objection is precluded by the forty seventh section of the statute 4 Wm. IV. ch. 1.

SHERWOOD, J. and MACAULAY, J. of the same opinion.

Per Cur.—Rule discharged.

DOE EX DEM. JACKSON v. WILKES.

A grant from the Crown must be by matter of record under the Great Seal, and an exemplification under the Great Seal of a grand invalid in its inception, will not have the effect of making such grant valid by relation, from its commencement.

Ejectment brought to recover possession of a small tract of land, one-fifth of an acre, in the village of Brampton. The lessor of the plaintiff proved his title by producing letters patent from the crown, granting him the premises in fee simple. The date of the patent was 5th March 1834, and upon the face of it, it appeared to be made in confirmation of a previous sale of the land to the grantor, through the Commissioner of Crown Lands, for the sum of 10*l.* 5*s.* To rebut this title the defendant produced an instrument, exemplified under the great seal of this province, of which the following is a transcript :—

[GREAT SEAL.] UPPER CANADA.

" WILLIAM THE FOURTH, *by the Grace of God, of the United Kingdom of Great Britain and Ireland, King, Defender of the Faith, &c.*

" To all to whom these presents shall come, Greeting :—

" Know ye, that amongst the rolls and records in the Secretary and Registrar's Office, in the province of Upper Canada, Lib, A. fol 8, it is thus contained:—Frederick Haldimand, Captain General and Governor-in-Chief of the province of Quebec and territories depending thereon, &c. &c. &c., General and Commander-in-Chief of His Majesty's Forces in said province, and the territories thereof, &c. &c. &c. Whereas his Majesty having been pleased to direct that in consideration of the early attachment to his cause manifested by the Mohawk Indians, and of the loss of their settlement which they thereby sustained, a convenient tract of land under his protection should be chosen as a safe and comfortable retreat for them and others of the Six Nations who have either lost their settlements within the territory of the American States, or wish to retire from them to the British; I have, at the earnest desire of many of these his faithful allies, purchased a tract of land from the Indians situated between the lakes Ontario, Erie and Huron ; and I do hereby, in his Majesty's name, authorise and permit the said Mohawk Nation

and such others of the Six Nation Indians as wish to settle in that quarter, to take possession of and settle upon the banks of the river commonly called Ouse or Grand River, running into Lake Erie, allotting to them for that purpose six miles deep from each side of the river, beginning at Lake Erie and extending in that proportion to the head of the said river—which they and their posterity are to enjoy for ever.

Given under my hand and seal at arms, at the Castle of St. Lewis, at Quebec, this 25th day of October 1784, and in the 25th year of the reign of our sovereign lord George the Third, by the Grace of God of Great Britain, France and Ireland, King, Defender of the Faith, and so forth.

[Signed,] FREDERICK HALDIMAND."

Registered, 26th March, 1795.

(Signed) WM. JARVIS.

By His Excellency's command.

(Signed) R. MATTHEWS.

"All which we have caused to be exemplified.

"In testimony whereof we have caused these our letters to be made patent, and the great seal of our said province to be hereunto affixed. Witness our trusty and well-beloved Sir John Colborne, K.C.B., lieutenant-governor of our said province, and major-general commanding our forces therein, this 28th June, 1834, and fifth year of our reign. (Signed) J. C."

It was then proved that the Six Nations Indians had enjoyed the lands described in this instrument for more than forty years; that the premises in question composed part of the tract; and that individual Indians had leased portions of the tract to different persons. There was also produced a letter, admitted to be under the signature of Mr. Goulburn, under-secretary of state for the colonies in 1816, addressed to Captain Norton, an Indian agent, in which it is stated that "there is no difficulty on the part of his Majesty's government, to admit that the grant on the Grand River, which was after the peace of 1783 made to the Five Nations and their posterity forever, is a grant as full and as binding upon the government as any other made to individual settlers."

A verdict was directed to be taken for the plaintiff, with leave for the defendant to move to enter a nonsuit if the court should be of opinion that by reason of the instrument under the hand and seal-at-arms of General Haldimand,

and the possession of the Indians under it, the King was disabled from making the grant under which the lessor of the plaintiff claims.

Draper accordingly obtained a rule nisi in Michaelmas Term last, which was argued in Hiliary Term by the *Attorney-General* for the plaintiff, and *Baldwin* for the defendant.

ROBINSON, C. J.—Nothing is reported to have been given in evidence at the trial, from which it could be inferred whether the defendant was or was not in possession by privity with the Six Nations Indians, or whether they countenanced the defence and objected to this action upon the idea that the Crown had done or was attempting anything in opposition to their rights, and inconsistent with the former act of the governor of the province of Quebec, under which the Indians had originally taken possession. From what passed at the trial, there was no ground for assuming this; and upon the argument of this case last term, I considered the legal questions which have been agitated to have been raised by objections purely technical, taken by the defendant to the title of Johnson, the lessor of the plaintiff, and urged for the purpose of maintaining himself in possession without its being attempted to be shewn, and indeed without its being pretended that the Crown, in what they have latterly done, have been acting adversely to the Indians, or with a view to deprive them of any advantage they could claim under the instrument of Governor Haldimand.

The defendant showing no privity between himself and the Six Nations Indians, and being, for all that appears, a stranger to any title that could be set up under the act of Governor Haldimand, does what any defendant in ejectment may do, generally speaking—that is, he takes whatever legal exceptions he can to the title set up for the plaintiff; and he maintains that by the instrument made by General Haldimand as governor of the province of Quebec, the King was divested of the title of the premises in question, and was disabled to make the grant which he assumed to make to the lessor of the plaintiff in 1834.

To this it is answered, that the instrument produced can have no legal operation to pass an estate from the Crown—first, because it is not under the great seal, and not matter of record; secondly, if it were indeed a patent under the great seal, it woul be void for uncertainty as to the parties who are to take under it, the grant not being made to any corporate body, nor to any person by name in their natural capacity; thirdly, that no estate is conveyed by the words of the instrument, which amounts merely to a license to the Six Nations of Indians to enjoy the land at the pleasure of the Crown.

The defendant, on the other side, maintains, that the instrument is in fact matter of record, being made so by its being recently exemplified under the great seal; that the grantor can make title under the enrolment, and cites 3 & 4 Edw. VI. ch. 4, as it seems from the note on the instrument, as well as from the certificate exemplifying it, that it has become matter of record; that it is not indispensable, with respect to all grants from the Crown, that they should be under the great seal, for that leases may be made in England under the exchequer seal)cites Com. Dig. Patent); that in the colonies, grants from the Crown may be good, though not under the great seal, if they are sanctioned by usage in the particular colony (Chalmers' Opinions on Cases from the Colonies, vol. 1, p. 241); that it does not appear to the court that there was a great seal in use in Canada when this instrument was made (1784); and that whether a great seal was necessary to grants of land, and whether the king could only grant by record in the province of Quebec, must be decided by the laws of Canada at the time the instrument was executed—that is, by the French law in force then—and not by the law of England, which, in civil matters, was suspended by the introduction of the law of Canada under statute 14 Geo. III. c. 83.

As to the objection, that the grant is bad for uncertainty in respect to the grantor: that it is at least certain as to the Indians, who went into actual possession and lived upon it, and that it would be good as regards their interests, though there might be uncertainty as to other persons who might

claim; that the Indians were by this grant made a corporate body and enabled to take (1 Roll. 513) and hold in a corporate capacity, although no corporate name was expressly given to them. That if the grant did but give a right to hold generally, without strict legal words of inheritance, the grantor had a life interest, during the continuance of which the King could not make a grant to others; and that if the Indians or any Indians have under Governor Haldimand's grant a right to hold possession, that right must prevent any other person from recovering in ejectment, which implies a right to the immediate possession.—1 Inst. 86.

In my opinion, the case is clearly in favour of the King's right to make the patent in 1834. Upon the first objection to the instrument of Governor Haldimand—for it is impossible to adjudge, upon any legal principle or upon any authority, that such an instrument could divest the crown of an estate—it is true, that by the law of England leases may be made of lands of the crown under the seal of the Court of Exchequer, either for years or for life, because such, it is said, has been the common usage of the Court of Exchequer, "and the customs and usages of every of the King's Courts are as a law, and it would lead to great difficulty and confusion if the multitude of leases which have been so made were to be held void."—2 Co. 16; Cro. Car. 99, 513, 528; Cro Jac. 109; Plow. 320, b.

But it is impossible to bring this case within the reason or authority of Exchequer leases of crown lands, for here neither is the great seal used nor any seal answering to that which, upon the authority cited, can be admitted as equivalent. The seal at arms of Governor Haldimand is no seal of the King, and it is not shewn that in point of fact it was ever pretended in any other case to dispose of crown lands by an instrument under the seal at arms of the Governor of Quebec. Again, this instrument does not profess in its terms to be a lease for years or for life; but if it be meant to convey any legal estate, it clearly was not intended to limit such estate to the life of the grantee. The general principle is clear, that no grant of the King is avail-

able or pleadable unless under the great seal, and it is equally clear that this case cannot be brought within the principle relied upon. Com. Dig. Patent C. 2; 2 Roll. 182, l. 5. The laws of Canada were spoken of in the argument. It was not shewn, that according to those laws the Governor of a colony, acting in the name of the King, could under his own seal at arms grant away the lands of the crown; but it is not important to discuss this point, for the question must be resolved by the laws of England, and not by the French law as it prevailed in Canada upon the division of the Province of Quebec. King George the Third, in the royal proclamation of 1763, introduced the law of England into the newly conquered country, and the same proclamation, in speaking of grants of land to be made in the Province of Quebec, uses the term *patent;* and no doubt, according to the law of England, it could only be by patent that lands could be granted. It is true that before 1784, when this instrument was made, the statute 14 Geo. III. c. 83, intervened, which enacted that thereafter, "in all matters of controversy relative to property and civil rights, resort shall be had to the laws of Canada, as the rule of decision of the same." But if it were otherwise clear, that under this form of words the laws of Canada could be considered as introduced in such a manner as to apply to the exercise of the King's prerogative in granting lands, binding his Majesty by whatever laws the French King had been bound, which I do not at present assent to, yet the ninth clause of the statute prevents such an application of the previous words, for it expressly declares "that nothing in this Act contained shall extend, or be construed to extend, to any lands that have been granted by his Majesty or shall thereafter be granted by his Majesty, his heirs and successors, to be holden in free and common soccage.' If without this clause the application of the laws of Canada would be extended to make valid this instrument of Governor Haldimand, which otherwise would convey no interest, it is clear that the ninth clause would prevent the laws of Canada from being so extended as to defeat the subsequent grant in free and common soccage, which has been made to Jackson, the lessor of the plaintiff.

We are thrown upon the law of England for the decision of this question, and by that law (and I imagine, not less by the laws of Canada), it is plain no estate has been created in crown lands by this grant, if it can be so called, which Governor Haldimand has assumed to make of them under his seal at arms. The want of the great seal is in my opinion fatal. It has been argued that the recent exemplification of this instrument, under the great seal of the province, has made it matter of record, but the question is, whether, when the patent was issued to Jackson in March, 1834, the King was or was not seized of the land? That he was so seized is plain, unless the instrument under Governor Haldimand's seal at arms had divested his Majesty of the estate. If that instrument could only derive validity from its being exemplified under the great seal, then the exemplification came too late, for clearly the principle upon which the enrolment of a bargain and sale may have an effect retrospectively, cannot apply in such a case, for no estate passed under that instrument at the time of its execution.—Com. Dig. Confirmation D. 5. But there can be nothing in this argument, in any view of it. The principle is—that the King can neither grant nor take an estate, but by matter of record. In respect to titles made to the King, the question of the necessity of the great seal does not occur, and it is sufficient to shew that the conveyance is by matter of record; but with respect to grants made by the King, the question is not merely whether the instrument of conveyance can or cannot be made out to be matter of record; the grant must be shewn to have been made under the great seal, and the exemplification under the great seal of an instrument in itself insufficient for the purpurpose, cannot change the nature of the instrument.

The 3 & 4 Edw. VI. ch. 4, was referred to—but nothing can be clearer than that that statute and the 13 Eliz. ch. 6, explaining it, can have no such effect as to make the exemplification of an instrument, which is not a patent, supply the place of a patent. It proves the very contrary, for it shews that no patent existed. Those statutes do nothing more than enable persons claiming by force of any patents

made to them, to make title by the enrolment of such patent. Enrolling an instrument such as that produced, I take to be merely a nugatory act. Whatever may have been the intention of the Colonial Government of Quebec at the time the instrument was made, which, as far as has been shewn to us, is without precedent; it is impossible to give it effect, as divesting the King of his estate, without admitting that Governor Haldimand, under his hand and seal of arms, could have alienated all the Crown lands in the province without the intervention of those forms which are necessary to the perfecting of a patent, and which are designed to afford protection both to the crown and the subject.

It is not necessary to enter into a particular consideration of what might be the legal operation of this instrument, supposing it to have been made in such a manner as to be binding on the crown; I must say, however, that the letter which was produced, under the signature of Mr. Goulburn, can have no effect on the judgment of this court upon the legal construction or effect of this act of Governor Haldimand. It states very openly and candidly what effect the Government are willing to concede to it, so far as their rights and the rights of the Indians are concerned, and would be a very strong document in support of the Indians if anything had been since done by the Government inconsistent with the frank avowal contained in that letter. But it is not pretended that anything has been done at all at variance with the sentiments then expressed by the under secretary of state, or repugnant to the wishes or rights of the Six Nations. The defendant, I repeat, has shewn no priority between himself and the Six Nations, and, for all that appears, the necessity for this ejectment against the defendant may as probably have arisen in consequence of measures taken by the crown in concert with the Indians, and for their interest and protection, as from an opposite cause.

Though my opinion is given upon the insufficient nature of the instrument produced, separate from its contents, I have not failed to consider the question raised with respect to the uncertainty of the grantees that are to take, and the

nature of the interests intended to be passed. At present I consider that the instrument cannot be held to convey any legal estate, for the want of a certain designation of any person or persons to take as grantees.—1 Co. 50; Dyer, p. 170; Co. Lit. 3, a.; 10 Co. 26, b. I do not think that a patent in the form of this instrument would have created a corporation consisting of "the Mohawk Nation and such other of the Six Nation Indians as wish to settle on the tract of land described;" and unless it can have that effect, as there are no persons particularly named, there cannot be said to be properly any grantees; and it is, at any rate, out of the question to contend that an instrument under the seal at arms of a colonial governor can constitute a legal charter erecting a corporation. The most that can be made of the instrument issued by Governor Haldimand is this, in my opinion—it may be considered as a declaration by the King's Governor, and in the King's name, that certain lands of the crown were held by the King for the exclusive use and enjoyment of the Six Nations. As it conveyed no legal title, not being under the great seal, and not being made to any persons in their natural capacity, or to a body corporate, and contains no legal words of inheritance, it is impossible to say the King did not continue fully seized in fee of the premises, or that in a court of law any greater effect could be ascribed to such an instrument than that of a license to possess during the King's pleasure, which pleasure would be determined by the King's death, or by the patent subsequently issued; and so long as the right of possession continued unaffected by any determination of the King's will, the King, as the possessor of the legal title, could of course assert that title against a stranger, for it might very well be that the ejectment might be necessary for the very purpose of protecting the Indians in the exclusive possession which had been promised to them; so that the grant made to the lessor of the plaintiff may be no infringement of ano equity between the crown and the Six Nations, and to allow of an ejectment against the defendant, who appears in no other light than a stranger, involves no opposition to legal principles, since if the crown had

made no recent grant, and had continued seized as trustee for the use of the Indians, (admitting that to be possible in law) the King could have asserted that legal title even against the *cestui qui trust*, and much more against a stranger.—Com. Dig. Grant G. 3; Hard. 443; 8 T. R. 118.

I am of opinion, on these grounds, that the verdict for the plaintiff should stand; and if this question which has been raised here were to be decided according to the laws of Canada, and not by the law of England, it has not been shewn that the result would be otherwise. We have ascertained that there was a great seal in use in the Province of Quebec in 1784, when the instrument of General Haldimand bears date; that grants of land, of which few were made by the British Government before the year 1795, were made by letters patent under the great seal, and that it has been uniformly held in the courts of Lower Canada that grants of the waste lands of the Crown could not be made in any other manner. Before the conquest, it appears that no seal was held to be necessary in grants from the French Crown. The Governor and Intendant were enabled to grant jointly, but their grant was not effectual until it was ratified by the King of France; and it may reasonably therefore be inferred that such an instrument as this before us could not have availed under the French-Canadian law to possess any interest beyond that of a mere license of occupation.

I repeat, however, that such a question as this, arising here or in Lower Canada, is not to be decided by the laws in force at the time of the conquest, but upon the principles of the common law of England, which, in respect to the prerogative of the King in granting the lands of the crown, continued to be in force after the passing of the 14 Geo. III. ch. 83, as well as before.

SHERWOOD and MACAULAY, J. J., of the same opinion.

Per Cur.—Postea to the plaintiff.