ration of the term thereby granted, should have paid the rent reserved, and have performed the covenants on his part to be performed, and if it should be the request of the lessee, then the lessor covenanted with the lessee to grant unto him a renewal of the said lease for other five years, to commence from the termination of the term thereby demised, at the rent of £27 10s. per annum. The plaintiff's counsel claimed a verdict, on the ground that the first term of five years having elapsed, the plaintiff had a right to recover the possession, the defendant's remedy being in equity for specific performance, or for an injunction to restrain an action at law. The defendant's counsel moved for a nonsuit on the evidence, and Mr. Gwynne, being of opinion that at all events a demand of possession was necessary, nonsuited the plaintiff, with leave reserved to set it aside and enter a verdict for plaintiff, with nominal damages, if the court should be of opinion that the action was sustainable on the evidence. The defendant offered no evidence of a request for a new lease.

In Michaelmas term, *Cosens* moved to enter a verdict for the plaintiff, pursuant to leave reserved. He cited Adams on Ejectment, 141–2, 129; Doe dem. Knight v. Quigley, 2 Camp. 505; Doe Richardson v. Dafoe, 4 U.C.R. 481; Doe Hollingsworth v. Stennett, 2 Esp. 717; Doe Roby v. Maisey, 8 B. & C. 767; Thompson v. Guyon, 5 Sim. 65; Doe Maitland v. Dillabough, 5 U.C.R. 214.

Dempsey and *Blevins* showed cause, citing Platt on Leases, I. 707,733; Statham v. Liverpool Dock Co'y, 3 Y. & J. 567.

DRAPER, J., delivered the judgment of the court.

Looking at the words of the 6th section of 14 & 15 Vic. cap. 114, it is plain that on the entry of appearance the cause is at once considered at issue, and the record for trial is the first place in which the formal plea given by statute appears. We think, therefore, no objection can be now properly urged to the adding the plea at the trial. It was amending a mere matter of form, causing no possible prejudice to the defendant.

The whole question as to whether the plaintiff's rule should be made absolute, turns on the necessity for a demand of possession.

The second term of five years was not actually created. No new lease was requested or made. It all rested in covenant, to lease on the defendant's request. Is that a defence in ejectment, brought after the first term has expired? We think not, for it is only an equitable interest or right, but the legal estate is in the lessor. If the tenant had proved a request it might probably have made this difference, that his possession would be referable to the agreement, and he could not be ejected without a demand of possession. But here, for all that appears, he has made no request, and the option is his whether he will take a new lease or no. It seems to us, therefore, that he is in the position of a tenant whose term has expired, and who is not entitled to a demand of possession.

Rule absolute.

KETCHUM v. MIGHTON ET AL.

(Hilary Term, 19 Vic.)

(Reported by C. Robinson, Esq., Barrister-at-Law.)

Statute of Limitations—Want of possession.

The right to land is not barred by forty years want of possession, unless some other person has also been in possession for that time.

In this case, where the plaintiff had been out of possession more than forty years, and had asserted no right, but declared that he owned no land in the township, and the deed under which he claimed had a suspicious appearance, the jury having found in his favor, a new trial was granted.

(14 Q. B. R. 39.)

Ejectment for lot 24, in the third concession of Pickering. The writ issued on the 4th of February, 1854. The defendant, Mighton, appeared by one attorney and defended for the whole of the premises. The other two defendants appeared by another attorney, and also defended for the whole of the premises.

The case was tried at Whitby, in November last, before *Draper, J.* The plaintiff produced an exemplification of a patent from the crown, dated 8th of July, 1799, granting the lot in question to "John Caldwell, U. E." in fee. 2nd, A deed, bearing date the 1st of December, 1798, made between John Caldwell, of the township of Ernestown, Midland District, wheel-maker, and himself, whereby the said John Caldwell, in consideration of £10, bargained, sold, remised, released, aliened, and confirmed to him (plaintiff,) the lot in question, *habendum* in fee, with a covenant of warranty. To sustain this deed, and to establish the identity of the John Caldwell by whom it purported to be made, the plaintiff gave proof of the hand-writing of the subscribing witnesses, and that they lived near John Caldwell, who lived and died in Ernestown: that he was married to Julianna, daughter of one Jacob Miller; and a copy of a petition of John Caldwell, a loyalist, was put in, in which he, in November, 1797, petitioned for a grant to his wife Julianna, and to his child Jacob, born before 1789, and stated that he had drawn but one hundred acres, and prayed for his additional land as a settler, to which petition was appended an affidavit of Jacob Miller, father to the petitioner's wife, and upon which petition an order in council was made, granting to himself two hundred acres to close all claims, and for his wife four hundred acres, as the daughter of a subaltern. A son of this Caldwell proved that they were aware, in the family, that his father had drawn a lot in Pickering, but they never looked after it, as they expected it was sold to the plaintiff. For the defendant, it was contended that the plaintiff's title commenced, and his right accrued, more than forty years before this action was instituted, and that consequently his right and title were extinguished. Witnesses were also called to prove that in 1810, the plaintiff having sold another lot in Pickering, near the lot in question, had repeatedly asserted that he owned no land in Canada except the lot he had then sold and two hundred acres in the township of Haldimand; and also, that parties had commenced about 1832 or 1833, to clear on this lot an acre or so: that since 1836 and 1837 the lot had been a good deal cleared off. The objection as to the forty years' possession was overruled *pro formâ*, leave being reserved to move to enter a nonsuit if it should be found entitled to prevail. The jury were strongly urged to reject the deed on which the plaintiff relied, because on the face of it, as was contended, it bore marks of fabrication and fraud. They however gave a verdict for the plaintiff.

In Micaelmas term, *Bell* obtained a rule *Nisi* for a new trial because the verdict was contrary to law and evidence; or for a nonsuit on the point reserved. He cited Doe Corbyn v. Bramston, 3 A. & E. 63; Scott v. Nixon, 3 Dru. & Warr, 388; Smith v. Lloyd, 9 Ex. 562.

Vankoughnet, Q.C., showed cause, citing Doe Maclem v. Turnbull, 5 U.C.R. 129; Keyse v. Powell, 2 E. & B. 132; Cannon v. Remington, 12 C.B. 1; Remington v. Cannon, Ib. 18.

DRAPER, J., delivered the judgment of the court.

The case of Smith v. Lloyd (9 Ex. 562) settles conclusively that the statute in England similar to ours of 4 Wm. IV., cap. 1, does not apply to cases of want of actual possession by the plaintiff, but to cases where he has been out and another in possession for the prescribed time: that there must be both absence of possession by the person who has the right, and actual possession by another, whether adverse or not, to be protected, to bring the case within the statute. I must admit I had a contrary impression as to a discontinuance, but the judgment of the court gives no countenance to any such distinction. So far as the point reserved therefore is concerned, the plaintiff is entitled to judgment, for all that was in question was the effect of the plaintiff not having taken actual possession for more than forty years after his title.

The question as to the authenticity of the plaintiff's title as to all matters of fact was submitted to the jury, and no other objection was raised to it. The appearance of the deed was commented on as leading to the conclusion that it was a fabri-