Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of Richard J. Kirby v. *John J. Cowderoy, from the Court of Appeal of British Columbia; delivered the* 18*th June* 1912.

PRESENT AT THE HEARING:

LORD MACNAGHTEN.
LORD ATKINSON.
LORD SHAW.

[DELIVERED BY LORD SHAW.]

This Action was commenced on the 8th April 1910, by a writ of summons in the Supreme Court of British Columbia, by the Respondent, who is the Plaintiff, against the Appellant, the Defendant. The action is for the redemption of certain land situated in the district of New Westminster. On the 26th January 1911 Chief Justice Hunter dismissed the action with costs. On the 6th June thereafter the Court of Appeal of British Columbia reversed that dismissal. The present Appeal has accordingly been brought. The real and only point of the case is as to the application of the British Columbia Statute of Limitations, cap. 123, R.S.B.C. 1897.

The facts are very simple. Before July 1889 the Appellant, Mr. Kirby, had lent to the Respondent, Mr. Cowderoy, certain sums of money, and there can be no doubt that he offered security over certain small parcels or tracts of land in the district of New Westminster. This security took the shape of an absolute conveyance.

[46.] J. 145. 80.—6/1912. E. & S.

The date of the conveyance is the 1st July 1889, and it is presumably in the ordinary form of indenture, with the usual clauses "to have "and to hold unto the said grantee . . to and for "his sole and only use for ever," with a covenant for quiet possession. Notwithstanding the form of this deed, it seems fairly clear, and to be established by letters passing between the parties, that the deed was meant to be a security only. In their Lordships' opinion, so far as the point in the present case is concerned, it is of no importance whether the deed be treated as an absolute conveyance or merely as a mortgage. By sections 16 and 36 of the Statute of Limitation, an action by any person claiming any land or rent in equity for recovery of the same may be brought only within twenty years. By Section 40, when a mortgagee has obtained possession, "the "mortgagor or any person claiming through him "shall not bring a suit to redeem the mortgage but "within twenty years next after the time at which "the mortgagee obtained such possession or "receipt, unless in the meantime an acknowledg-"ment of the title of the mortgagor or of his "right of redemption shall have been given to the "mortgagor . . in writing." It is admitted that the latter portion of this section does not apply, there being no written acknowledgment, and accordingly the whole question in this case is as to the running of the period of twenty years from the date of obtaining possession of the land. And this question does really not depend upon the reckoning of the lapse of time, but upon another, namely, whether in the circumstances of this case the Appellant, Mr. Kirby, ever had possession under the deed of July 1889.

Before dealing with that, it may be useful, however, to note that the deed appears to be one to which the British Columbia Statute, cap. 23, of the Consolidated Acts, 1888, being an Act to

facilitate the conveyance of real property, applies. Under Section 4 of that Act, "Every such deed, "unless any exception be specially made therein, "shall be held and construed to include ". . . the estate, right, title, interest, inheritance, "use, trust, property, profit, possession, claim, "and demand whatsoever, both at law and in "equity, of the grantor." By Statute, accordingly, possession is yielded as part of the conveyance. In view of the facts just to be stated, it is not, however, in their Lordships' opinion, necessary to determine any point as to whether the "possession" so conveyed can be reckoned for the period of limitation in face of, say, occupation of the premises in an adverse sense by the grantor of the deed.

For the question in the present case seems to be largely determined by a consideration of what this property so conveyed was. The Respondent affirms what was put to him, namely, that "it "was simply wild land; no one was in "possession of it," and as to the period when the deed was granted, "it never had a value." The Respondent's position in regard to the property was very simple. He had got his loan and had granted his conveyance. He came under a promise to pay interest periodically and compound interest and he never made any payment whatsoever. As to the property, he left it severely alone. The Appellant, however, was not so fortunate. The property having been duly conveyed to him by the deed of the 1st July 1889, he became liable as the owner thereof to pay the taxation upon it. Upon this subject the Respondent is asked and answers as follows:—

Q.—"You have never paid any of the taxes, have you, "Mr. Cowderoy?" *A.*—"No."

By the Court: "So that unless he [that is, the Appellant, "Mr. Kirby] had looked after the property himself his "security would have disappeared, and been sold for taxes?"

A.—"Well, I knew that he was always attending to it."

Q.—" How did you know that ?" *A.*—" Well, when I " saw him sixteen years ago, he told me it was all right, and " he was looking after everything."

It appears to be established, in short, that (1) for over 20 years before the institution of this suit the Appellant had, so far as this wild land was concerned, performed the only act of possession of which it appeared to be capable, namely, he had paid all the taxation upon it; whereas (2) the Respondent was aware that this was being done by the Appellant, and he (the Respondent), so far from having anything even remotely akin to adverse possession, had washed his hands of all connection with the property. In these circumstances, their Lordships are of opinion that the Statute of Limitation applies, and that it is not open to the Respondent thereafter —when, as is the case here, the patch of land appears to have suddenly become of some marketable value—to bring this action to redeem.

On the general subject of possession, the language of Lord O'Hagan in *The Lord Advocate* v. *Lord Lovat* (5 A.C. 288)—language cited with approval by Lord Macnaghten in *Johnston* v. *O'Neill* (1911, A.C. 583)—appears to be applicable to the present case. Possession " must be " considered in every case with reference to the " peculiar circumstances . . . the character " and value of the property, the suitable and " natural mode of using it, the course of conduct " which the proprietor might reasonably be " expected to follow with a due regard to his own " interests; all these things, greatly varying as " they must under various conditions, are to be " taken into account in determining the suffi- " ciency of a possession." There does not appear to their Lordships to be much doubt accordingly that possession of this land was, during the years in question, with the Appellant, and no possession of any kind with the Respondent.

Their Lordships are accordingly of opinion that the action is excluded by the Statute of Limitations. In this view it becomes unnecessary to consider other aspects of the case dealt with by the learned Chief Justice. They will humbly advise His Majesty that the Appeal should be allowed, and the judgment of Hunter, C.J., dismissing the action, should be restored with the further costs incurred in both Courts since the date of that judgment. The Respondent will also pay the costs of the Appeal.

In the Privy Council.

RICHARD J. KIRBY

v.

JOHN J. COWDEROY.

DELIVERED BY LORD SHAW.

LONDON:
PRINTED BY EYRE AND SPOTTISWOODE, LTD.,
PRINTERS TO THE KING'S MOST EXCELLENT MAJESTY.

1912.