W. BRUCE MADDISON (DEFENDANT) ..... APPELLANT;

AND

HENRY R. EMMERSON (PLAINTIFF)...RESPONDENT.

1904
*Feb. 24.
*April 27.

ON APPEAL FROM THE SUPREME COURT OF NEW BRUNSWICK.

Crown land—Adverse possession—Grant during—21 Jac. I c. 14 (Imp.)—Information for intrusion.

Though there has been adverse possession of Crown lands for more than twenty years the Act 21 Jac. I ch. 14 does not prevent the Crown from granting the same without first re-establishing title by information of intrusion.

Judgment appealed from (36 N. B. Rep. 260) reversed, Davies J. dissenting.

APPEAL from a decision of the Supreme Court of New Brunswick (1) refusing to set aside a verdict for for the plaintiff and order a new trial.

The defendant obtained a grant from the Crown of land of which the plaintiff had been in possession for more than twenty years, and the latter brought an action of ejectment and obtained the verdict sustained by the full court below. The only question raised on defendant's appeal was whether or not under 21 Jac. I. ch. 14 the grant of the defendant was valid, the plaintiff's contention being that, before it could be issued, it was necessary for the Crown to regain possession of the land by information of intrusion which has always been the jurisprudence in New Brunswick.

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*PRESENT:—Sir Elzéar Taschereau C.J. and Sedgewick, Davies, Nesbitt and Kilam JJ.

(1) 36 N. B. Rep. 260.

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The statute as given in the text books and reports is shorn of its title, preamble and second clause, which are the key to its purpose and meaning. The statute in full 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.

"Where the King out of his prerogative royal may enforce the subject in information 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 whensoever 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.

"And be it further enacted, that where an information of intrusion may fitly and aptly be brought on

the King's behalf that 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." 17 Ed. II. stat. I. c. 13.

Powell K.C. for the appellant. Even if we assume, for the purposes of argument, that the respondent was in occupation of the land at the time the grant issued to the appellant, at common law the Crown could grant and the appellant could take the *locus in quo*. We submit that the rule, regarded either as existing at common law or by statute, that prevents a subject from alienating or his grantee from taking lands which at the time of the grant are adversely held by a third person, never applied to grants from the Crown of land of which the Crown had completed its title by obtaining possession in law. As to the means by which the King acquired, held and parted with his lands, see Encyc. Brit. (9 ed.) *vo.* "Doomsday Book." As to rights subsequently accrued to the Crown, they were established by being made matter of record. 4 Co. 54 b. Where the King's right did not appear by record but was dependent upon extraneous facts, inquest of office was resorted to, which "was devised by law as an authorative means to give the King his right by matter of record without which he in general can neither take nor part with anything." 1 Finch, L. 423; Broom & Hadley's Com. vol. 3 p. 386; Chitty's Prer. ch. xii, p. 246; *Scott* v. *Henderson* (1); *Doe d. Hayne* v. *Redfern* (2); *Doe d. Fitzgerald* v. *Finn* (3). Not only could the King acquire title to land by record alone, but he could also dispose of or alien his lands by record. Chitty's Prer. of the Crown 389; 3 Broom & Haldey 386;

(1) 3 N. S. Rep. 115. (2) 12 East 96 at p. 110.
(3) 1 U. C. Q. B. 70.

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Finch L. 324; *Jackson* v. *Winslow* (1). An intruder cannot oust the King but by matter of record; Co. Litt. 277; Com Dig. Prer. D. 71; *Wyngate* v. *Marke* (2); *Louisburg Land Company* v. *Tutty* (3); *Goodtitle d. Parker* v. *Baldwin* (4). The contention that the statute of James deprives the Crown of the right to grant its land and its grantee to take under its grant when the land had been for twenty years in the possession of an intruder, has received such scant consideration from the courts of New Brunswick and Nova Scotia that, if we except the judgment of Chief Justice Tuck, three or four pages at most of the reports contain all the judicial discussion of it. The judgments, the appellant submits, are really assumptions, ventured, so far as the judgments themselves shew, without any attempt to construe the statute itself. The English cases, with the exception of *Doe. d. Watt* v. *Morris* (5), never were considered by the judges, except by Chief Justice Teck, and even he did not have his attention called to either the case of the *Atty. Gen.* v. *The Corp. of London* (6) or *Goodtitle d. Parker* v. *Baldwin* (4).

The legislature never could have intended the word "possession" in the statute of James I, ch. 14, to have any other meaning than its loose popular meaning. It cannot be construed as giving to that word the significance of legal possession, for in such case the statute could not apply at all to an information of intrusion, which only lies where the King had the possession in law, and his method of recovering possession was, as has been shewn, either by ejectment or by *scire facias*. The statute merely effects procedure and confers upon the intruder, in cases coming within the statute, no legal estate whatever. If it does create a legal estate,

(1) 2 John. N. Y. 80.
(2) Cro. Eliz. 275.
(3) 16 N. S. Rep. 401.
(4) 11 East 488.
(5) 2 Bing. N. C. 189.
(6) 2 Mac. & G. 247.

it is a legal estate entirely contingent upon the filing of an information of intrusion and cannot confer any right in possession until that contingency happens. If the intruder is out of occupation or possession of the land he has no right against any person who takes possession and cannot bring an action of ejectment against him. *Goodtitle d. Parker* v. *Baldwin* (1); *Doe d. Carter* v. *Barnard* (2); *Brest* v. *Lever* (3); *Nagle* v. *Shea* (4); *Asher* v. *Whitlock* (5). See also "Law of Torts" by Clerk & Lindsell (2 ed.) 310. The weight of authority is that the presumption of title from possession in an action of ejectment may be rebutted by shewing that the title is in fact in a third person. To an action of ejectment, *jus tertii* is a good defence.

Anterior to 21 Jac. I. ch. 14, the King could grant, and his grantee took a good title in possession to, lands the title to which had once been perfected in him by possession without regard to the fact whether an intruder was in their occupation at the time of the grant or not. The statute of James relates solely to procedure and has made no change in the previous law whereby the King is placed under no disability to grant nor his grantee under any disability to take what title the King has to his lands when an intruder has been in the occupation of them for twenty years. The case of *Doe d. Watt* v. *Morris* (6), cannot apply here as an authority for it merely decides that, owing to limitations in the procedure open to the King (which limitations are by the provisions of the statute authorizing the sale in the particular case imposed upon his grantee), the intruder in that case could only be evicted from the granted land by an information of intrusion.

(1) 11 East 488.
(2) 13 Q. B. 945.
(3) 7 M. & W. 593.
(4) Ir. Rep. 8 C. L. 224.
(5) L. R. 1. Q. B. 1.
(6) 2 Bing. N. C. 189.

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That case proceeds upon a mistaken view of the remedies open to the King, and the King is not limited to evict an intruder from his land. It does not confer upon the intruder with twenty years occupation possession in law or any other estate in the land of the King. It can only confer an estate contingent upon the filing of an information and the finding of title in the King in the suit and dependent for its creation upon the act of the Crown in bringing a suit of information of intrusion. Even if does permit the intruder, after twenty years occupation of the lands of the King, to retain possession until dispossessed by an information of intrusion, the disability is one of remedy alone and when the grantee obtains possession in any way he is entitled to retain it. Title may be set up as a defense to a possessory action. An action of ejectment will not lie at the instance of an intruder on Crown land against even a mere wrong doer, much less will it lie against the grantee of the Crown.

As to construction of statutes and authority of old decisions, we refer to *Nagle* v. *Ahern* (1); *Gwyn* v. *Hardwicke* (2); *Pochin* v. *Duncombe* (3); *Magistrates of Dunbar* v. *Duchess of Roxburghe* (4); *Morgan* v. *Crawshay* (5); *Tustees of Clyde Navigation* v. *Laird & Sons* (6); *Feather* v. *The Queen* (7); *Northeastern Railway Co.* v. *Lord Hastings* (8); *Lancashire and Yorkshire Rway. Co.* v. *Mayor etc. of Borough of Bury* (9); *Hamilton* v. *Baker* (10); *Canadian Pacific Railway Co.* v. *Robinson* (11); *Caldwell* v. *McLaren* (12).

The King's right to grant the land to the appellant and his right to take a title to it must stand or fall on

(1) 3 Ir. L. R. 45.
(2) 1 H. & N. 49.
(3) 1 H & N. 842, 856.
(4) 3 Cl. & F. 353-4.
(5) L. R. 5 H. L. 304.
(6) 8 App. Cas. 658.
(7) 6 B. & S. 257.
(8) [1900] A. C. 260.
(9) 14 App. Cas. 417.
(10) 14 App. Cas. 209.
(11) 14 Can. S.C.R. 105.
(12) 9 App. Cas. 392.

the principles of the common law. And by the common law, whether based on legal fiction, as is generally accepted, or on broad constutional principle, as Story intimates, the well settled rule is that the Crown can grant its land when in the adverse occupation, or if any person prefers to call it such possession, of an intruder, no matter how long that occupation or possession may have continued.

Pugsley K. C. and Friel for the respondent. It has always been the recognized law of New Brunswick since the earliest settlement of the province, that where there has been adverse possession of Crown land for upwards of twenty years it is necessary for the Crown to establish its title by inquest of office before it can issue a valid grant. *Doe d Ponsford* v *Vernon* (1); *Smith* v. *Morrow* (2); *Murray* v. *Duff* (3); *Scott* v. *Henderson* (4); *Smyth* v. *McDonald* (5). The law is understood to be settled by *Doe d. Watt* v. *Morris* (6).

As to our right to bring ejectment, we also rely upon the decisions in *Browne* v. *Dawson* (7); *Revett* v. *Brown* (8); *Cholmondeley* v. *Clinton* (9); *Doe d. Harding* v. *Cooke* (10).

The true reason for the passing of the Statute 21 Jac. I cap. 14 was not merely to change the law as to pleading, which would be a most immaterial thing, but it was to afford protection to the subject who had been in possession adversely to the Crown for upwards of twenty years The protection afforded him was that, before he should be disturbed in his possession, there should be an information of intrusion and the title should be tried, found or adjudged for the King.

(1) 2 Kerr 351.
(2) 1 Pugs. 200.
(3) 33 N. B. Rep. 351.
(4) 3 N. S. Rep. 115.
(5) 5 N. S. Rep. 274.
(6) 2 Bing. N. C. 189.
(7) 12 A. & E. 624.
(8) 5 Bing. 7.
(9) 2 J. & W. 1 at p. 156.
(10) 7 Bing. 346.

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While the previous portion of the section provides that in the case of an information for intrusion the defendant may plead the general issue and shall not be pressed to plead specially, yet this is not the essential part of the provision. The essential part is that "in such cases the defendant shall retain the possession he had at the time of such information exhibited, until the title be tried, found or adjudged for the King." The language of the section covers the case of other persons than the King claiming, and, although it is inartificially worded, the clear meaning is that, when there has been adverse possession against the Crown for upwards of twenty years, neither the King, nor any person claiming under him, shall be permitted to disturb the person in possession until after, upon an information of intrusion, the title has been found to be in the King. The statute was passed for benefit of the subject. It was to protect the subject who had been in possession of land for over twenty years, against being disturbed in that possession until title had been asserted on behalf of the King and had been tried and determined. If, being out of possession for upwards of twenty years the Crown could be induced, as it might often be, improvidently to make grants to others, the effect would necessarily be to do away with the salutary object of the statute.

DAVIES J. (dissenting).—This was an action of ejectment brought by the respondent to recover possession of a mill site and premises of which he and his predecessors in title had been in undisputed possession for over forty-five years. The appellant (defendant) claimed under a recent grant from the Crown, obtained on representations and under circumstances which, apart from his legal contentions, would not entitle him to consideration at the hands of the court if it was open to the court to consider them. As the appeal comes before

us it raises legal questions only, and the first one is whether the statute of 21 Jac. I, ch. 14, places any and what limitations upon the Crown in the assertion of its right as against intruders who have been over twenty years in undisputed possession of Crown lands; secondly, if it does, can the Crown ignore that statute and give a grant of the lands to a third party and in this way enable the grantee without trial, finding or adjudication, to oust the intruder from possession. And, lastly, whether this court will reverse a series of uniform decisions in the Province of Nova Scotia and New Brunswick in which courts of those provinces for fifty or sixty years past have followed a decision of the English Court of Common Pleas and held that in cases of such possession by intruders for over twenty years the Crown could not issue a legal grant of the lands to a third party but was obliged first to proceed by writ of intrusion to have its right to possession found and adjudged. The appeal therefore, if allowed, will not affect alone the interests of the immediate parties but will overturn what has been frequently and uniformly decided by the courts of those provinces to be law, and, may, as shown by Mr. Justice Hanington in his able judgment, be followed by most lamentable consequences in many parts of New Brunswick. With these, however, we are not to trouble ourselves but to rest content with expounding the law as we conceive it to be. The far reaching consequences, however, of such a decision as we are asked by the appellant to give has necessarily induced us to give to the appeal a great deal of close attention and research. The result has been, so far as I am concerned, to convince me that the judgment appealed from and the series of decisions which it followed alike in Nova Scotia and New Brunswick were based upon sound law.

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On the first question, of the meaning and effect of the statute of James, we are not left to colonial authorities only. The case of *Doe d. Watt* v. *Morris* (1), decided by the English Court of Common Pleas as far back as the year 1835, is an authoritative and reasoned judgment (though perhaps not binding on us) on the very point. The unanimous judgment of the court was delivered by Tindal, C. J. and as this decision is the only English one upon the statute I cite from it as follows in order to show what was really there decided.

Referring to the general and acknowledged principle of the common law that the King can never be put out of possession by the wrongful entry of a subject, the Chief Justice goes on to say:

> But it is to the statute 21 Jac. I. c. 14, that reference must be more particularly made, in order to determine the exact position and rights of the Crown as to the inclosures which are the subject of this action, at the time of making this contract. And by that statute it is enacted, "that wherever the King hath been or shall be out of possession by the space of twenty years, or shall not have taken the profits of lands, &c, within the space of twenty years before any information of intrusion brought to recover the same, in every such case the defendant may plead the general issue, and shall not be pressed to plead specially; and that in such cases the defendant shall retain the possession he had at the time of the information exhibited, until the title be tried, found, or adjudged for the King."
>
> Now, the inclosures in question having been made and continued for more than twenty years before the contract, and during the whole of that period the occupiers of the same having been in actual, though wrongful, possession, and no part of the profits thereof having been taken by the Crown within the last twenty years, it follows necessarily from the enactment of the statute, that if the Crown at the time of making the contract has been desirous to regain the *possession in fact, it must have brought an information of intrusion;* and that if such information had been brought, and the defendant had pleaded the general issue, the defendant would have been entitled to retain the possession which he then had against the Crown, "until the title was tried, found, or adjudged for the King."

(1) 2 Bing. N. C. 189.

It was contended by Mr. Powell for the appellant that the Chief Justice's judgment, an extract from which I have just given, does not necessarily determine the substantial question whether the Crown could oust from possession by other means than by information for intrusion an intruder who had been for twenty years or more in actual possession of Crown lands. I should myself have had no doubt that the affirmative answer to the question must be drawn from the Chief Justice's reasoning. But if there was any doubt upon that point it seems to me to be removed by the concluding part of his judgment where he defines what the court did hold. He says:

> We hold it unnecessary, therefore, to enter upon the discussion of the effect and operation of the statute of limitations upon the present action of ejectment, as we ground our judgment on the points of law before particularly mentioned; *that the intruders, after twenty years' adverse possession, were protected even against the Crown itself, until a judgment in intrusion;* that the commissioners were not empowered by the statute *to sell any property of the Crown so circumstanced;* and that there is nothing in this certificate of sale to shew that they intended so to do, even if they had the power.

Nothing could, in my judgment, be clearer or more definite on the very point on which this appeal turns, and I feel that I could not yield to the argument pressed by the appellant without over-ruling this decision in *Doe d. Watt* v. *Morris* (1). In the part of his judgment previously quoted the Chief Justice had said:

> If the Crown at the time of making the contract (which in the case at bar was issuing the grant to appellant) had been *desirous to regain the possession in fact it must have brought an information of intrusion,*

and if brought, then, as he says, the

> defendant would have been entitled to retain the possession which he then had against the Crown "until the title was tried, found, or adjudged for the king."

(1) 2 Bing. N. C. 189.

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To my mind, nothing could be clearer than this and if it is the law the Crown could neither issue an effective grant or enter upon possession by its officers until it had successfully asserted its right on an information by intrusion.

Since that decision was given in 1835, no case can be found in England where it has been questioned or adversely commented on. The case is cited with approval in all the editions of Shelford's Real Property Statutes down to the latest in 1900. The learned author says, page 142 of the edition of 1874:

> Although the King can never be put out of possession in point of law by the wrongful entry of a subject yet there may be an adverse possession *in fact* against the Crown. Therefore after such an adverse possession by a subject for twenty years the Crown *could only recover land by information of intrusion.* Consequently ejectment would not lie at the suit of the grantee of the Crown notwithstanding the rights of the Crown are not barred by the statutes of limitation.

If ejectment would not lie at the suit of the grantee of the Crown in such a case neither could he enter into possession as he did in this case and retain it as against the intruder having twenty years' possession, because such peaceable entry in order to be effective and change the legal possession can only be made by *one legally entitled to possession.* And as against an intruder having had twenty years' possession he is not entitled to such legal possession until it has been adjudged to and found for the Crown after and on the proper proceedings for intrusion. I cannot accept for one moment Mr. Powell's argument that the statutory right to retain possession until the Crown's right to regain it had been "found and adjudged" is a mere contingency beginning with the filing of an information and dependent for its creation upon the act of the Crown in bringing a suit of information of intrusion. Such a limited and narrow interpretation of the Statute of James is not only opposed to all the decided cases but

is, in my judgment, directly opposed alike to the letter and the spirit of the statute. It would appear to me almost absurd to hold that the statutory right to remain in possession given to the subject who for twenty years had enjoyed it in fact was conditional upon the Crown bringing on information of intrusion and could be avoided by the Crown sending one of its officers to enter and take possession without form of law. Such a mode of repealing or avoiding in effect an Act of Parliament, passed for the benefit and protection of the subject, should not in my opinion be resorted to.

The redressing of injuries received by the Crown from the subject are, as is stated in the 3rd volume of Blackstone's Commentaries (marginal paging 257),

> by such usual common law actions as are consistent with the royal prerogative and dignity and as he cannot be disseized or dispossessed of any real property which is once vested in him he can maintain no action which supposes a dispossession of the plaintiff such as an assize *or an ejectment.*

The notes to Lewis' edition of these commentaries say that this reasoning would not apply to proceedings in ejectment where the King would be, in fiction, only lessor of the plaintiff.

But while Cole on Ejectment, page 62, mentions expressly an information of intrusion as the method by which the Crown may recover lands, nowhere is it stated that the Crown can bring ejectment, nor was the research of the appellant's counsel able to produce any precedents for such a practice. It would seem to me therefore that the Crown's proper, if not only, remedy to recover possession of lands held by an intruder for over twenty years would be by information of intrusion. In Blackstone's Commentaries again at page 259 of same volume it is stated

> that it is part of the liberties of England and greatly for the safety of the subject that the King may not enter upon and seize any man's possession upon bare surmises.

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These principles and practice affecting the assertion of the Crown's rights were far more important and vital in the days of King James I. than they are to-day. But applying them to the construction of the statute in question they confirm me in the opinion which I think prevailed with the Court of Common Pleas when delivering their judgment in *Doe d. Watt* v. *Morris* (1), that the statute intended to assure to the *bonâ fide* occupant for over twenty years of part of the Crown demesnes security of possession unless and until the Crown's title had been found and adjudged after trial of an information of intrusion.

The Statute of James it is argued was strictly one relating to pleading and practice. It is quite true that that statute does not take away the estate or rights of the Crown or give any statutory title to the intruder. But it did more than merely regulate the practice or procedure because it guaranteed and assured to the intruder the integrity of his actual possession until the legal proceedings had ended in an adjudication of title in the King. It properly defined and regulated the methods by which the Crown rights could be maintained and established and it limited that method to a mode of procedure which would enable the Crown to weigh and determine any equitable rights which the intruder might bring forward, guaranteeing him meanwhile in peaceable possession.

It is not therefore a question whether the Crown was to lose or the intruder to gain an estate, but simply whether under the statute of James the twenty years occupant could be turned out of his possession until the completion of the proceedings prescribed by that statute. If the argument of the appellant is acceded to that even if the Crown is limited in the assertion of its rights to the statutory procedure pre-

(1) 2 Bing. N. C. 189.

scribed its grantee is not so limited the statute would virtually be repealed and what seems to me to be one of its substantive provisions, namely, the guarantee of the intruder's possession, annulled.

The question now before us has been frequently the subject of judicial discussion and decision in the Provinces of Nova Scotia and New Brunswick.

It first arose incidentally in Nova Scotia in 1843, in the case of *Scott* v. *Henderson* (1). The question in that case was whether the Crown could give a grant at all of lands which were at the time in the actual possession of an intruder. The court was equally divided in opinion on the point. Chief Justice Haliburton and one of his associates held that any such grant would be void. But the case of *Doe d. Watt* v. *Morris* (2) was cited with approval by one or more of the judges who, while divided in opinion as to the particular point before them, did not seem to have any doubt on the question now before us or as to the meaning of Ch. J. Tindall's decision, or the effect of twenty years adverse possession.

Afterwards, in 1863, the question came squarely before the Supreme Court of Nova Scotia in the case of *Smyth* v. *McDonald* (3), and was unanimously determined in the same sense as *Doe d. Watt* v. *Morris* (2). Sir William Young, the Chief Justice, and Dodd and Wilkins JJ. each delivered reasoned judgments on the point, and, so far as colonial judgments can settle any law, this question was supposed to be finally determined, and the decision of *Smyth* v. *McDonald* (3) has been accepted in that province as the law ever since.

In New Brunswick the same construction has always been placed upon the statute of James I. In the year

(1) 3 N. S. Rep. 115. (2) 2 Bing. N. C. 189.
(3) 5 N. S. Rep. 274.

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1843, in *Doe d. Ponsford* v. *Vernon* (1), the unanimous judgment of the court, then comprising Chipman C. J., Botsford, Carter and Parker JJ., was delivered by Ch. J. Chipman, who said:

> The Crown * * having been so out of possession for twenty years anterior to the grant to the defendant in 1839, this latter grant by the operation of the statute 21 Jac. I. ch. 14, as expounded in the case of *Doe d. Watt* v. *Morris* (2) would not be valid without the Crown having first established its title by an information of intrusion.

The same question arose in the case of *Smith* v. *Morrow* (3), before a court consisting of Chief Justice Ritchie, afterwards Chief Justice of this court, and Allan, Weldon, Fisher and Wetmore JJ. and the court then held in the same way and to the same effect while at the same time most properly determining that

> the possession necessary to prevent the Crown from granting or to prevent a grant actually issued from taking effect should be defined actual, continuous and unequivocal.

Afterwards, in *Murray* v. *Duff* (4), in 1895, the Supreme Court again in a reasoned judgment reaffirmed the position it had continuously maintained as to the construction of the statute. The present Chief Justice Tuck and Mr. Justice Barker reviewed all the cases on the subject, and the decision of the court there it was supposed for ever settled the question so far as New Brunswick was concerned.

The case of *Doe d. Fitzgerald* v. *Finn* (5), is cited by the appellant as being at variance with *Watt* v. *Morris* (2), and with the decisions following it of the courts of Nova Scotia and New Brunswick. But while there is no doubt that Chief Justice Robinson took occasion in the course of his judgment in that case vigorously to criticise the judgment of the Court of Common Pleas in *Watt* v. *Morris* (2), as to the meaning

(1) 2 Kerr, 351.
(2) 2 Bing. N. C. 189.
(3) 1 Pugs. 200.
(4) 33 N. B. Rep. 351.
(5) 1 U. C. Q. B. 70.

and effect of the statute 21 Jac. I., c. 14, his remarks were merely *obiter* as he based his judgment upon other and different grounds That case of *Doe d. Fitzgerald* v. *Finn* (1) was decided not upon the construction of the statute of James but upon that of the provincial statute, know as the Heir and Deyisee Act, and of the proviso in the Ontario statute of limitations declaring that time should not run against a grantee of the Crown *until he had received notice of the occupancy of the squatter claiming by possession.* While there was no want of vigour in Chief Justice Robinson's observations upon the English decison of *Doe d. Watts* v. *Morris* (2), neither was there the slightest doubt in his mind as to what that case really decided.

The Chief Justice, in that case, after quoting the proviso in the Ontario statute, goes on to say:

Under this proviso the grantee of the Crown would not lose his estate by a trespasser continuing upon it more than twenty years *unless he could be shewn to be aware of such occupation.* Can we then suppose that the legislature imagined that the Crown was to lose its estate by reason of an occupation under circumstances exactly similar? I think it reasonable to hold *that the legislature have in this proviso recognized it as a principle* that there cannot reasonably be said to be any dispossession of waste or ungranted lands of which no one claiming title has ever yet taken possession.

But no such proviso was ever introduced into the legislation of New Brunswick, and I venture to think, after a careful perusal of the judgments of the court of that Province that no legislature could be found there to adopt the principle which Ch. J. Robinson found embedded in the legislation of Ontario and upon which he decided the case now in review.

But the appellant contends that as he, in the absence of the respondent, entered and took actual possession, the latter could not even with proof of forty and odd years undisputed possession maintain an action of

(1) 1 U. C. Q. B. 70. (2) 2 Bing. N. C. 189.

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ejectment against him or any other person who was able to get into possession, and for this he cites the case of *Goodtitle d. Parker* v. *Baldwin* (1) and other authorities. I do not agree to any such proposition. If it was law it would in many cases effectually repeal the Statute of Limitations. The cases cited by the respondent are authorities for the well known law that a defendant in ejectment can defeat the plaintiff's action by *proving a jus tertii* even although he does not claim under such third person *but not by asking it to be assumed.* That was the point decided in *Doe d. Parker* v. *Baldwin* (1) and it is on that point the case is cited in the text books. There the ejectment was for part of the Forest of Dean. The statute of Charles II. had declared the title of that forest to be in the Crown *and to be inalienable* and Lord Tenterden held that the statute of limitations then in force, of Geo. III., did not repeal this Statute of Charles II. That was not a case to which the Crown or its grantee was a party and of course the statute of James was not cited or invoked. It did not go further than hold that the presumption of title from possession may be rebutted in an action of ejectment by evidence shewing affirmatively that the right to possession is in a third party. If the appellant's contention on this point was maintained the startling result would be that as all lands in British Provinces were originally vested in the King no recovery in ejectment could ever be maintained against a wrong-doer by any one under a possessory title short of sixty years. Such a decision would most effectually operate practically to repeal the statute and would be directly contrary to a host of decided cases. See Cole on Ejectment, p. 298; *Doe d. Harding* v. *Cooke* (3); *Holmes* v. *Newlands* (4).

(1) 11 East 488.
(2) 7 Bing. 346.
(3) 11 A. & E. 44.

The statute of limitations in force when *Parker* v. *Baldwin* (1) was decided only barred the remedy but did not extinguish the title. The later statute of 3 & 4 Wm. IV., of which the New Brunswick statute is practically a copy, expressly in its 34th section *extinguishes* the title. *Jones* v. *Jones* (2).

It does not transfer the extinguished title to the possessor it is true, but it creates a statutory right or title in the possessor which he can invoke as against all wrong-doers. As is said in the notes in Smith's Leading Cases (1895) 10 ed. pp. 700-1

> So that if he (the former owner) enter after that period (the statutory limitation) he is a mere wrong-doer as against any person who happens to be in possession

citing *Holmes* v. *Newlands* (3); and again

> and this section seems to have the collateral effect of giving the tortious possessor a title against all the world after the lapse of the prescribed period.

In *Doe* v. *Sumner* (4), Parke, B. said that the effect of the statute is

> to make a parliamentary conveyance of the land to the person in possesssion after

the period of limitations has elapsed. And in *Scott* v. *Nixon* (5), Sugden, L.C. compelled an unwilling purchaser to take a title depending upon parol evidence of possession under the statute.

These remarks of course are applicable as between the claimant by possession and wrong-doers which the appellant would of course be unless his grant gave him a right to possession and they do not affect the Crown's rights of property which can only be extinguished by sixty years possession. But while it takes sixty years of possession to *extinguish* under the statute of limitations the title of the Crown, it only

(1) 11 East 488.
(2) 16 M. & W. 699.
(3) 11 A. & E. 44.
(4) 14 M. & W. 39.
(5) 3 Dr. & W. 388.

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takes twenty years of such possession under the statute of James to stay the Crown from ousting an intruder on its lands until its title has been formally found and adjudged in the manner that statute prescribes.

Mr. Powell finally contended that even if his Crown grant was not good to enable him to maintain ejectment, still, that as a fact he had got possession and cannot be ousted. But in this I do not agree. The owner of land, it is true, who is *entitled to the legal possession* acquires that possession if he enters peaceably and is not obliged to resort to legal proceedings. But that assumes everything that is in dispute here. The plaintiff's suit is to eject appellant from a possession said to be unlawful. If my construction of the statute of James is correct, if the Crown could not give him a grant under which he would be legally entitled to enter and oust the intruder by ejectment, he certainly could not defeat the statute by walking upon the land in the owner's absence and asserting rights which the law only allows *to owners legally entitled to possession.* Every plaintiff in ejectment must show a right of possession as well as of property and therefore the defendant need not plead the statute of limitations. Of course if the statute of James did not interfere with the Crown's right to possession even to the extent of providing that it could not be asserted as against one for twenty years in the possession in fact of the *locus*, then of course the Crown could grant and the grantee could bring ejectment or enter and take possession if he could do so peaceably. But that argument assumes everything in dispute.

There is one point more which I think the respondent can successfully invoke in this case, and that is that even if the decisions of the British Court of Common Pleas and the Supreme Courts of New Brunswick and Nova Scotia upon the meaning and object of the

Statute of James were not such as this court would have approved of had the question been one *res integra* still they are conclusive as showing at least that the true construction of the statute is *very doubtful* and in all such cases this court will hesitate long, I take it, before overruling such a series of provincial decisions as we have here, based upon an English decision which for over half a century has stood unquestioned and uncriticised in England, and which has down to this day been approved and adopted by some of the leading text writers of Great Britain. For my own part, even if I disagree with the conclusions of of these various courts, I would without hesitation adopt the rule followed by Lord Westbury, Lord Campbell, Lord Herschell and other great law lords in the House of Lords and refuse to introduce the precedent of disregarding a uniform interpretation of an old statute upon a question materially affecting property and constantly recurring, and which interpretation even though I was inclined to quarrel with it had been adhered to for so many years without interruption. *Morgan* v. *Crawshay* (1); *Gorham* v. *Bishop of Exeter* (2); and *Lancashire and Yorkshire Rway. Co.* v. *Mayor etc. of the Borough of Bury* (3) in 1889.

The judgment of the majority of the court was delivered by

NESBITT J.—This is an appeal from the judgment of the Supreme Court of New Brunswick refusing the motion of the defendant below that the court set aside the verdict and finding of Mr. Justice Landry on the trial of the cause and pronounce a verdict for the defendant therein, and amend and give the postea and enter a verdict for the defendant and failing that to

(1) L. R. 5 H. L. 304 at p. 319. (2) 15 Q. B. 52 at p. 73.
(3) 14 App. Cas. 417.

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enter a non-suit and failing that that a new trial be granted.

The facts of the case are as follows:

This was an action of ejectment brought in the Supreme Court of the Province of New Brunswick by the plaintiff below against the defendant below for the recovery of the possession of a small lot of land, containing about ten acres, situate in the County of Westmoreland, in the Province of New Brunswick.

The defendant below claimed the land as grantee from the Crown. The plaintiff below claimed the land as against the defendant below by virtue of the possession of those through whom he claimed. About fifty-seven years before the issuing of the grant by the Crown to the defendant, one Somers entered upon the lot in question and erected a mill thereon. From the erection of this mill down to the year 1892, Somers and those claiming under him remained in actual occupation of the land but without any right from the Crown. In 1886 the land was mortgaged to the plaintiff who in 1892 sold the property under a power of sale contained in the mortgage. About the time of the sale the holder of the equity of redemption left the property. The plaintiff claims to have entered into possession after the sale, but he did not remain in continuous occupation of the land and was not in occupation of it at the time of the grant from the Crown to the appellant. After the land was granted to the appellant, he, the appellant, entered into and remained in peaceable possession of the same, and this action was brought by the respondent to recover the possession. At the trial the respondent relied upon the common law and contended that, the respondent having been in adverse possession of the *locus in quo*, the Crown could not grant it, and he also relied upon the statute 21 James I. ch. 14, and contended

that the Crown could not make, under the circumstances of the case, a grant of the land and that the appellant could not take any title thereto without the title having first been tried in a suit by information of intrusion and found and adjudged to be in the Crown. The appellant claimed on the other hand, that the Crown could, at common law and under the statute, make a valid grant of the land, and that he under the grant made to him, was entitled to the land and to the possession thereof.

The case for the plaintiff, in the first instance, was founded wholly upon the claim of a presumption of title arising from long continued possession. The plaintiff called as a witness a Mr. Baker, an official of the Crown Lands Department of the province. On cross-examination, in answer to the question,

> The lot was never granted, as a matter of fact until to the defendant?

this witness said:

> No grant was ever issued till the Madison grant, that I know of.

The plaintiff himself testified that, when he first learned of the grant to the plaintiff, he went to the Crown Land Office.
Being asked,

> Q. Didn't you know by that provision that it takes sixty years to deprive the Crown of its title?

he said

> A. Every student at law learns that.
> Q. Then if you knew that you knew at that particular time you hadn't a good title, that the title was in the Crown?
> A. No I didn't, I didn't know anything about it. I never knew until that time that the grant had not issued.

At the time referred to the plaintiff was Commissioner of Public Works and a member of the Provincial Government of New Brunswick, and it is safe

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to infer that all the records of the Crown Lands Department would be open to his full examination.

This evidence is amply sufficient to rebut any possible presumption of a lost grant from the Crown, and also, as it seems to me, to afford proof that the records of the Department shewed no trace of any grant from the Crown prior to that made to the defendant, in 1895. If, then, *primâ facie* proof of the title of the Crown at the date of the making of that grant should be required it was sufficiently furnished.

It does not seem necessary to turn back to the old books for authority that the mere presence of an intruder upon the lands of the Crown imposes no bar upon the power of the Crown to make a grant.

No such limitation has been expressly contended for by counsel for the respondent. The expressions of opinion in its favour on the part of a former Chief Justice of Nova Scotia, in *Scott* v. *Henderson*, (1), are not now accepted in that province, the Supreme Court of which has decided, in the case of the *Louisburg Land Co.* v. *Tutty* (2), that the Crown could grant, notwithstanding the adverse occupation of a third party which has continued for a period of less than twenty years.

In *Farmer* v. *Livingstone* (3) this Court, on an appeal from Manitoba, held the plaintiff entitled to recover in ejectment upon a grant from the Crown made while the defendant was in actual occupation of the land. And in a subsequent case between the same parties, *Farmer* v. *Livingstone* (4), this Court also decided that the respondent's occupation did not even give him a *locus standi* to question the validity of the patent. See also *Webb* v. *Marsh*, (5);

(1) 3 N. S. Rep. 115.
(2) 16 N. S. Rep. 401.
(3) 5 Can. S. C. R. 221.
(4) 8 Can. S. C. R. 140.
(5) 22 Can. S. C. R. 437.

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The statute in question is as follows :

An Act to admit the subject to plead the general issue in Information of Intrusion brought on behalf of the King's Majesty and retain his possession till trial.

Where the King out of his prerogative royal may enforce the subject in Information 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 whensoever 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.*

The early books touching upon the Statute of James are Viner in his Abridgement, Comyn in his Digest and Bacon in his Abridgement, and they only refer to the statute as a matter of practice. Viner refers to it in vol. 17, page 217, under the heading "Statutes relating to Intrusions;" Comyn refers to it vol. 7, page 81, under the heading of "Pleadings", and Bacon in title "Prerogative" E, page 102, under the heading "Judicial Proceedings." And a note to Dyer, page 238, cited by Robinson C.J. in *Doe d. Fitzgerald* v. *Finn* (1), says :

The whole effect of the statute is, the subject is allowed to plead the general issue and retain possession till trial.

The first case upon the statute, so far as the reports show, is *Goodtitle d. Parker* v. *Baldwin* (2), a case

(1) 1 U. C. Q. B. 70.

(2) 11 East 488.

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which has apparently escaped the notice of the different courts and counsel who have considered the statute. The land in this case formed part of the forest of Dean. One of the pieces had been in the possession of the lessor of the plaintiff, his father and mother, for upwards of sixty years, and all of them had been in their possession for upwards of forty years, without any interference on the part of the Crown. The defendant, in some way which does not appear, became possessed of the lands, and the lessor of the plaintiff brought ejectment to remove him from the possession. Bayley J. at the trial left it to the jury to presume that the possession had been with the license of the Crown, as being the only way to account legally for their respective and adverse possessions, and the jury found for the defendant. Wigley, counsel for the plaintiff, on motion for a new trial relied on, among other points, the statute of 21 Jac. I., ch. 1. Ellenborough C.J. delivered judgment for the court in favour of the defendant and refused the motion for a new trial. He made no special reference to the Act, but said, among other things,

that the plaintiff must recover against the defendant by the strength of his own title and not by the weakness of the defendant's title.

The judgment of the court, since the point was taken, would indicate that the court was of opinion against the statute having any application in favour of the plaintiff and is an express decision in favour of the defendant in this case.

The next case (1835) is that of *Doe d. Watt* v. *Morris* (1). The head note is as follows:

Held, that the conveyance of a manor by the commissioners 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.

(1) 2 Bing. N. C. 189.

I cite the head-note as shewing what the learned reporter conceived to be the point actually decided, and because such an entirely different view has been taken by various courts of what that case did actually decide.

What was actually decided was that the Commissioners had not purported to sell the lands and that the statute could not be read as authorizing the Commissioners to sell a right of recovery or any land the Crown was not in possession of. In fact Chief Justice Tindal would seem to imply in the most unmistakable language that, if the grant had been from the Crown direct of the very land, it would have been treated as an assignment of the prerogative right to bring an action to obtain possession, and 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 next reported case is *Attorney-General* v. *Parsons* (1) in 1836. It grew out of the case of *Doe d. Watt* v. *Morris*. (2). The lessor of the plaintiff having failed in the ejectment suit, an information of intrusion was exhibited in the name of the Attorney-General, to eject the intruder. Part of the head-note is

> the title of the Crown to lands of which it has been out of possession for twenty years may be tried in the information of intrusion itself and need not be first found by inquest of office, the only effect of the statute 21 Jac. I., ch. 14, being to throw the onus of proving title in the first instance on the Crown.

According to the report in Meeson & Welsby the defendant's cousel claimed that the statute enabled the defendant, where the King had been out of possession for twenty years, to retain the possession from the expiration of the twenty years until the title was tried, found or adjudged for the King, and, therefore, an

(1) 2 M. & W. 23.
(2) Bing. N. C. 189.

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office was necessary. Lord Abinger, in reply, stated that,

whereas at common law the defendant was put to show his title on the record, the statute says he may in such case throw the *onus probandi* on the Crown.

Abinger C. B., in giving judgment, said:

It means only that the onus is thrown on the Crown to prove its title in the first instance. The defendant shall not be bound to plead his title specially where he has had twenty years possession without disturbance; in that case the Crown stands in the same situation as a subject.

Alderson B. said:

where the defendant pleads not guilty or *non intrusit* though the Crown prove the intrusion, he is entitled to hold the possession until the Crown also proves title.

The case of *The Attorney-General* v. *Parsons* is also repored in the Law Journal, (1), where the judgment of the court is given as follows:

The object of the statute is simply to provide that, after a possession of twenty years, the defendant shall not be bound to set out his title by a special plea, which otherwise he would have been bound to do. The proof of title in that case is thrown upon the Crown, and even though the King prove an intrusion, yet the defendant shall hold possession unless the title of the Crown be proved. There is no need of any distinct proceedings.

While it is true that in this case the point before the court was whether an inquest of office should be held or not, yet the language of the judges is inconsistent with their entertaining the idea that the statute went further than merely prescribing procedure. It is more than inconsistent, it is impliedly an absolute repudiation of the claim put forward for the defendant that the King is disseised by the statute. What is the point of the defendant's contention that the King's title should first be established by office found? It is this, that if the King was disseised an information of

(1) 6 L. J. Ex. 9.

intrusion would not lie, as possession in the King is the essential condition of the action, and as the statute had in the counsel's view disseised the King it was necessary that the King should re-establish his title and reclothe himself with possession by office found before the information of intrusion could be legally exhibited. The reply of the court must be taken in connection with the contention. When the court says in reply to the argument that an inquest of office must first be brought,

that the object of the statute is simply to provide that after a possession of twenty years the defendant shall not be bound to set out his title, etc.

it necessarily, by implication, negatives the claim that the statute disseizes the King. In the case of *Attorney-General* v. *The Corporation of London* (1), in 1850 the question of there being a substantive right conferred by the statute came up and was decided by Lord Cottenham. The Corporation of London in its answer set up, as a specific ground for resisting discovery, that to compel the discovery would be to violate the spirit and intention of the statute 21 Jac. I. ch. 14 (of which it claimed the benefit), and a subversion of the common law right and principle that the claimant of any estate of freehold shall recover by the strength of his own title and shall have no right to a discovery of the title by which such estate is held. Lord Cottenham said, on page 258 :

Now it is said that the statute of King James, as pleaded in the answer, gives a party against whom the Crown is litigating an advantage different 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 in the same situation as a party who was contesting with any other plaintiff ; but here in equity the Crown and subject always were on the same footing and they are on the same footing now there was no evil, therefore, to be remedied.

(1) 2 Mac. & G. 247.

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At law, however arising from technical reasoning, there was 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 up and pleaded. That was a privilege which the Crown maintained against the defendant at law; but no such privilege has ever been asserted here, nor am I at all aware of there being any different rule, as far as discovery is concerned, applicable to a suit between the Crown and a subject and a suit between ordinary parties.

In Williams & Yates "Law of Ejectment" (1894), at p. 7, I find:

The Crown may recover possession of lands by an information of intrusion exhibited by the Attorney General

citing Manning's Practice, page 189, and Cole's Ejectment, page 162, and stating that:

The defendant to an information of intrusion cannot plead the general issue but must specially plead his own title unless the Crown has been out of possession for more than twenty years and then the onus is on the Crown to prove its title.

I find in Shelford on Real Property Statutes (1) the rule to be that

ejectment would not lie at the suit of the grantee of the Crown although the rights of the Crown are not varied by the statute of limitations.

We are of course in this case not troubled by this consideration since the grantee of Crown is in possession and the intruder on the Crown's land seeks to recover in ejectment against such grantee.

In Ontario, in 1844, the case of *Doe d. Fitzgerald* v. *Finn* (2), settled the construction of the statute for that province. The conclusions reached in this case are as follows: The Statute of James is simply a regulation of procedure. Before the statute the King could make an effective grant of the land of which he had acquired possession without regard to the fact that an intruder was in possession at the time of the grant. The statute did not change the law in this respect, and the grantee of the Crown takes the King's title

(1) 8 ed, p. 142.

(2) 1 U. C. Q. B. 70.

including the possession and may evict the intruder by an action of ejectment. This judgment has been acted on and recognized as law in *Attorney General* v. *Stanley* (1); *Reg.* v. *Sinnott*, (2).

The respondent relied in the court below on the judgment in *Doe d. Watt* v. *Morris* (3) in 1835; the opinion of Bliss J. in *Scott* v. *Henderson*, (4) in 1843; the judgment of the court in *Smyth* v. *McDonald*, (5) in 1863; the judgment of the New Brunswick court in *Doe d. Ponsford* v. *Vernon*, (6) in 1843; the judgment of the New Brunswick court in *Smith* v. *Morrow*, (7) in 1872; and the opinion of Chief Justice Tuck in *Murray* v. *Duff* (8) in 1895.

Turning to the New Brunswick cases, the first is *Doe d. Ponsford* v. *Vernon*, (6). So far as the report shews, the statute was not discussed by counsel on either side. The court of its own motion referred to *Doe d. Watt* v. *Morris* (3). The facts of the case are peculiar:—In 1784 the Crown granted Lot No. 33 to Egbert and others. Sometime after this grant and before the year 1786 the Crown granted Lot No. 39 in the rear of Lot No. 33, to Brundage and Coombs. The description in the grant of No. 33 was very loose. Followed literally, it would stop short of No. 39, and be about fifty acres too small. In 1786 the Crown granted to Shaw a piece of land adjoining Lot No. 33 and by the description Lot No. 33 was recognized as extending back to Lot No. 39. In 1787 the Crown granted another lot adjoining to Beaman and the description in this grant also recognized Lot No. 33 as extending back to No 39. In 1839 the Crown granted "Lot A." to the defendant, describing it as lying

(1) 9 U. C. Q. B. 84.
(2) 27 U. C. Q. B. 539.
(3) 2 Bing. N. C. 189.
(4) 3 N. S. Rep. 115.
(5) 5 N. S. Rep. 274.
(6) 2 Kerr 351.
(7) 1 Pugs 200.
(8) 33 N. B. Rep. 351.

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between lots No. 33 and No. 39. The jury found that a lot No. 33 extended back to Lot No. 39, and that the *locus in quo* was included in the prior grant. The following extract contains all of the judgment which treats of the Statute of James:

> The case may be considered in another point of view. The Crown must be deemed at least out of possession to the extent of the Egbert grant as recognized in the Shaw and Beaman grants, and having been so out of possession for twenty years anterior to the grant to the defendant in 1839, this later grant by the operation of the statute 21 Jac. I. ch. 14 as expounded in *Doe d. Watts* v. *Morris*, (1) could not be valid without the Crown first having established its title by an information of intrusion.

In considering this dictum it must be remembered that, as far as appears from the report, the point involved was not argued before the court below; that the opposing authorities were neither cited to, nor considered by, the court and that the dictum was not a statement by the court of its own opinion but was a casual observation as to the holding in *Doe d. Watt* v. *Morris* (1).

The next New Brunswick case is *Smith* v. *Morrow* (2), an action of trespass in which the plaintiff was an intruder, who claimed to have twenty years possession of the land before the Crown granted it to the defendant. The action was for trespass for the defendant cutting on the land after he, the defendant, got the grant. The plaintiff, on the trial, requested Weldon J. to leave the question of his possession to the jury, which the judge refused to do. The verdict having been found for the defendant, the plaintiff moved for a new trial.

Allen J. delivered the judgment of the court. After stating the facts of the case, and the plaintiff's contention that the Crown could not make a grant without office found, he proceeded as follows:

(1) 2 Bing. N. C. 189. (2) 1 Pugs. 200.

To prevent the Crown from granting, or to prevent a grant actually issued from taking effect, the possession should be defined, actual, continuous and unequivocal, and wholly opposed to mere isolated acts of trespass on the Crown's estate without visible limits or effect. To hold that mere acts of locating on the wilderness lands of the Crown, and this too without clearly apparent bounds, would be sufficient to prevent the Crown from granting without office found, would, in my opinion, be most unreasonable and disastrous. The majority of the court think there was evidence of acts of possession by the plaintiff and those under whom he claims, outside of the Kimball grant, for the period of twenty years, which ought to have been submitted to the jury.

It was taken for granted by the court and the counsel for the defendant that the Crown was incapacitated from granting land which, for twenty years, had been in the occupation of an intruder. The statute was not discussed at all, and the only question before the court was whether there was evidence of there being acts of possession which should have been left to the jury.

The last New Brunswick case is *Murray* v. *Duff* (1). This case was one of trespass also. The decision of the court did not go on the effect of the statute of James, and the Chief Justice was the only judge who expressed an opinion upon it. He based his judgment chiefly on *Doe d. Watt* v. *Morris* (2), and he summed up his views of the decision in that case in these words:

Before leaving *Doe d. Watt* v. *Morris* (2) I desire to say that in my opinion it is in that case distinctly held that, after twenty years possession against the Crown, the effect of 21 Jac. I. ch. 14, was to disable the King from granting the estate until the title had been found by office; that the right of the Crown in such case was nothing more than the right to file an information of intrusion, a right that could not be assigned or, at all events, only by words expressly granting it. In other words the court decided, under the circumstances stated in the special case, that the right of maintaining an action of ejectment is barred by the statute of limitations, 21 Jac. I. ch. 14.

(1) 33 N. B. Rep. 351. (2) 2 Bing. N. C. 189.

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The Chief Justice's view, I think, was erroneous as it was not held by Chief Justice Tyndal that the effect of the statute was to disable the Crown from granting the estate, but that, to evict an intruder after the Crown had been out of possession for twenty years, the Crown must file an information of intrusion.

Turning to the Nova Scotia cases, the case of *Scott* v. *Henderson* (1) was not a case under the statute of James, although the statute was considered in it. Halliburton C J., and Haliburton J. were of the opinion that the statute contained nothing which would deprive the King of the right of granting his lands if he had the right to do so before the passing of the Act. Hill J. expressed no opinion on the effect of the statute upon the King's power to grant land. Bliss J., on page 143, expressed the opinion that the statute had broken in upon the common law principle and recognized an adverse possession against the Crown after twenty years, in which case he claimed the Crown could not now grant without first proceeding against the intruder.

The case of *Smyth* v. *McDonald* (2) did really decide squarely that the statute disables the Crown from granting. The facts of this case brought it within the statute of James. Young C.J., at page 280 of the report, said:

> *Doe d. Watt* v. *Morris* (3), if not precisely in point, is nearly so, and the defendants having twenty years possession between themselves and their ancestors were protected by the statute.

Bliss J. simply concurred in the opinion that the judgment of the court should be for the defendant who was the intruder. Dodd and Wilkins JJ. disposed of the question in a very few lines, holding that the grantee of the Crown, the then plaintiff, could not take the

(1) 3 N. S. Rep. 115. (2) 5 N. S. Rep. 274.
(3) 2 Bing. N. C. 189.

land by the grant, as the King was out of possession and could not grant it.

It is clear that title cannot be acquired against the Crown in a less period than sixty years, and that, until such title is acquired, the intruder has only a right to claim that he must be evicted by an information of intrusion, and I cannot see that the effect of our holding that a wrong construction has been put upon the statute of James by the courts of New Brunswick would have the effect of doing more than saying to an intruder upon Crown property, you must be in possession for sixty years before the title of the Crown is extinguished. The intruder's possession is not acquisitive but merely extinctive, and the Crown's title is not extinguished by a less period of possession than sixty years.

The chief ground urged was the disturbance of title. I think the cases establish that, where the construction of a statute is involved, the plain words of the statute must be given affect to. See particularly the case of *Hamilton* v. *Baker* (1). In 1859, *The Glantanner* (2) was decided by Dr. Lushington. In 1865, he approved of this case and made it the basis of the decision in *The Mary Ann* (3). In 1868, Sir Robert Pillimore approved of *The Mary Ann* (3) in *The Feronia* (4). In 1877, the Court of Appeal accepted without comment and acted upon the preceding case, the court consisting of James, Brett and Amphlett L.JJ.; *In re Rio Grande Do Sul Steamship Co.* (5). In 1883, Sir Robert Phillimore, when the case of *The Mary Ann* (3) was questioned before him, expressly approved of it and referred to the fact that it had been treated as settled law in the then last edition of Maude and Pollock on "Merchant Shipping."

(1) 14 App. Cas. 209.
(2) 1 Swa. 415.
(3) L. R. 1 Ad. & Ecc. 8.
(4) L. R. 2 Ad. & Ecc. 65.
(5) 5 Ch. D. 283.

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In 1886, Sir James Hannen, in the case of *The Ringdove* (1), thought that the reasoning of Dr. Lushington was not altogether satisfactory to his mind, but he followed the case. In 1889, the case of *Hamilton* v. *Baker* (2) came before the House of Lords and Lord Halsbury, L.C., Lord Watson and Lord McNaghten unanimously overruled the cases of *The Glentanner* (3) and *The Mary Ann* (4) and did so, notwithstanding the fact that the practice of the Admiralty Court had followed the decisions from the time they were given, a period of thirty years.

The ground was taken before the House that the results of overruling the old decisions would be disastrous, and whether right or wrong it was too late for even the House of Lords to interfere. Lord Macnaghten said :

> I am sensible of the inconvenience of disturbing a course of practice which has continued unchallenged for much a length of time and which has been sanctioned by such high authority, but if it is really founded upon an erroneous construction of an Act of Parliament there is no principle which precludes your Lordships from correcting the error. To hold that the matter is not open to review would be to give the effect of legislation to a decision contrary to the intention of the Legislature, merely because it has happened, for some reason or other, to remain unchallenged for a certain length of time.

See also *Caldwell* v. *McLaren* (5) ; *Lancashire & Yorkshire Railway Co.* v. *Mayor, etc., of Borough of Bury* (6) ; *North Eastern Railway Co* v. *Lord Hastings* (7) ; *Trustees of Clyde Navigation* v. *Laird & Sons* (8) ; *Gwyn* v. *Hardwicke* (9).

In the present case Barker J. said :

> It is, I think, to be regretted that so important a question, and one upon which there has been such a diversity of opinion among judges, should not have received more consideration than it apparently has

(1) 11 P. D. 120.
(2) 14 App. Cas. 209.
(3) 1 Swa. 415.
(4) 1 Ad. & Ecc. 8.
(5) 9 App. Cas. 392 at p. 409.
(6) 14 App. Cas. 417.
(7) [1900] A. C. 260.
(8) 8 App. Cas. 658.
(9) 1 H. & N. 49 at p. 53.

in this province. * * * I must adhere to what I said in *Murray* v. *Duff*, (1) that, after so long a lapse of time, the question should be considered as settled in this province, at all events until a court of appeal shall decide otherwise.

Gregory J. said;

I think, too, that it would be very doubtful, if the case was presented now for the first time, if I would have taken the view that has been adopted by the court in the past, and which seems now to be accepted as the law, until some high court shall say that there was error in the former judgments.

Landry and McLeod JJ. also intimated doubts of the correctness of the conclusion. Hanington J. alone supported it upon principle.

The law upon the point in question should be the same for all the portions of Canada in which the law of property is based upon that of England. It should require a case of an extraordinary character to induce this court to feel itself precluded by local decisions from applying to a particular part of the Dominion a construction of the law which seems to it properly applicable to all of such portions.

In this country, where intruders may take possession of most valuable Crown properties and remain in possession for many years enjoying the fruits of their intrusion without any knowledge on the part of the Crown, I think it would be most dangerous to introduce any limitation upon the sixty year term. It is to be assumed that, in cases in Nova Scotia and New Brunswick where intruders have settled upon land of the Crown and made improvements, and have not acquired a title by a sixty years' possession, the Crown will take into consideration all the circumstances before granting a title to the land to a third party. If further relief is necessary it is for the legislature to supply.

I think that, in this case, the Crown could grant the land and, the grantee having obtained possession, the

(1) 33 N. B. Rep. 351.

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plaintiff cannot maintain ejectment against him, and that the verdict should be set aside and a verdict entered for the defendant with costs in this court and in the court below.

Appeal allowed with costs.

Solicitors for the appellant: *Powell, Bennett & Harrison.*

Solicitor for the respondent: *James Friel.*