ALEXANDER FARMER.....APPELLANT;

AND

WILLIAM GUY LIVINGSTONE.....RESPONDENT.

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*May 12.

*June 10.

ON APPEAL FROM THE COURT OF QUEEN'S BENCH FOR MANITOBA.

Ejectment—Letters Patent—Parliamentary title—Equitable defence—38 Vic. c. 12 (Man.) 35 Vic., c. 23 (D.)

L., in 1875, applied for a homestead entry for the S. W. ¼ of sec. 30, township. 6, range 4 west, pre-empted by *F.*, and paid $10 fee to a clerk at the office, but was subsequently informed by the officers of the Crown that his application could not be recognized, and was refunded the $10 he had paid. *F.* subsequently paid for the land by a military bounty warrant in pursuance of sec. 23 of 35 *Vic.*, c. 23. *L.* entered upon the land and made improvements. In 1878, after the conflicting claims of *F.* and *L.* had been considered by the officers of the Crown, a patent for this land was granted by the Crown to *F.*, who brought an action of ejectment against *L.* to recover possession of the said land. *F.*, at the trial, put in, as proof of his title, the Letters Patent, and *L.* was allowed, against the objection of *F's* counsel, to set up an equitable defence and to go into evidence for the purpose of attacking the plaintiff's patent as having been issued to him in error, and by improvidence and fraud. The judge, who tried the case without a jury, rendered a verdict for the defendant.

Held, on appeal, reversing the judgment of the Court of Queen's Bench (*Man.*), that *L.*, not being in possession under the Statute, had no parliamentary title to the possession of the land, nor any title whatever which could prevail against the title of *F.* under the Letters Patent.

Per *Gwynne*, J.:—That under the practice which prevailed in *England* in 1870, which practice was in force in *Manitoba* under 38 *Vic.*, c. 12, at the time of the bringing of this suit, an equitable defence could not be set up in an action of ejectment.

* PRESENT.—Ritchie, C. J., and Fournier, Henry, Taschereau, and Gwynne, J. J.

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APPEAL from the judgment of the Court of Queen's Bench of the province of *Manitoba* discharging a rule nisi obtained by the appellant to set aside a verdict rendered for the defendant.

The action was one of ejectment to recover possession of the south-west quarter of section thirty, in the sixth township, in the fourth range west of the principal meridian, in the province of *Manitoba*.

The case was tried before *Wood*, C. J., without a jury.

The plaintiff (appellant) at the trial put in as proof of his title, letters patent, under the Great Seal of *Canada*, granting the land in question to him in fee simple.

The defendant, in pursuance of an order made at the trial, filed an answer in which he maintained that the issue of the said patent to the plaintiff was, as against him, fraudulent and void, and that he is, as against the plaintiff, entitled to the possession of the lands in question, and in which he prayed by way of cross relief, that the said letters patent might be decreed to be void for having been issued through fraud, or in error or improvidence.

The learned Chief Justice found that the letters patent issued to the plaintiff were void as having been issued in error and mistake, and on that ground rendered a verdict for the defendant, and that the defendant was entitled to a decree declaring the said letters patent to be void.

The plaintiff in the following term moved to set aside the verdict and for a new trial on the grounds. 1. That the production by the plaintiff of the Crown patent was conclusive of his right to recover. 2. That it was not competent for the defendant to impeach the validity of the patent on the ground of fraud, error, improvidence, or otherwise. 3. That there was no evidence given at the trial of such fraud, error or improvidence

in respect of the issuing of the said patent to the plaintiff. A rule nisi was granted accordingly.

The Court of Queen's Bench gave judgment in favour of the defendant, and discharged the rule nisi with costs.

From that judgment the plaintiff appealed to the Supreme Court.

The following are the material facts of the case:—

In 1875, after the defendant had been some short time in the *Boyne* settlement, he conceived the idea of erecting a saw-mill on the *Boyne*; and, to carry out the design, he required the sw ¼ of section 30, tp. 6, range 4 west.

On the 15th February, 1875, the plaintiff, who had entered an adjacent quarter section as a homestead, got from the Dominion Land Agent at *Emerson* the following pre-emption receipt:

"DOMINION LANDS OFFICE,
"*Emerson*, Feb. 15th, 1875.

"*Wm. Alexander Farmer* has entered to pre-empt the sw ¼ of section 30, township 6, range 4 west.

"GEO NEWCOMB,
"In charge District No. 2."

In May, 1875, defendant filed certain affidavits to prove that plaintiff had abandoned his homestead, or had forfeited it by not making sufficient improvements upon it, and claimed the right to a homestead entry for the sw ¼ of section 30, (plaintiff's pre-emption), and a pre-emption entry for plaintiff's homestead. Immediately after leaving the affidavits and signing the application and making the affidavit for a homestead entry of the lands in question and handing in the fee of $10, the defendant returned to the *Boyne* settlement, and went into actual possession and occupation of the lands.

About the same time plaintiff applied to purchase his

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pre-emption claim, tendering a Military bounty warrant in payment.

Both these applications were made to the local agent at *Emerson*, within whose district the land in question is situated. The case being referred to the general agent he found that defendant had already been entered for two homesteads, and that this application, if granted, would make the third homestead he had obtained. He therefore instructed the local agent that defendant had forfeited all right to a homestead entry, and that his application was null and void, and that he would act regarding plaintiff's application precisely as though no conflicting application had been received.

Mr. *Newcomb*, the local agent, in consequence of this decision, sent the following letter to the defendant:

"OFFICE OF DOMINION LANDS,

"*Emerson*, June 2nd, 1875.

"SIR,—I have the honor to acknowledge the receipt of your application to homestead sw 30, 6, 4 w., and affidavits in support of same, also your $10 fee and abandonment of previous claim, and to inform you that it is impossible for me to give you the entry applied for without special instructions, as my books show that you have already made two homestead entries, and that is all the law allows any person to make.

"Your $10 will be here awaiting instructions from you.

"I have the honor to be, Sir,

"Your obedient servant,

"GEO. NEWCOMB.

"W. G. LIVINGSTONE, Esq.,
Headingly."

On June 5th, 1875, defendant wrote as follows:

"WINNIPEG, June 5th, 1875.

"G. NEWCOMB, Esq.,

"*Emerson.*

"DEAR SIR:—I received yours of June the 2nd, No.

473, and in reply would say, that I have not made more than one entry. The lot which was entered for me at *High Bluff* was taken away from me by the Department, and the other given in *lieu* of it; so I have only abandoned one lot. I spoke to Mr. *Codd* about the matter, and he told me I would be allowed to make the entry, so I hope this will be satisfactory, and that you will forward me receipt at once.

"And oblige,

"Yours,

"W. G. LIVINGSTONE."

The agent then answered:

"OFFICE OF DOMINION LANDS,

"*Emerson*, June 7th, 1875.

"SIR,—I have the honor to acknowledge the receipt of your letter of 5th June, and to inform you that your application to enter the s. w. ¼ of 30, tp. 6, range 4 west, cannot be recognized.

"I therefore return your $10 enclosed.

"I have the honor to be, sir,

"Your obedient servant,

"GEO. NEWCOMB.

"To W. G. LIVINGSTONE, Esq.,

"Headingly."

Thereupon defendant proceeded immediately to *Winnipeg* to lay his case before the agent, *D. Codd*, at the same time placing in Mr. *D. Codd's* hands a letter, showing under what circumstances a lot had been withdrawn from him, and another given. This claim was forwarded to *Ottawa* to the honorable the Minister of the Interior about the same time, and a receipt was acknowledged of the same, bearing the date of the 25th June, signed by *J. S. Dennis*, Surveyor General.

On the 25th April, 1876, defendant was informed by a letter signed by the agent of the Dominion Lands

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Office, *Winnipeg*, that the title of the land in question was legally vested in the plaintiff.

On the 8th May, 1876, defendant forwarded a petition to the Minister of the Interior, alleging that he had occupied the said lot since the 7th May, 1875, to the present day; that he had been living with his family on the said lot; that he had built a house, stables, &c., and had six acres under crop; and that all these improvements were made by him *bonâ fide*, and considering all the time that his claim was legal, just, and could not be set aside upon any ground whatever; that the reason alleged by Mr. *Newcomb* was not supported by the facts; that he never abandoned two homesteads; that the plaintiff, at the time he made application for the said lot, had not complied with the law; that he had no improvements whatever made upon the lots claimed by him (plaintiff) as homestead and pre-emption, and therefore had lost all claim upon the same and prayed that his entry for the said lot s. w. ¼ of 30, township 6, range 4 west, be confirmed, and that justice be done in the premises.

This petition was acknowledged on the 30th June, 1876.

The case was then considered by the Minister and the officers of the Department, and on the 10th July, 1878, the Surveyor General informed the defendant that the Minister could not sustain his action in the matter in deliberately settling upon the land after he had been notified by the agent of the prior claim thereto by the plaintiff, and on the 12th Sept., 1878, letters patent were issued by Crown for these lands in favor of the plaintiff.

Mr. *Bethune*, Q. C., for appellant:

The first point I will argue is, that the Chief Justice had no jurisdiction to entertain the equitable defence

set up to this action. By the statute of the Legislature of the province of *Manitoba*, 34 *Vic.*, c. 2, sec. 1, it is, amongst other things, enacted "that the Court of Queen's Bench shall possess such powers and authorities in relation to matters of local or provincial jurisdiction as in *England* are distributed amongst the Superior Courts of Law and Equity and of Probate," and by section thirty of the same statute it is enacted "that the Chief Justice shall make rules to regulate the practice of the court, and shall prescribe the forms of proceeding to be used, but until such rules are made, the practice and proceedings shall be regulated by the rules in force in *England* at the time of the transfer of this province to *Canada*, in so far as such rules can be applied to the circumstances of this province," but by a subsequent act the other judges must concur with the Chief Justice. And by the subsequent statute of the same Legislature, 38 *Vic.*, c. 12, s. 1, it is in substance enacted that the forms and practice of the Queen's Bench in *Manitoba* are to be regulated by the rules of evidence and practice and procedure as the same were on the 15th July, 1870.

The practice therefore is the same as that which prevailed in *England* in 1870; by that practice no equitable defence could be set up to this action.

The letters patent remain valid until the pronouncing of a judgment or decree of a court of competent jurisdiction made in a suit brought for the purpose of setting it aside. Such a decree or judgment could be pronounced only upon a bill in Equity or upon a *scire facias* at the instance of the Attorney General, or some person having such an interest in the land as gave him a right to maintain such a suit.

Then as to the Dominion statute 35 *Vic.*, c. 23, s. 65, it was not intended to prescribe any mode of procedure in the provincial courts, and even by s. 69 of 35 *Vic.*,

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c. 23, it is clear that a direct proceeding ought to be taken for the purpose of setting aside the patent. The terms "upon action, bill or plaint," show that it is at the instance of a plaintiff that the jurisdiction is to be exercised and not by way of defence or cross-relief.

This brings me to the second point, that the respondent had no *locus standi* to impeach the issue of the patent to the appellant as he never acquired any interest in the land.

The learned counsel then contended upon the facts that the respondent's claim was merely on the bounty of the Crown, and could not have been enforced against the Crown even if no patent had been issued.

The respondent is a mere volunteer, having given no consideration, and could not therefore ask the interposition of the court against the Crown, and cannot now ask the aid of the court against the appellant, who is a purchaser from the Crown. *Boulton* v. *Jeffrey* (1); *Proctor* v. *Grant* (2); *Stevens* v. *Cook* (3); *Cosgrave* v. *Corbett* (4).

Mr. *Boyd*, Q. C., for respondent:

I will first deal with the objection taken by the plaintiff at the trial, that it was not competent for the defendant in this form of action to introduce evidence impeaching the patent to the plaintiff under 35 *Vic.*, c. 23, sec. 69. I contend that an appeal will not lie to this court in a matter of practice. The evidence was taken in accordance with precedent in the Court of Queen's Bench, *Manitoba*; and in *England* an Appellate Court will not interfere in a matter of practice. *Henderson* v. *Malcolm* (5); *Walcot* v. *Northern Ry. Co.* (6). The court has only declared that the Crown has issued

(1) 1 Grant's E. & A. R. 111.
(2) 9 Grant 26.
(3) 10 Grant 410.
(4) 14 Grant 617.
(5) 2 Dow. 285.
(6) 4 Macq. 348.

a patent in error. In *Reese* v. *Attorney General* (1) it was held that the Attorney General was not necessarily a party to a proceeding to set aside a patent. In *Manitoba* there is but one court, and the course of procedure sanctioned by the Chief Justice avoids circuity of action and multiplicity of suits.

The learned counsel then reviewed the facts of the case and contended that assuming the facts to be fully known to the Crown, there was manifest error in law; assuming the facts not to be known, there was error as to facts; in either case the patent was issued in error or improvidence, and relied on the following as authorities for setting aside patents issued under such circumstances: 35 *Vic.*, c. 23, sec. 69; *Dougall* v. *Laing* (2); *Attorney General* v. *McNully* (3); *Lawrence* v. *Pomeroy* (4); *Attorney General* v. *Garbutt* (5); *Stevens* v. *Cook* (6); *Boulton* v. *Jeffrey* (7).

Mr. *Bethune*, Q. C., in reply:

This case is not within *Lawrence* v. *Pomeroy* (8), because the actual settlement was within the knowledge of the Crown. The line of decisions in *Ontario* proceed upon statutes which are applicable to the province of *Manitoba*.

RITCHIE, C. J.:—

I think it quite unimportant whether a defendant in *Manitoba* could or could not avail himself of an equitable defence in an ejectment suit, because the plaintiff made out a clear case under a Crown grant, and the defendant did not show that he had any legal or equitable defence to the action, he did not show any grant or conveyance from the Crown, nor any legal title

(1) 16 Grant 467.
(2) 5 Grant 292.
(3) 8 Grant 324.
(4) 9 Grant 474.
(5) 5 Grant 181.
(6) 10 Grant 410.
(7) 1 Grant's E. & A. R. 117.
(8) *Ubi supra.*

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or equitable interest in the land under any statutory provision; in other words, he showed no *locus standi* enabling him to attack the letters patent, even if they could be impeached in such a proceeding.

I think the defendant is not in possession under the statute, not having complied with its terms, and that he has therefore no parliamentary title to the possession of the land, nor any title whatever that can prevail against the title of the plaintiff under the letters patent. Therefore, the letters patent should have been received and acted on as conveying a good and valid title to the plaintiff; on this simple ground, I think the judgment should be reversed.

FOURNIER, HENRY and TASCHEREAU, J. J., concurred.

GWYNNE, J.:—

I have read with the greatest attention the very able judgment of the learned Chief Justice of the province of *Manitoba* in this case, especially that accompanying his verdict rendered in favor of the defendant, which contains his criticism of the evidence as taken before him, as also the evidence so taken. Adopting, then, in this case the conclusions of facts arrived at by the learned Chief Justice of *Manitoba*, I am free to admit that, assuming the evidence before him to be all the evidence that could be offered affecting the points decided by him, he has made out a very strong case to justify the Dominion Government in taking proceedings to recall and avoid the letters patent under which the plaintiff claims, as issued improvidently and in error and mistake of facts, occasioned by wrong information as to the true state of the case communicated by the local officials to their superiors at *Ottawa*; but I am at the same time unable to concur in the conclusions of law arrived at by the Court, that in this case the

defendant is entitled to judgment, or that in this action the letters patent can be declared to be null and void.

By the statute law of the province of *Manitoba* it is enacted that the Chief Justice and Judges of the Court of Queen's Bench of the province shall make rules to regulate the practice of the Court and shall prescribe the forms of proceeding to be used, *but until such rules are made* the practice and proceedings shall be regulated by the rules in force in *England* on the 15th July, 1870.

It was admitted in argument that no rules have been made by the Judges under this authority. This case must therefore be governed by the rules prevailing in *England* in July, 1870, and as no such defence could be set up in ejectment in *England*, so neither can it in *Manitoba*. The evidence as taken therefore cannot affect or prejudice the plaintiff's rights in this suit, nor until he shall be called upon under the Act to support the letters patent when assailed by action, bill, or plaint, under 35 *Vic.*, c. 23, sec. 69, can he be required to offer evidence in support of them. Whether the Courts in the province of *Upper Canada* (upon the authority of the judgments of which Courts the learned Chief Justice of *Manitoba* wholly rests his argument in the case before us, and in which province the statute law does authorize equitable defences in actions of ejectment,) would entertain, as an equity capable of enforcement by way of defence to an action of ejectment, a claim of the nature of that of the defendant in the case before us, we are not called upon to determine. I express no opinion upon that question, reserving all consideration of it until it shall arise. I may observe, however, that hitherto no such case has presented itself in the courts, that I am aware of. Moreover, it is to be observed that the language of the statute law of old *Canada*, which vested in a person interested in land *under contract*

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with the Crown, *an estate* in the land recognizable in the Courts both of law and equity, is very different from the language of the *Dominion Lands Acts*, which constitute the sole authority regulating the disposition of the Dominion Lands in the province of *Manitoba*. What, then, is meant in the learned Chief Justice's judgment by the expression "the common law of the Crown Lands Department," "by which law" he says, "it was incompetent for the Crown to sell or for the plaintiff to purchase these lands," I confess I do not very clearly apprehend. The application of the term "squatter sovereignty," also made use of by the learned Chief Justice, does not appear to me to be more accurate. The claims of squatters in old *Canada* were recognized upon the principle of its having been a usage of the Crown for many years in disposing of its lands to give, purely *ex gratiâ*, a preference to persons who had actually cleared and cultivated land, in ignorance of any prior claim, although they had originally entered without title. But it is obvious that inasmuch as the disposition of the land in question was wholly governed by the Dominion Lands Act of 1872 and the practice and regulations of the Department under that Act, upon which alone the defendant must rely for any title he has, no usage can have yet grown up of the nature of that referred to in *Cosgrove* v. *Corbett* (1), and other like cases; moreover, the Courts have in no case that I am aware of recognized and enforced against a patentee of the Crown a claim set up by a squatter who had entered in direct opposition to the authority of the Department and with knowledge that the subsequent patentee set up a claim to the lot which the officials in the Department rightly or wrongly recognized, and recognizing subsequently granted him letters patent.

(1) 14 Grant 620.

In fine, whether the local officials acted rightly or wrongly in refusing to entertain the defendant's application and to enter him as a homestead claimant on the lot in question and to keep his money and to give him a receipt therefor under the provisions of the Act, it is plain upon the evidence that they did so refuse, and although that refusal may, under the circumstances, justify the Crown in taking proceedings under the Act to repeal the letters patent, I cannot see in the Dominion Lands Act of 1872 anything that can be said to justify the judgment that it has given to the defendant either at law or in equity a parliamentary title which the Courts can, in this action, pronounce to be preferable to the title vested in the plaintiff under his letters patent. In my opinion, therefore, the judgment of the Court below must be reversed, and a verdict and judgment in the action of ejectment be ordered to be entered for the plaintiff.

Appeal allowed with costs.

Solicitors for appellant :—*Ross and Killam.*

Solicitor for respondent :—*Frederick McKenzie.*