HIS MAJESTY THE KING, on the information of the Attorney-General of Canada,

PLAINTIFF;

AND

SUSAN HAMILTON AND OTHERS,

DEFENDANTS.

1915
Nov. 22.

Title to land—Adverse possession against Crown—Acknowledgment.

Defendants were claiming title to certain real property by adverse possession of 60 years against the Crown. During the ripening of their statutory title two of defendants' predecessors in possession, under whom they claimed, wrote a letter to the Minister of Public Works, under whose control the property in dispute fell at the date of such letter, in which it was stated that the property had then been in possession of the writers' family for 39 years, and the following request made:—"We most urgently and respectfully solicit that the aforesaid lot be sold to us, as we consider we have the prior right and are willing to pay any reasonable amount for a deed of the same."

Held, that the above letter was an acknowledgment of the Crown's title and interrupted the operation of the statute in defendants' favour.

Semble: That a judgment for the Crown in an information of intrusion must be followed up by possession before a statutory title by adverse possession accruing at the time, can be interrupted.

INFORMATION of intrusion.

The facts are stated in the reasons for judgment.

May 11, 1915.

The case came on for hearing before the Honourable Mr. Justice Cassels.

W. D. Hogg, K.C., for the plaintiff;

A. E. Fripp, K.C., for the defendants.

CASSELS, J., now (November 22, 1915) delivered judgment.

1915

THE KING v. HAMILTON.

Reasons for Judgment.

An Information of intrusion exhibited on behalf of His Majesty to have it declared that the plaintiff is entitled to possession of the lands and premises in the Information described, and that the plaintiff be paid the issues and profits of the lands and premises in question, from the first day of January, 1914, until possession be given.

The defendants deny the title of the plaintiff, and by the third paragraph of their defence they allege, as follows:

"The Defendants say that the title to the said lands "is vested in them and that they have been in unin- "terrupted, actual, visible and continuous possession "and enjoyment of the said lands and premises since "the year 1832 and are now in full possession and "enjoyment of the said lands and premises and every "part thereof."

The Crown filed a reply to the said statement of defence, in which they allege, as follows:

"2. His Majesty's Attorney-General in further "reply to the said Statement of Defence says that "heretofore to wit, on the Thirteenth day of February, "1890, an Information of Intrusion was filed in this "Honourable Court by the Attorney-General of Canada "on behalf of Her late Majesty Queen Victoria against "James J. Hamilton, Susan Hamilton, John Sevigny "and John Roberts as defendants, for the possession "of the land mentioned and described in the Informa- "tion herein and other lands, the said James J. Hamil- "ton, Susan Hamilton, John Sevigny and John "Roberts being at the said date the persons who "claimed possession and ownership of the said lands. "That the said Information was duly served upon the "said James J. Hamilton, Susan Hamilton, John "Sevigny and John Roberts, who made default in

"defending the said action and judgment was moved "for and entered against them for recovery of the "possession of the said lands, and a writ of possession "was subsequently issued out of this Court directed "to the Sheriff of the County of Carleton to take and "have in the name of Her said late Majesty the Queen "the lands and premises aforesaid, whereby and by "reason whereof the Crown became entitled to posses- "sion of the said lands, and the title thereof has "remained undisturbed in the Crown since the date of "the said judgment: and the Attorney-General on "behalf of His Majesty says that the defendants either "as defendants in this action, or claiming under the "defendants in the former action, are now estopped "from pleading and ought not to be allowed to plead, "as a defence to the Information of His Majesty the "statements which are alleged and set out in the "second and third paragraphs of the Statement of "Defence in this action."

The land in question in this Information is a small piece of land on the South West corner of Rideau and Mosgrove Streets upon which was erected in the year 1832 a small log cottage, which still remains upon the premises—the log cottage having been, at a subsequent period, covered over.

It is proved that the defendants and their predecessors in title have been in possession and occupation of the premises in question from the year 1832, down to the date of the filing of the Information in this action; and if in point of fact there had been no interruption of this possession the defendants would have acquired title by adverse occupancy.

The facts set up in the replication by the Crown have been proved before me by the production of a certified copy of the pleadings and proceedings and

1915
THE KING
v.
HAMILTON.
Reasons for Judgment.

judgment in the information of intrusion commenced in the year 1890 against James J. Hamilton, Susan Hamilton his wife, John Sevigny and John Roberts.

It also appears from the evidence before me that while judgment was pronounced in this information of intrusion the defendants to that information who were then in occupation of the premises were not dispossessed. There was some attempt to prove that the writ had been handed to the Sheriff, but if so it was not executed.

During the trial I had considerable doubt as to whether or not the informants had proved their title, in other words whether it was proved that the building in question was erected on the 60 feet around the basin and the By-wash.

On further consideration, having regard to the facts as proved, and the subsequent letter to which I will have to refer later, and the judgment in the information of intrusion recovered in the year 1890, I have come to the conclusion that the title of the informant has been sufficiently proved to enable them to sustain this action.

The Rideau Canal was constructed under the Statute of 8 George IV, Cap. 1.

In the case of *Magee v. The Queen*, (1) the late Mr. Justice Burbidge in very comprehensive reasons for judgment, has referred to the various statutes bearing upon the construction of the Rideau Canal. It will be noticed that in that case, in the argument for the suppliants, (at page 315) suppliants counsel submitted that: "we are entitled to a declaration as to the By-"wash, that part of the property has been abandoned "by the Crown."

The house in question in this action was built

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

apparently upon the tract of 60 feet around the basin and the By-wash. The By-wash in question is probably best described by the witness John Litle, a witness in his 84th year, and who has lived all his life on the bank of the By-wash. He remembers the old log-house which had been built by one James Cuzener, being the house in question. It is conceded by the Crown as alleged by the defendant in the defence that this house was erected as I have stated in the year 1832. Litle is asked:

"Q. Where did James Cuzener live?—A. Right on "the bank of the By-wash.

He is asked:

"Q. How long do you remember the old log house? "Was it there the time the canal was built?—A. I "remember it over 70 years ago.

He is asked:

"Q. How close was the Creek? It passed his "house?—A. His house was up on the height of the "street, and the water running from the Canal would "be some few yards down from the house."

Further on he is asked on cross-examination:

"Q. The water ran through the Hamilton property? "—A. Right past.

"Q. It ran alongside of it?—A. Yes, it ran parallel "down by Mosgrove down that way."

The By-wash in question is no doubt the Creek which was referred to by this witness, and the cottage in question would be erected on the 60 feet.

It would appear from the Statutes referred to in the report of the judgment of *Magee v. The Queen*, that in 1856, the Rideau Canal and its adjuncts were transferred to the Crown for the benefit, use and purposes of the Province.

1915

THE KING v. HAMILTON.

Reasons for Judgment.

The Ordnance Vesting Act was enacted in 1843, 7th Victoria, Cap. II. This Statute vested the property—and the same statute provided that all lands taken from private owners at Bytown under the authority of the Rideau Canal Act for the uses of the Canal which had not been used for that purpose should be restored to the party or parties from whom they were taken. Mr. Justice Burbidge then proceeds to refer to disputes which had arisen, and refers to the enactment of the statute of 1846, Chapter 42, 9 Victoria. This statute, as pointed out at page 320 of the judgment in the Magee case, made clear what was intended by the previous Act and provided that the provision of the previous Act should be construed to apply to all lands at Bytown set out and taken from Nicholas Sparks under the provisions of the Rideau Canal Act, except—

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

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

The result is that the Basin and By-wash and the 200 feet along the canal, and the 60 feet along the Bywash were retained by the Crown.

I think the evidence before me shows that the cottage in question was erected within the 60 feet along the By-wash. The evidence of the witnesses is necessarily somewhat vague.

Mr. Justice Burbidge in the *Magee* case (1) referred to an official plan produced from the office of the Rideau Canal dated and signed on the 9th July, 1847. This

(1) 3 Ex.C.R. at p. 323.

plan has been produced before me as Exhibit Number 1, and evidence has been produced to identify the lands in question with the lands shown on this plan to have been reserved and that the lands in question in the action before me formed part of the reserved lands.

It has to be borne in mind that in order to prove title under the Statute of Limitations (in this case, *The Nullum Tempus Act*), it is not sufficient to prove that the true owner has been out of possession for a period of 60 years, but it is essential that 60 years of actual adverse possession must be established. If there was an interruption of possession and a vacancy during a period in which the lands were not adversely occupied, the title of the true owner would in law place him as being in possession. (2)

It is also essential that in order to establish the defence of title by adverse possession, the possession must be that by successive occupants claiming in some sufficient way under each other. (3)

In the particular case before me it has been shown that Samuel Cuzener and his wife, and after their death the children remained in the occupancy of the premises. The present occupants claim through the original James Cuzener and his wife Hannah Cuzener.

On the death of James Cuzener, Hannah Cuzener and her daughters remained in occupation, and by the will of Hannah Cuzener which bears date the 1st December, 1869, it is provided as follows:

"Second—I give to my daughter, Susan Hamilton, "all my household furniture, and wearing apparel, for "her sole and only use, besides all my right, title, "claim, interest and demand which I now have, or "may have, of the House and premises which I now "occupy and reside in, situate in Rideau Street, in the

(1) See *Agency Company v. Short*, 13 A.C. p. 793.

(2) See *Simmons v. Shipman*, 1[illegible] Ont. R. p. 301.

1915

THE KING v. HAMILTON.

Reasons for Judgment.

"said City of Ottawa, Township, County, Province "and Dominion aforesaid, in rear of the House rented "by me to Thomas Dowsley, to her and to her only "for her sole use and benefit. Third—I like give and "devise to my said Daughter, Susan Hamilton, two-"thirds of the rents and profits of the House and "premises in Rideau Street, in the said City of Ottawa, "now rented by me to Thomas Dowsley, and the "remaining Third to my Daughter Sarah, wife to "John Thomolson . . .

After the death of Hannah Cuzener a letter was written on the 17th April, 1871, which is signed by Susan Cousins and Sarah Cousins. The Susan Cousins referred to was subsequently married to one Hamilton, and then became known as Susan Hamilton. This letter is as follows:

"Ottawa City,
17th October, 1871.

"Sir:

"We the undersigned (being sisters) beg to inform "you that having understood that the small property "or lot situated on the southern side of Rideau Street "and adjoining the By-wash (leading from the Canal) "on the west side of it, on which there is a wooden "building, has been applied for by the St. George's "Society for the purpose of erecting a Hall thereon. "We would hope that the same might not be sold, as "we consider our right to it cannot be alienated from "the length of time said lot has been possessed by our "family, namely 39 years. Our Father, the late "James Cousens, in his lifetime settled upon this lot "in 1832 with permission of the Ordnance Department, "our Mother outlived our Father and resided upon "this property for a number of years and at her "decease bequeathed it to us, and we have continued

"upon it ever since. Our father's name was entered "upon the Books of the Department at the time of his "settling down here which was then called Bytown, "these facts are known to many of the citizens.

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

"We remain,

"Your most obedient servants,

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

"(signed) Susan Cousens,

" " Sarah Cousens."

I think that this letter is a sufficient acknowledgement of title within the meaning of the Statutes relating to Limitation to stop the running of the statute.

The law is expounded in *Darby & Bosanquet on Limitations*(1); and in *Halsbury's Laws of England.*(2)

Darby & Bosanquet state: "It does not seem that "any particular form of acknowledgment is necessary, "but anything from which an admission of ownership "in the party to whom it is given may be fairly implied "would be sufficient," etc.

Now, this letter while setting up a moral right to have the property sold to them, points out that "we "would hope that the same might not be sold" as it had been in the occupation of the family for 39 years. It further proceeded "and we most urgently and "respectfully solicit that the aforesaid lot be sold to "us, as we consider we have the prior right and are "willing to pay any reasonable amount for a deed of "the same."

(1) 2nd ed. p. 383. (2) vol. 19, p. 132.

1915

THE KING v. HAMILTON.

Reasons for Judgment.

This letter is addressed to the Honourable Sir Hector Langevin, the Minister of Public Works.

The cases referred to by Mr. Fripp seem to me do not support the contention put forward by him. In *Beigle v. Dake,*(1) the title had ripened by possession and the offer of the defendant was an offer for a paper title which might be worth to him the sum of $100, although he might have a perfect title by statute. See page 261 of the reasons for judgment. And in that case also it was pointed out by the learned Judge, that there was no writing signed as required by the Statute.

The case of *Drake v. North,* (2) is a judgment of the late Chief Justice Robinson. At page 478, he points out as follows:

"This is not the case of a party who being in posses-
"sion under an imperfect title, or at least under some
"claim of right, has endeavoured to strengthen his
"title by getting in some outstanding claim. In such
"cases it would not be fair to infer that he intended to
"acknowledge the right of the party to dispossess him
"if he pleased, if he declined to confirm his title.
"Nor is this case the same as if Montgomery had gone
"to the defendant and stated himself to be the owner,
"and persuaded the defendant to recognize his title.
". . . But here according to the evidence, the
"defendant appears to have sought out Montgomery
"as the owner, and endeavoured to purchase from him
"or to get him to sell to him." etc.

I think that the letter which I have quoted in full is a clear admission of the title, and is a request upon the part of these two devisees of Susan Cuzener to purchase the property in question.

(1) 42 U.C. 250.

(2) 14 U.C. Q.B. at p. 476.

It would appear from this case of *Drake v. North* that such a letter would be sufficient proof of title to enable the plaintiff in ejectment to assert title as against the defendant who was admittedly a trespasser.

I am of opinion, therefore, that this letter was an acknowledgment of title sufficient to interrupt the running of the statute. If this be the correct view, then the 60 years would not have run as against the Crown at the time of the commencement of the present proceedings.

As I have stated, there was the subsequent proceeding in ejectment in the year 1890. On the argument before me, it was contended on behalf of the Crown that the effect of this judgment was to interrupt possession, and that the statute ceased to operate at the time of the recovery of this judgment. Mr. Fripp on the other hand, on the part of the defendants, claimed that the judgment in ejectment had not the effect of giving possession to the plaintiff, and that without actually having removed defendants from occupation there was no interference of the running of the statute. Both Counsel seem to have made diligent search for authorities bearing on this point and have cited numerous authorities.

After the best consideration I can give to the case, I am of opinion that if the judgment in an information of intrusion has merely the same effect as a judgment in ejectment the contention put forward by Mr. Fripp is the correct view, and that unless the judgment in ejectment be followed up by possession the running of the statute would not be stopped.

In *Doe v. Wright,* (1) it was held that judgment in ejectment does not give possession but gives only a right to the possession, etc.

(1) 10 A. & E., p. 763.

1915

THE KING v. HAMILTON.

Reasons for Judgment.

In *Sterling v. Penlington*, (1) it is stated that confession of lease, entry or delivery in ejectment, "would not "be a good actual entry to avoid a fine, or the Statute "of Limitations, unless upon a proceeding in the same "action on the ejectment; but in another action after "the 20 years it would not."

In *Bampton v. Birchall*, (2) Lord Langdale's language would lead to the same result. In that case there had been a proceeding in ejectment which had been stayed for non-payment of costs. It is pointed out how long the parties had been left in possession by any effectual proceeding. There is no doubt that the mere making of an entry is insufficient. This is covered by the statute.

In *Piper v. Stevenson*, (3) will be found an elaborate collection of authorities.

In the case of *Doe Perry v. Henderson*, (4) the head note is as follows:

"Held also, that a judgment in ejectment recovered "by B. against A. after the 20 years had expired, "would not save the statute. *Aliter*, if recovered "within the twenty years, and A. within the twenty "years *had been dispossessed upon such judgment.*" The Chief Justice Sir John Beverley Robinson, at page 500 puts it as follows:

"Thirdly—As to the effect of the recovery in eject- "ment. It has been decided in England repeatedly, "that a recovery in ejectment is no estoppel; and upon "the second trial the same question is only brought a "second time, as it may be in this form of action, "before the court."

He proceeds: "If within the twenty years Robert "Perry or his assignees had set up their title and

(1) 9 Mod. p. 247 (1739).
(2) 28 Ont. L.R., 382.
(3) 5 Beav. p. 67.
(4) 3 U.C. Q.B., 486.

"recovered, *and the possession had been changed*, then "of course the operation of the statute would have "been prevented," assuming, apparently, that a change of possession under the judgment is essential.

In the case of *Thorp v. Faccy*, (1) at page 350, Wills, J. puts it as to a declaration in ejectment, its utmost effect is that of an entry, a mere entry—and by section 10, has no effect. The judgment does *not give possession unless it be executed.*

There are numerous other cases cited before me which I think it needless to refer to.

As I pointed out, if the letter which I have quoted be an acknowledgment, this question as to the necessity for a following up of the judgment by obtaining possession is not of moment.

The case was argued before me as if the judgment of 1890 was one in ejectment. I am not by any means satisfied that the same rule should apply to a judgment in an information of intrusion as in ejectment.

It is true the procedure in intrusion is made similar to the proceeding in ejectment, but it must be borne in mind that the Crown is assumed to be always in possession. That the information becomes necessary by reason of the defendant having been in actual occupation for more than 20 years, and therefore the defendant has the right to call upon the Crown to make their title which he could not have done at law within the 20 years, although probably a different rule prevailed in equity. (2)

The reasons and effect of requiring the Crown to prove the title where the defendant has been in occupation for more than 20 years are fully dealt with in the case of *Emmerson v. Maddison.* (3) It is stated there

(1) (1866) L.J. N.S., 349.

(2) See *Attorney-General v. Corporation of London*, 2 Mac. & G., p. 258—Lord Cottenham's judgment.

(3) 34 S.C.R., 533; (1906) A.C. 575.

1915

THE KING v. HAMILTON.

Reasons for Judgment.

that possession as well as the right had always been in the Crown notwithstanding the occupation of the plaintiff and his predecessors—and it may well be that the Crown having established their title in 1890 by the judgment in the information of intrusion it was not necessary as in ejectment to follow up the judgment by actually obtaining possession. I can find no authority on the point. It is in my opinion not necessary for the plaintiff to rely on this point, and I refrain from further dealing with it.

I think that having regard to the evidence and facts which I have quoted including the letter and the judgment of 1890, the Crown has sufficiently proved its title, and that the defendants have failed in the defence set up.

The Crown is entitled to the judgment asked for, and to the costs of this proceeding.

Judgment accordingly.

Solicitors for plaintiff: *Hogg & Hogg.*

Solicitors for defendants: *Fripp & McGee.*