Robinson, C. J.—This case brings up an important question, and one which, cannot I think, be quite satisfactorily disposed of without our knowing whether the Crown had ever in any manner exercised any act of ownership over Point au Pelo Island, and whether it had been acquired by purchase from the aboriginal Indian tribe to which it had belonged.

Our statute of limitations in regard to real property, 4 Wm. IV. ch. 1, does not bind the Crown, nor has any legislative provision that I am aware of been made in Upper Canada, or in Canada since the union, placing any limitation upon the Crown in respect to the time within which its title to real property must, under any circumstances, be asserted.

At common law we have the maxim, *nullum tempus occurrit regi*, which would leave the Crown at liberty to pursue its remedy, by action or information, at any distance of time.

The British statute, 2 James I. ch. 2, never could have affected such a question as here, from the nature of the provisions contained in it, for it could only be applied to actions in respect to estates to which the King had title within sixty years before the passing of that act.

We have only to consider the *Nullum tempus* Act, 9 Geo. III ch. 16, which was passed because the operation of the statute of James the First was spent.

That act, I have no doubt, must be held in force here, under our general adoption of the law of England in all matters relative to property and civil rights, by our statute 32 Geo. III., ch. 1, although the King is not named in the last mentioned statute.

Then what should be the effect of the statute 9 Geo. III., ch. 16, under the circumstances of this case?

According to the statenent of facts placed before us, there has been an actual and uninterrupted possession of the whole of the premises in question by the defendants, and those under whom they claim title, from the year 1789 to the present time. There is therefore no reason for considering the question as applying only to any part or parts of the island, and not to the whole, for the admission is of an actual and continued occupation since 1789 of the whole island. It is not stated whether such occupation was held with the knowledge or in any manner by the sanction of the Crown, or whether it was held adversely under a claim of right, or adversely by persons who acted in the first instance as trespassers, and not claiming title.

Under the statute 9 Geo. III., ch. 16, occupants do not from the mere lapse of time acquire a title, as they might under our statute 4 Wm. IV., ch. 1, by occupying lands owned by individuals for more than twenty years, without payment of rent or written acknowledgment of title. The effect of the statute 9 Geo. III. is simply that the Crown is barred; and that will only be the case where the possession appears to have been adverse, and by a party claiming title, and not entering as a mere trespasser.

Can it be said that this is shewn to have been the fact in regard to this island? The statement is, that Alexander McKee, the first occupant, who held possession in 1789, devised the island to his son Thomas McKee, whose heir inherited it, or claimed to do so, and conveyed it by deed to William McCormick in 1823. It is not stated whether the devise or the deed professed to give an estate in fee, but that I think may be fairly inferred; and it is expressly admitted that there has been no intermission in the occupation of the premises.

Supposing that the British statute 9 Geo. III., ch. 16, is in force here by reason of our adoption of the English law, as I think I may say it has always been assumed to be, though there seems to have arisen no case in which a court has been called upon to apply it, some proof, I think, should be given in any such case that the possession has been adverse to the Crown, and not permissive, and has not been a mere continued possession taken in the first instance by a mere intruder not asserting title. (See *Doe dem. William IV.* v *Roberts*, 13 M & W. 520.) I cannot say that I see in the case stated anything that would warrant us, standing in the place of a jury, in coming to that conclusion.

In the next place, I think that to enable us to apply the statute 9 Geo. III., ch 16, the case should be one in which the Crown might in the nature of things have had it in its power to set up in its favor one or other of the exceptions contained in the statute; namely, that within the sixty years His Majesty or his successors had, "by force or virtue of his right or title to the land, been answered the rents, issues, or profits of the land." or that the land "had within that time been duly in charge of His Majesty, or some of his predecessors, or shall have have stood *insuper* of record within the space of sixty years." It is only, I think, in regard to lands of which that might be predicated that this statute can have been intended to apply.

Now if in 1789, or at any time more than sixty years ago, this had been part of the lands of the Crown from which rents and profits had been received for the Crown, or might in the ordinary course of things been received, amd yet it had been shewn that for sixty years no rents and profits had been in fact received, nor the land in any way put in charge to or for the Crown, the meaning of which is explained in some of the provisions of the act, then the Crown might fairly have been deemed to have abandoned its right in favour of the person who had been left so long unmolested in the possession, though even the nature and origin of that possession would require, I think, to be made to appear more distinctly than it does in the case before us.

But for all that appears this island had not for sixty years been part of the organized territory of the province, in which the title of the original Indian inhabitants had been extinguished, or if the Indian title had been extinguished, the land may never have been surveyed and laid out by the Crown with a view to granting it, but may have been suffered to lie like other waste lands from which the Crown had neither derived either rents or profits, and which can never be supposed to have been under the actual supervision and charge of its officers. As to all waste lands so situated I apprehend the entry of any stranger, and his continued possession for sixty years, would not, under the statute, bar the Crown, and certainly not unless it were shewn that the Crown knew of such occupation sixty years ago, and that it was taken adversly to the Crown, and with the intention of setting up a title against the Crown. That, in my opinion, would be the case in regard to any trespasser, or succession of trespassers, who might for sixty years past have been occupying lands in the remote parts of Upper Canada, north of our lakes; and it would make no difference if there had been a succession of trespassers who had pretended to convey the land from one to another; and if so, we cannot on any principle draw a distinction between lands so situated and lands similarly circumstanced lying nearer to the settled portions of the province.

This land, it is stated in the case, has never been assessed, from which it is reasonable to infer that it is not land which has yet been made liable to assessment. For anything that appears, this may have been regarded and treated by the Crown as Indian land, in which the right of the natives had not been extinguished, though it is by law a part of the township of Mersea as the case states and in that case, or even if it formed part of the waste lands of the Crown, to which no tribe of Indians could pretend any claim, but which had never been organized by the Crown, and surveyed and laid out with a view to its being occupied, I do not think the *Nullum Tempus* Act of 9 Geo. III. could be properly held to apply to it. We could draw no distinction founded upon the proximity to settlement or comparative remoteness, but, so far as the application of legal principles is concerned, must look as we should upon any other waste land of the Crown which had never by any particular act been reduced into possession of the Crown, as lands from which rents or profits might be derived. To hold otherwise would be inconsistent, I think, with the various statutes which have from time to time been passed for the protection of the waste lands of the Crown, and of what are called Indian lands, from trespassers, The Indians could not have adopted any legal proceedings for dispossessing trespassers, either as holding in a corporate capacity or otherwise; and it would seem unreasonable, on the other hand, that the time should be considered as running so as to bar either the Crown or the Indians, while the Crown could not be held to be acquiescing in any interruption of rents or profits, which it had never at any time been receiving, or in a position to receive.

I do not doubt, when I consider the position of this island on the southern frontier of Canada, that it must have been known to the government in fact that McKee and McComick and his family had held the long possession which is admitted. If the govern-