Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of Solling and another v. *Broughton, from the Supreme Court of New South Wales, delivered 22nd July* 1893.

Present:

THE LORD CHANCELLOR.
LORD WATSON.
LORD HOBHOUSE.
LORD MACNAGHTEN.
LORD MORRIS.
LORD SHAND.
SIR RICHARD COUCH.

[*Delivered by Lord Macnaghten.*]

The question in this case relates to the title to a piece of land containing 10 acres, situate at Gore's Wharf in the parish of Willoughby in the county of Cumberland. The proceedings commenced on the 2nd of November 1887 with an application by the Respondent Thomas Broughton to bring the land under the provisions of the Real Property Act, 26 Vict., No. 9, amended by 41 Vict., No. 18. The applicant's title was passed by the Examiners of Titles, and the usual notices were issued. On the 16th of November 1889 the Appellants who were in possession of the land at the time lodged caveats against the application. Cases were stated in pursuance of the Act by both parties, and in the result issues were settled which the Court directed to be tried before a jury between the caveators as Plaintiffs and the applicant as Defendant.

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The applicant in his case showed a complete documentary title, commencing with a Crown Grant dated the 29th of September 1838 to one William Gore in fee. The caveators relied on a possessory title, and alleged that the applicant had been out of possession for more than twenty years. An alternative case in which they put forward a documentary title was abandoned.

The trial took place before Sir William Windeyer J. and a jury of four persons. It lasted six days. The learned Judge summed up the case to the jury, who by the consent of both parties were not required to find a verdict on the specific issues. They found a special verdict on certain questions which were submitted to them and the issues were reserved to be dealt with by the Full Court.

The judgment of the Full Court, of which Sir William Windeyer J. was himself a member, was delivered by Sir Frederick Matthew Darley C. J. on the 18th of August 1891. The judgment states the material findings of the jury in the following terms :—

"In their answer to the second question the jury found that Broughton made an entry on the land in 1855; and reading this finding with the evidence given, it must be taken to mean an entry in June 1855 upon the land when it was vacant and in the occupation of no one. Then in answer to the third question the jury found that Broughton made an entry when no one was in actual occupation between November 1867 and November 1887; and looking at this by the light of the evidence it plainly refers to an entry by Broughton in the year 1875 when he went there and found the place vacant and the house upon it empty."

Upon these findings, having regard to facts which were either admitted or proved, the Court was of opinion that the caveators had "failed

" to show that for any period of 20 years they were " in continuous possession " and concluded by stating that " the applicant must in both suits be " declared to be the party finally successful and " the caveats must be removed."

From this judgment and the orders consequential upon it the caveators have appealed.

Their first ground of complaint is that they ought not to have been made Plaintiffs in the trial of the issues, but that they ought to have had such advantage as a Defendant in possession has in an action for the recovery of land. In answer to this objection it would probably be sufficient to say that there was no appeal to the Full Court, and that there is no appeal to this Board, from the Order which directed the caveators to be Plaintiffs. It is stated in the judgment under appeal that it has been held in New South Wales " that a Caveator in possession " is not in the same position as a Defendant in " ejectment" and authority was cited in support of that view. Their Lordships do not desire to throw any doubt upon this proposition, which in itself does not seem unreasonable, or indeed to express any opinion upon it, as the point is not properly before them. But it may be observed that in the present case the caveators would have gained no advantage by being made Defendants. The applicant comes forward and shows a complete documentary title, and proves that he was in possession within the period of twenty years before the commencement of the proceedings. Then the burden of proof is shifted (*Leigh* v. *Jack* L.R. 5 Ex. Div.264), and it lies upon the caveators to show that the applicant's original title has been defeated, or in other words that the entry in 1875 was not effective.

Then it was objected that the findings of the jury as to Broughton's entries on the land come

to nothing. The Statute it was pointed out declares that no person shall be deemed to have been in possession of any land within the meaning of the Act "merely by reason of "having made an entry thereon." That "evidently applies," as Lord Campbell observes in *Randall* v. *Stevens*, 2 El. and Bl 652, "to a *mere entry*, as "for the purpose of avoiding a fine, which may "be made by stepping on any corner of the land "in the night time and pronouncing a few words, "without any attempt or intention or wish to "take possession." In the present case there is no ground for supposing that the findings of the jury, who must have had their minds directed to this question—the substantial question between the parties—were illusory and unmeaning. The entries must have been regarded by the jury as effective. They are so treated by the Court which included the learned Judge who presided at the trial. And if the evidence is to be looked at it is plain that these entries were made *animo possidendi*, and that on entering upon the land Broughton was in of his fee simple title, and that any other person there not having his license or authority would have been a mere trespasser.

Under these circumstances it was for the caveators to prove that Broughton's entry in 1875 was of no avail. That could only be done by shewing that Broughton's right and title had been previously extinguished. Now the facts are these:—William Gore mortgaged the land in fee in 1840. He died intestate in 1845, leaving his son William Bligh Gore his heir-at-law. In May 1855 the successor in title of the original mortgagees sold the land as he was entitled to do by the terms of the mortgage deed. The purchaser on that sale mortgaged the land in fee to Broughton on the 15th of June

1855, and Broughton purchased the equity of redemption in 1861. So long as the mortgage continued the possession of William Bligh Gore, the heir-at-law of the mortgagor, was not hostile to or inconsistent with the mortgagee's right. It was said that there was no proof that interest was ever paid on the mortgage. It was for the caveators to prove non-payment of interest, if that fact was supposed to be material. It could not really have been material, because no title could have been acquired under the Statute of Limitations between 1840 the date of the mortgage and 1855 the date of the sale. If William Bligh Gore continued in possession after the sale, as it may be presumed he did, until Broughton's entry in the following June, he must either have been tenant at will or tenant at sufferance. Broughton it seems took William Bligh Gore with him when he made the entry in June 1855, and authorized him to remain in occupation. Whether William Bligh Gore in fact acted as Broughton's agent or not, from June 1855 he was tenant at will, and even if there had been continuous occupation from that date by William Bligh Gore and persons claiming under him without any acknowledgment of Broughton's title no title could have been acquired under the Statute of Limitations until June 1876, and it is found that Broughton entered again in 1875.

The same result may be reached, as it has been reached by the Full Court, on the shewing of the caveators themselves. They seek to set up a possessory title derived from one French who died in October 1875, and who was the husband of Mrs. French one of the Appellants. But French did not enter until after the death of William Bligh Gore in 1863, and the Appellants cannot connect French in title with William Bligh Gore. French was a nephew of William

Bligh Gore, but he was neither his devisee nor his heir nor one of his next of kin. There must have been an interval between the death of William Bligh Gore and the entry of French. During that interval, whether William Bligh Gore was tenant at will or tenant at sufferance, the rightful owner on the determination of the tenancy by the death of the tenant must have been in of his fee simple title without the presence of any other person on the land who could carry on or initiate a claim hostile to or inconsistent with his right.

Under these circumstances the caveators cannot connect themselves with William Bligh Gore and the authority of *Doe* v. *Barnard*, 13 Q.B., 945, on which they seem to have relied in the Court below is really against them.

Their Lordships will therefore humbly advise Her Majesty that this appeal ought to be dismissed. The Appellants will pay the costs of the appeal.