At the trial at Cornwall, before *Macaulay, C.J.*, it appeared that a patent issued for this lot 12, on the 28th of June, 1837, to Donald McDonald, describing him as formerly of North Britain, but now of the township of Cornwall, in the eastern district of Upper Canada; and the plaintiff proved that he was the eldest son and heir of the patentee, who died in the township of Roxburgh, five or six years before the trial.

On the defence there was produced a certificate from the Clerk of the Peace of the Eastern District, the late Mr. Farrand, dated 1st February, 1796, stating that he had received into his office on that day from Alexander McLeod a land-board certificate of the 25th of June, 1794, for lot 18, in the 15th concession of Lancaster, located to the said *Alexander McLeod;* and also a certificate, dated 23rd of November, 1787, of Deputy Surveyor General Collins, for lot No. 12, in the 5th concession of Lancaster, 200 acres, located to Donald McDonald, with a writing at the foot of the certificate, dated 18th of January, 1796, purporting to be a sale and transfer of the last mentioned lot, by the said Donald McDonald to the said Alexander McLeod, for the consideration of £25 therein acknowledged to have been paid.

Defendant also produced an instrument in writing, not sealed, bearing date 22nd of January, 1798, purporting to be a sale by Alexander McLeod to Donald McDonell of Glenoir, in the county of Glengary, and township of Charlottenburg, (not the patentee) of lot 12, in the 5th concession of Lancaster. The vendee by this writing agreed to pay for the lot £50—viz., £10 on the first of May following, and £10 in each of the four following years, on a day named—at least that was evidently the meaning of the instrument, though it was most inaccurately expressed; and it was stipulated that McLeod should receive for himself three-fourths of whatever hay might be collected on the aforesaid premises (not said for what term of time,) and to leave the said premises under such fences as might be deemed sufficient. On this agreement was endorsed a receipt for £10.

The Donald McDonell mentioned in the instrument lived on the lot, having succeeded Alexander McLeod in the possession of it; and it appeared from the evidence that this Donald McDonell died upon the lot, leaving Hugh McDonell, his eldest son and heir, who succeeded him in the possession, and on his death, his son and heir, Alexander McDonell, went into possession. He seemed to have removed to Lower Canada, leaving the defendant, who was his father-in-law, in possession of the lot. So that it appeared that the Donald McDonell who purchased from McLeod, the assignee of the original nominee of the crown, and his family, had been in possession of this land from the time of his purchase in 1798, or soon after.

It was proved by a witness, Archibald McDonell, who was also a son of Hugh McDonell, and a brother of the Alexander McDonell under whom the defendant appeared to hold, that his father, Hugh McDonell, the son and heir of Donald McDonell, vendee of McLeod, (not the patentee) went to Donald McDonell, the patentee, who sold his right to McLeod, before the patent was issued, and endeavoured to obtain a deed from him, but it seemed he failed; and afterwards Archibald McDonell, the witness, who had obtained possession of the east half of the lot from his father, Hugh McDonnell, also applied to the same Donald McDonell for a confirmation of his title, but did not receive it, as the latter refused to give it unless he was paid £60. After his death, which occurred six or seven years ago, the same Archibald McDonell applied to his heir, the present plaintiff, and upon terms made with him succeeded in getting a conveyance from him.

The defendant in the present action endeavored to maintain his possession of *the west half* upon the evidence, without the aid of any confirmation of title from the patentee or his heir.

The learned Chief Justice of the Common Pleas (*Macaulay C.J.*) before whom the cause was tried, stated to the jury that what the plaintiff relied upon was that the patent having issued to the original nominee of the Crown, the plaintiff's father, in 1837, about eighteen years only before this action was brought, and it not being shown that up to that time the estate was not in the crown, there could be no title made out under the Statute of Limitations by showing twenty years' possession; but that it was contended that in support of so long a possession as fifty years a grant from the patentee might be presumed to have been made before the patent—such a grant as would operate against himself and his heir by estoppel; and being inclined to countenance the defence as much as possible in a case in which justice seemed to be so clearly on the side of the defence, he left it to the jury to find upon the evidence of possession and the other facts proved, whether the patentee did make a grant to McLeod, or the other Donald McDonell, McLeod's assignee, and the father of Hugh McDonell. He left it to them to find whether the plaintiff's father was certainly the locatee of the lot, and the person intended by the patent to be the grantee. This charge was objected to by the plaintiff's counsel.

The jury found in favor of the plaintiff, the heir of the grantee of the Crown.

Brough obtained a rule *nisi* for a new trial, the verdict being contrary to law and evidence and the judge's charge.

McDonald, Q.C., showed cause, citing Connell v. Cheney, 1 U.C.R. 307; Doe McGill v. Shea, 2 U.C.R. 483; Doe Charles v. Cotton, 8 U.C.R. 313.

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

This case may be shortly stated thus:—Donald McDonell "from North Britain," was the original nominee of the Crown, and received a land-board certificate for this lot. In January, 1796, he sold the lot to Alexander McLeod, as the certificate of the Clerk of the Peace shows—that is, he transferred his certificate to him; and in January, 1798, McLeod sold or contracted to sell the lot, by a writing not under seal, to Donald McDonell of Glenoir, who was to make certain annual payments.

Whether these have been made or not does not appear; but the vendee went into possession, and he and his descendants, and the defendant holding under them, have held uninterrupted possession ever since; that is, for more than fifty years.

Then we see that in 1837 a patent first issued from the Crown for the land, granting it to the original nominee, Donald McDonell, who was then still living; and his son and heir has brought this action against the defendant in possession under the title derived from McLeod, and has obtained a verdict in his favour.

So it is the heir of the person who assigned to McLeod, (though not by deed) bringing ejectment against the person holding under the heir of McLeod's assignee.

If the assignment to McLeod had been such at the time as could convey a legal estate, there would be no question that the plaintiff would have no right to recover; but when McLeod took the writing, such as it was, from Donald McDonald the owner, his grantor had no legal estate to convey, for the title was then in the Crown; and, moreover, if he had held the legal title, it would not have passed by that writing not under seal.

The possession of fifty years held by defendant and those under whom he claims, or any possession above twenty years, would bar the plaintiff's title if the patent had issued more than twenty years ago; but there can be no bar, and the legal title under the patent cannot be held to be extinguished under the Statute of Limitations, without allowing the statute to run while the estate was yet in the Crown. This we have always held to be inadmissible.

The learned Chief Justice struggled to support the defendant's long possession, as it was natural and proper that he should; and he left it to the jury to presume a grant made