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

Present:

LORD CRANWORTH.
LORD KINGSDOWN.
LORD JUSTICE KNIGHT BRUCE.
LORD JUSTICE TURNER.

THE facts in this case are few and simple. In 1830 Nicolas Devine died intestate in New South Wales, seized in fee of the land which is the subject of this action, and which is situate at Petersham, near Sydney, in that Colony.

He left Edward Devine, his brother and heir-at-law. Edward at the death of Nicolas was living in Ireland, and he continued to reside there till his death, which took place in 1835. He left the Appellant, his grandson and heir-at-law, and also heir-at-law of Nicolas.

The Appellant never was within the Colony of New South Wales till the month of May 1857, the present action having been commenced on the 22nd day of November, 1856.

The action was an action of ejectment brought by the Appellant as heir of Nicolas, to recover the land of which Nicolas his ancestor had so died seized. And he was certainly entitled to succeed in his action unless he was barred by the Statute of Limitations, the action not having been brought until twenty-six years, or thereabouts, after the death of Nicolas.

The Statute of Limitations relative to real estate in England is the 3 & 4 Wm. IV, c. 27. But it

was contended that this is not the statute by which we ought to be guided in deciding this case.

By an Ordinance of the Legislative Council of the Colony, made on the 13th of July, 1837, it was enacted that the 3 & 4 Wm. IV, c. 27, and every clause thereof, should be adopted in the Colony from and after the 1st of August, 1837. And the first question is, whether this adoption of the English statute was within the power and competency of the Legislative Council. That depends on the true construction of the Statute 9 Geo. IV, c. 83, under which the Colony was governed until the establishment of its present Legislature.

By that statute the King was empowered to appoint a Legislative Council in the Colony, and the Governor, with the advice of the Council, was authorized to make laws and ordinances for the good government of the Colony, such laws and ordinances not being repugnant to the laws of England.

In the course of the argument we expressed our clear opinion that, under this statute, the Colonial Legislature had the right to make the Ordinance in question ; and we now advert to the point only for the purpose of repeating our unqualified adherence to the opinion we had already expressed.

Proceeding, then, on the assumption that we are to be guided by the provisions of the 3 & 4 Wm. IV, c. 27, the question is, whether they present any bar to the action.

Nicolas, the person last seized, died in 1830. The action was not brought by the Appellant, his heir, till the year 1856. He claims through his grandfather Edward, whose right accrued in 1830, and as the second section of the statute enacts that no action shall be brought to recover any land but within twenty years next after the time at which the right to bring such action shall have first accrued to the person through whom the Plaintiff claims, it is plain the right of the Plaintiff was barred after 1850, that is, twenty years from the year 1830, unless it is saved by some subsequent clause of the statute, or unless he can show that he does not come within its operation.

The sixteenth section of the statute enacts that if, when the right of any person to bring his action shall have first accrued, such person was under any

of the disabilities there enumerated (including absence beyond the seas), then such person or any person claiming through him, may bring his action within ten years next after the time when the person to whom the right shall have first accrued shall have ceased to be under disability, or shall have died, whichever shall have first happened. This section does not assist the Appellant, for the ten years which it gives him from the death of his grandfather, Edward, through whom he claims, expired in 1845, long before the expiration of the twenty years to which he was entitled under section 2.

But then the Appellant contended that even conceding that the statute became part of the law of the Colony in 1837, still it could not affect his pre-existing rights. The Statute of Limitation in force in the Colony in 1835, when the right of the Appellant first accrued, was the 21 Jac. I, c. 16; and it was argued for him that, under that statute, his right was not barred in November 1856, when he brought his action. And in support of this argument he relied on the case of Doe dem. Evans *v.* Page, reported in the 5 Queen's Bench Reports, 767. There the Court of Queen's Bench held that the 7th section of the statute which defines the time when the right to bring an action against any person who shall be in possession as tenant-at-will shall be deemed to have first accrued, must be held to refer only to persons in possession as tenants-at-will when the Act passed or afterwards; that it could not apply to the case of tenancies-at-will which had expired before the Act passed; and Lord Denman pointed out very forcibly in the judgment which he delivered that this was the natural construction of the words used, and that to consider them as extending to the case of a tenancy-at-will which had expired before the Act passed, would be to adopt a forced construction of the language, which would occasion very great hardship. No such observations are applicable in considering the effect of the 16th section. It is plain that, under that section, the right of the Appellant was barred at the end of ten years after the death of Edward; and as the statute is expressly made to take effect in the Colony from and after the 1st of August, 1837, it is by its provisions, and not

by those of the 21 Jac. I, c. 16, that the rights of the Appellant must be governed.

It is unnecessary, therefore, to consider whether the Appellant is right in supposing that, under the prior statute, *i. e.*, the 21st Jac. I, c. 16, he would not have been barred.

If the Appellant has any hardship to complain of (which, however, we do not at all mean to intimate that he has), it arises not from anything contained in the English statute, but from that statute having been adopted in the Colony without any modifications having reference to the mode in which it would affect existing rights there. We are not, however, satisfied that this arose from anything like haste or oversight in the Legislature. With reference, particularly, to the disability insisted on by the Appellant (that arising from absence beyond the seas), it is by no means impossible that the Colonial Legislature may have thought it inexpedient to make or keep alive enactments on this head, now that Australia is practically only like a distant part of England. We give no opinion on the point made by the Respondent that Ireland, according to the 19th section of the statute, is expressly declared not to be beyond the seas. It is unnecessary for us, in the view we have taken of the case, to give any opinion on this point.

On the whole we think the Judgment below was right, and that the Appeal must be dismissed with costs.