

*Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of Hogan v. Hand, from the Supreme Court of New South Wales ; delivered 13th March, 1861.*

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Present :

LORD CRANWORTH.

LORD KINGSDOWN.

LORD JUSTICE KNIGHT BRUCE.

LORD JUSTICE TURNER.

THE action which has given rise to this appeal was an action of ejectment brought in the Colony of New South Wales on the 16th of April, 1856, to recover possession of about forty acres of land near Windsor, in the County of Cumberland. These forty acres form part of an estate called the "Cornwallis Estate," purchased in 1796, by one Michael Hogan. He left the Colony soon after the purchase, and put two of his servants, John Riley and Philip Tully, into possession of the forty acres as his tenants at will.

Michael Hogan died intestate in March 1833, leaving the Plaintiff his heir-at-law. Tully and Riley continued to occupy the forty acres jointly till the year 1835, when Tully died, and after his death Riley alone occupied them till 1847, when he died. Since that time the Defendants, claiming as volunteers under Tully and Riley have been in possession.

The cause was tried in the month of October 1858, when the jury found a verdict for the Plaintiff. But by a rule of Court dated the 14th of January, 1860, that verdict was set aside, and a new trial was ordered. Against that rule the Plaintiff has appealed to Her Majesty, and the appeal was heard a short

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time since at this bar, and we are now prepared to give our judgment.

The rule was granted on the ground that the Plaintiff was barred by the Statute of Limitations, and what we have to consider is whether the Court was right in holding that the Statute barred the Plaintiff's right.

The title of Tully and Riley as tenants at will would, of course, continue till the determination of the will, and this occurred (if not sooner) by the death of Michael Hogan in March 1833. William, his son, the present Appellant, acquired by the death of his father, a right of entry, and as, when this action was commenced, more than twenty years had elapsed since that event occurred, it was contended that his right to bring the present action was barred by the second section of that Statute. But the evidence of Mrs. Hogan, the Appellant's mother, and of Frances, his sister (pages 22 and 24), show, beyond a doubt, that the Appellant went to New York in or about the year 1804, and that he ever afterwards lived there, or in other parts of the United States. He was therefore entitled to the benefit of the 16th section of the Statute, which, in the case of a person beyond seas at the time when his title accrues, saves his right for ten years after the twenty years given by the 2nd section. If, therefore, the will was not determined but by the death of Michael Hogan, the lessor, the statute, for the reasons we have stated, would not present a bar.

Some question was raised at the trial as to whether Tully and Riley were tenants at will; whether they were not left in possession as mere servants, or caretakers as they are called, of Michael Hogan. It is sufficient to say that this would make no practical difference, but in truth the evidence leaves no reasonable doubt that they were not servants; that they had possession of the land for their own benefit as tenants at will under Michael Hogan.

We have considered the case on the hypothesis that the tenancy at will endured until the death of Michael Hogan; but evidence was offered at the trial to show that in the month of June 1832, Michael Hogan granted a lease of the Cornwallis estate, including these forty acres to one William Cox for a term of seven years, to commence on the 1st of January, 1833. Evidence was also offered to

show that Cox entered, by virtue of this lease, and was possessed of the land demised until the month of March 1837, when he died, and that, after his death, his executors entered and enjoyed the land till the lease expired on the 1st of March, 1840. If these facts were well established in evidence, then, when the action was brought in 1856, twenty years had not elapsed after the Appellant's title had accrued, and so the statute would be out of the question, for his title was that of a reversioner expectant on the determination of a term of years. The lease could not give any title to Michael Hogan the lessor, though it certainly gave a right to Cox to determine the tenancy at will, and to enter and possess the lands during the term. But until the