Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of the Attorney-General for New South Wales v. *Emily Susannah Love, from the Supreme Court of New South Wales; delivered* 14*th May* 1898.

Present:

THE LORD CHANCELLOR.
LORD MACNAGHTEN.
LORD MORRIS.
MR. WAY.

[*Delivered by the Lord Chancellor.*]

This is an Appeal by the Attorney-General for New South Wales against the Judgment of the Supreme Court of the Colony pronounced on the 18th of February 1896 overruling a demurrer to the Defendant's plea to an information of intrusion to recover certain lands in the parish of Concord and county of Cumberland in the said Colony. The question involved is whether the English Nullum Tempus Act 9 Geo. III. c. 16 is in force in the Colony and applies to land which has never been granted out or dealt with by the Crown.

It does not appear to be denied that the lands in question (described by their abuttals and containing 13¼ acres) were and had ever since the original settlement of the territory of New South Wales been waste lands belonging to and vested in the Crown.

The Defendant by his plea dated 10th April 1895 averred that one Edward J. Keith more

than 60 years before the filing of the information entered on and thenceforward held possession of the lands as his own property that he conveyed his interest therein to William Love who settled the same in trust for himself and his wife Susannah Love and the survivor of them for life and after the decease of the survivor on the Defendant Emily Susannah Love absolutely that the foregoing persons had from the entry of Edward J. Keith to the present time held continuous possession of the lands adversely to Her Majesty and without payment of rent to her and had themselves since the said entry taken and enjoyed the rents revenues issues and profits of the land and that Her Majesty's title to the land did not first accrue within 60 years next before the filing of the information. The plea did not aver that the lands had not been in charge of the Crown within the said 60 years.

On 20th May 1895 the applicant replied traversing the allegations of the plea and also demurred thereto on the grounds (1) that the Act 9 Geo. III. c. 16 is not in force in New South Wales, (2) that assuming it to be in force it does not apply to lands which have never been dealt with by the Crown, (3) that the period of 60 years was not alleged to have run out before the date of the Constitution Act 1855, (4) that the plea showed no title in the Defendant.

Joinder in demurrer having been delivered the demurrer came on for hearing before the Full Court (consisting of Chief Justice Darley and Justices Windeyer and Simpson) by whom judgment was pronounced on the 18th February 1896 in favour of the Defendant overruling the demurrer, Simpson J. stating that he felt very considerable doubt about the matter.

Their Lordships have no doubt that the Judgment accurately describes the importance

of the question here raised to the Colony. The learned Judges say "the earlier grants "issued by the Crown were vague in the "extreme and that it would be in the pre- "sent day impossible to ascertain from the "description in the grants to what lands they "applied." And it is clear that the inference which the learned Judges draw from that state of facts is accurate "that the holders would not "be able to show upon the face of the "instrument a title, and have to rely upon "possession."

Their Lordships do not think that the learned Judges at all exaggerate the mischief and confusion which would arise in the transfer of property if the holders could not depend upon the operation of the Statute in question.

Two arguments appear to have been suggested against the application of the Act to the particular Colony under 9 Geo. 4 c. 83 which *primâ facie* applied the Nullum Tempus Act to the Colony in question as much as if it had in terms re-enacted it for that Colony.

Section 24 of that Act provides "that all laws "and statutes in force within the realm of "England at the passing of this Act" (that is to say in the year 1828) "shall be applied in "the administration of Justice in the Courts of "New South Wales" and it is sought by construction to limit the words "all laws and "statutes" by introducing into the Section the words "having relation to procedure" or some equivalent expression. At least that is the only intelligible mode in which the argument can be supported, because the words which do occur in the Section "in the administration of Justice" would certainly include a limitation of the time within which actions can be brought, and their Lordships are of opinion that the language of

the Section cannot be limited so as to exclude the Statute, which for the reasons pointed out by the learned Judges were and are so important in the administration of justice in the Colony.

The second argument is not very intelligible since the words upon which reliance is placed are words which in the Statute thus applied (9 Geo. III. c. 16) except from the operation of the Statute lands in respect of which the Crown has been answered by rents, revenues, issues, or profits thereof within the space of 60 years next before the issuing or commencing of such action, information, &c. as shall at any times have been duly in charge or stood *in super* of record within the space of 60 years.

The provision is intelligible enough and what in substance it means is that if the Crown is not actually in possession but that in the Crown's accounts some person is charged with the rent which they had not paid and still stand as a Crown debtor in the Crown Books and that condition of things has existed within the 60 years the title by that condition of things, although the possession may have been for 60 years, was not adverse, because during that period something was payable to the Crown which had not been paid.

It is not suggested here that the person in possession filled that character, but the argument appears to be that because there is no such administration in the Colony as involves the peculiar form of Crown accounting thus described the remedial operation of the Statute cannot apply.

Their Lordships are unable to accept any such suggestion. There is no allegation here of any equivalent record against the person who held possession for 60 years and if no modification or limitation such as Section 24 of the Act autho-

rises has been made so as to apply such a mode of accounting to the Crown as might have an equivalent effect the only result would be that there is nothing upon which the exception preserving the Crown's right could operate but certainly would not cut down the enacting part of the Statute or establish that it was inconsistent with the laws of England.

For these reasons their Lordships are of opinion that the Judgment of the Supreme Court was right and they will humbly advise Her Majesty that this Appeal should be dismissed accordingly.