

*Judgment of the Lords of the Judicial Committee
of the Privy Council on the appeal of Milson
and others v. The Attorney-General of New
South Wales, from the Supreme Court of New
South Wales; delivered 23rd February 1895.*

Present :

LORD WATSON.

LORD MACNAGHTEN.

LORD SHAND.

LORD DAVEY.

[Delivered by Lord Davey.]

This is an appeal from an Order of the Supreme Court of New South Wales refusing the application of the present appellants for a new trial or to have the verdict found for the Attorney-General (the present respondent) entered for them.

The proceeding in which the Order was made was an Information of intrusion by the Attorney-General against the appellants to recover for the Crown a strip of land of 100 feet in depth and over a mile in length lying between the sea and certain lands (now called "Cremorne") on the north shore of Sydney Harbour. The Information was filed on the 23rd April 1889. The defence raised by the defendants' plea was that more than sixty years before the filing of the Information one James Robertson entered into possession of the said lands with the intention of exercising dominion, and that the said James Robertson and the defendants have since held

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continuous possession adversely to Her Majesty, and further that Her Majesty's title did not accrue within sixty years next before the filing of the Information.

The action was tried by Mr. Justice Foster with a jury of four, who returned a general verdict for the informant with 40s. damages.

It appears from the evidence that by a Crown Grant dated the 1st May 1833 the then Governor on behalf of the Crown granted to James Robertson the lands now called "Cremorne," described as "eighty-six acres of land more or less situated in the County of Cumberland parish of Willoughby" and defined by boundaries, subject to certain reservations which are immaterial for the present purpose, and also reserving to the Crown "all land within one hundred feet of high-water mark on the sea ~~coast and on every creek harbour and inlet."~~

The lands so reserved are the lands in question in the Information.

After certain mortgage transactions, ultimately by a deed dated the 15th July 1853 the lands comprised in the grant were conveyed to the appellant James Milson ("subject to the reservations and conditions in the original deed of grant thereof") and on the 9th August 1887 he conveyed one moiety thereof to the other appellants. The question raised by the pleadings was therefore, whether the appellants and those under whom they claim have had continuous adverse possession of the lands in question for sixty years prior to the 23rd April 1889, the date of the filing of the Information.

A question was raised in the course of the trial whether the Act 9 Geo. III. c. 16 is in force in the Colony. The point appears to have then been dropped, but it is revived in the case of the respondent before their Lordships, and their

Lordships learnt from the respondent's Counsel that they proposed to argue the point and relied upon it. Their Lordships did not find it necessary to call upon the Counsel for the respondent, and being of opinion that the appellants have failed to establish any case for the application of the Act they do not find it necessary to consider or express any opinion upon the question whether the Act is in force in the Colony or not.

The appellants relied principally on the evidence of J. B. R. Robertson (the son of James Robertson the grantee), now about eighty years of age, and of an old witness named Rodd, to establish their contention that James Robertson took possession of the land in question before the 23rd April 1829 and was in possession on that date. Without minutely analysing that evidence their Lordships think it enough to express their opinion that it was insufficient to shew that James Robertson was in possession of any part of the lands on the 23rd April 1829. The memory of the witness Rodd as to dates, it may be remarked, was very vague. Moreover, their Lordships much doubt whether the acts of possession relied on, such as the making of a fence across the neck of the peninsula to keep Robertson's cattle from straying, or the piling of a few stones to form "a rough landing place," would in the circumstances of the land in question be evidence of possession of the whole of the land. But however this may be their Lordships feel no hesitation in saying that the reservation in the deed of grant of 1833 is conclusive evidence that Robertson was not then asserting a title to the land inconsistent with that of the Crown, or (in other words) had no possession of the land adverse to the Crown at that date. It does not matter whether the

reservation is to be read as an exception out of the grant, or the deed is to be read as a grant and re-grant. In the latter case the title of the Crown under the re-grant clearly accrued within the sixty years. In the former case (which their Lordships think the right interpretation) the acknowledgment of the title of the Crown to the fee is altogether incompatible with the freehold being in the defendant, or with his assertion at that time of any claim or title to the freehold. If therefore Robertson was in occupation of the land at that time (which their Lordships do not think is established by his evidence) he certainly had not adverse possession. And in the opinion of their Lordships there was no evidence for the consideration of the jury of any adverse possession in Robertson on or prior to the 1st May 1833.

The new trial was moved for on several grounds, of which three only (numbered 3, 4, and 5) are maintained in the appellants' case. No. 3 and 4 raise the somewhat startling contention that in order to bar the Crown under the Statute 9 Geo. III. c. 16, the possession of the defendant need not be continuous or exclusive. And in No. 5 the contention is raised that if the jury found that Robertson was in possession from 1829 to 1833 they might presume that such possession continued unless it was affirmatively shewn to have been abandoned. Suffice it to say that the jury have not found that Robertson was in possession from 1829 to 1833, and in the opinion of their Lordships the jury could not have properly found upon the evidence that Robertson had possession in fact or (at any rate) adverse possession between those dates.

Their Lordships see no reason whatever to differ from the judgment of the Court below on the construction of the Statute, and they do not

desire to add anything to the reasons given by the learned Chief Justice.

Their Lordships will therefore humbly advise Her Majesty that the Appeal be dismissed with costs.
