by the patentee before his own legal title accrued, and such a grant as would support an estoppel working in interest after the completion of the patent. But the jury declined to find such a grant, and have found for the plaintiff, which we apprehend is according to the legal right, however hard it may seem.

We see nothing to found an estoppel upon—no deed made at any time; and we do see what it was that McLeod did hold—a mere writing not under seal, and not such in its terms as would support an estoppel. The only question, as it seems to us, is, whether a grant from the Crown ought to have been presumed in support of the long possession—that is, a grant prior to the one which we see; we cannot say that we think it should, and we still continue to entertain the opinions which were expressed on that point in the case in this court, of Doe dem. Finn v. Fitzgerald (1 U. C. R. 70.)

If, however, it could have been presumed, the jury did not presume it, and we cannot insist on their doing so. It is, besides, rather a strong circumstance that the brother of the defendant's landlord—that is, the other son of Hugh McDonell,—has so far acquiesced in the plaintiff's title, that he has compromised with him, and paid him for the half of the lot which he was occupying.

If that was just in his case, there is nothing to show that the plaintiff's title to the other part of the lots did not stand on as good a ground. It may be that McLeod had not made the payments which he was to have made for the land to the plaintiff's father; or it may be that the other son of Hugh McDonell submitted to pay a sum of money merely to save the trouble and expense of an uncertain law suit. However that may be, the verdict that has been rendered seems to us in accordance with the law of the case, and certainly cannot be ascribed to and misdirection, for the learned Chief Justice was desirous of giving to the defendant the full benefit of all that could be urged in his favour.

We see no ground on which we can set aside the verdict; for the cases cited by Mr. Brough of England dem. Syburn v. Slade (4 T. R. 682), and Doe dem. Bowerman v. Syburn (7 T. R. 2), cannot be applied under the circumstances of this case. There it was quite clear that no beneficial interest could have been remaining in the party after a certain time; and the question was whether he should be presumed to have made a conveyance which it was plainly incumbent on him to have made many years before, and the making of which was a mere matter of form. Here we know not what may have intervened: the consideration money may never have been paid by McLeod; and we cannot, as a court of law, say that the heir of the patentee was bound to confirm a disposition attempted to be made by his ancestor by a writing not under seal, and that he must therefore be presumed to have done so.

Rule discharged.

McWHIRTER v. BONGARD.

(Hilary Term, 19 Vic.)

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

Division Court—Prohibition.

Held, (affirming Bongard v. McWhirter, 12 U.C.R. 143) that under 16 Vic., cap. 177, sec. 9, a suitor in the Division Court, who desires to remove the cause to another division, must apply to the judge who ordinarily would have cognizance of the cause, and not to the judge of the division to which he desires to transfer it; but,

Held, that in this case the question was not open for decision, the only issue taken being as to which of the two divisions was most convenient to try in, and upon that point the decision of the judge who had granted the order was decisive.

(14 Q. B. R. 84.)

The plaintiff in this case had applied for a writ of prohibition, but the point involved being considered by the court to be one of some doubt, the writ was refused and he was ordered to declare in prohibition, which he now did accordingly.—See Bongard v. McWhirter, 12 U.C.R. 143.

The declaration alleged a writ of prohibition to John Bongard to cease further to prosecute his suit against David McWhirter in the 8th Division Court of the county of Prince Edward.

Plea—averring, that before defendant brought said suit—viz.: on the 1st of March, 1851—he resided within the limits of the 8th Division Court of the county of Prince Edward; and that the plaintiff resided within the 9th Division Court of the united counties of Frontenac, Lennox and Addington, and so resided when the judge's order was obtained; that said 8th and 9th divisions are adjoining divisions; that it was more convenient for plaintiff, defendant, and their witnessess, to attend at the 8th than at the 9th Division Court; that defendant obtained from David Lockwood Fairfield, Esq., judge of the County Court of Prince Edward, a special order to try the suit in the 8th Division Court.

Replication—That it was not more convenient to go to the 8th Division.

At the trial, at Picton, at the Spring Assizes of 1855, *Mr. Justice Burns* held that the issue was improperly taken on a matter in which the law gave the judge discretion, and entered a verdict for the defendant, reserving "leave to the plaintiff to move the court to enter a verdict and judgment for the plaintiff, if upon the facts disclosed upon the plea and upon his notes, the court should be of opinion that the plaintiff was entitled to judgment, without reference to the immateriality of the issue raised: in fact, to decide as if upon demurrer.

It was contended on the part of the plaintiff, that the judge of the County Court of the county of Prince Edward was not authorized by law to grant the order, which should have been granted by the judge of the County Court of the united counties of Frontenac, Lennox and Addington.

Patterson for the plaintiff. *Fitzgerald*, contra.

ROBINSON, C. J., delivered the judgment of the court.

Upon the question which gave rise to this proceeding, we retain the opinion expressed in Bongard v. McWhirter (12 U. C.R. 143.) We think, as the law then stood, it was to the judge who ordinarily would have cognizance of the cause, that application was to be made by the suitor who desired to remove the cause to another division, and not to the judge of the Division Court, to which it was the desire of the suitor to have the cause transferred. The 69th rule of the judges of the Division Courts promulgated in 1851, so far as it could be allowed to affect this question upon the construction of the statute, is only prospective, and can only as to past acts be material, as being an indication of the footing on which the judges of the Division Courts thought it best that the matter should rest.

But really the question on the proper construction of the statute 16 Vic. is not open to us, for the reason which struck Mr. Justice Burns at *Nisi Prius*, when the issue upon this record was brought before him to be tried. No point was raised in this prohibition suit upon the legality of the proceedings for effecting the removal of the cause from the 8th to the 9th division, but merely upon the question of fact, which of the two divisions *was the one most convenient* for the cause to be tried in. We agree with the learned judge that the decision of the judge who made the order settled that point, if he was the proper person to apply to, which is not made a question upon this record. The jury were asked to determine the question of convenience, after an order had been made by the judge of the Division Court, determining that the 8th division was the most convenient court.

It is not denied in the record that the judge who made the order was the proper person to apply to, and that point not being denied, then his discretion could not be overruled by a jury.

We think, therefore, the rule for setting aside the verdict for the defendant should be discharged, for we cannot deal with the case, even by consent, without regard to the nature of the only issued raised, and the verdict upon that issue cannot be held by us to be contrary to evidence.

Rule discharged.