plaintiff; "but here in equity the Crown and the subject always were "on the same footing, and they are on the same footing now. "There was no evil therefore to be remedied. At law, "however, there was, arising from technical reasoning, a great "injury accruing to a Defendant in litigation with the Crown. "The Crown's title was taken to be proved unless a contrary "title was set out and pleaded."

There is, in their Lordships' opinion, nothing in *Doe* d. *Watt* v. *Morris* necessarily inconsistent with the proposition that the Statute 21 Jac. 1. c. 14 is a statute regulating procedure

only, nor, if it were supposed to go further, could their Lordships agree with any such extension of its operation.

The Courts of New Brunswick, however, have taken a different view of the decision in *Doe* d. *Watt* v. *Morris*, and have held that when the Crown has been out of possession for 20 years it cannot make a grant until it has first proceeded against the intruder; and it appears that the same opinion has prevailed in Nova Scotia. The history of the doctrine in New Brunswick is not very satisfactory, for it originated with a case of *Doe* d. *Ponsford* v. *Vernon*, 2 Kerr, 351, decided in 1843. The point was neither discussed nor raised in argument, but the Court, in delivering judgment, referred to the case of *Doe* d. *Watt* v. *Morris*, to which it gave the effect which has been mentioned. The next case was that of *Smith* v. *Morrow*, 1 Pugsley 200 (1872), in which the statute was not discussed in argument, but it seems to have been taken for granted by the Court that the Crown could not grant lands of which it had been out of actual possession for 20 years. In *Murray* v. *Duff*, 33 N. B. Rep. 351 (1895), the last of the New Brunswick cases bearing upon the question, the Chief Justice put the same construction upon *Doe* d. *Watt* v. *Morris*.

Two cases have been cited from Nova Scotia, in the first of which, *Scott* v. *Henderson*, 2 Thomps., N. S. Rep. 115 (1843), Bliss, J., expressed the same view, which was afterwards expressly adopted as the ground of decision in *Smith* v. *McDonald*, 1 Oldwright 274 (1863).

In the present case four out of the five Judges who decided it in favour of the Plaintiff rested their judgment almost entirely on the ground that the current of authority in New Brunswick and Nova Scotia was too strong to

be disregarded, and two at least of them intimated pretty plainly that they would have come to a different conclusion if they had not felt themselves bound by previous decisions in those Provinces.

Their Lordships therefore cannot feel that they are greatly at variance with judicial opinion, even in New Brunswick, in coming to a different conclusion. They agree substantially with the reasoning of the majority of the Supreme Court of Canada, and will humbly recommend to His Majesty that this Appeal should be dismissed. Owing to the arrangement made by the Government of New Brunswick it is unnecessary to say anything about costs.