1889
*Feb. 8,9,11.
*June 14.

WILLIAM GOMEZ FONSECA AND JOHN C. SCHULTZ (DEFENDANTS) } APPELLANTS;

AND

THE ATTORNEY GENERAL OF CANADA ON RELATION OF ELIZA MERCER (PLAINTIFF)..... } RESPONDENT.

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

Crown lands—Letters patent for—Setting aside—Error and improvidence—Superior title—Evidence—Res judicata—Estoppel by, as against the crown.

Letters patent having been issued to F. of certain lands claimed by him under The Manitoba Act (35 Vic. ch. 3, as amended by 35 Vic. ch. 52), and an information having been filed under R. S. C. c. 54 s. 57 at the instance of a relator claiming part of said lands to set aside said letters patent as issued in error or improvidence.

Held, 1. That a judgment avoiding letters patent upon such an information could only be justified and supported upon the same grounds being established in evidence as would be necessary if the proceedings were by *scire facias*.

2. The term "improvidence," as distinguished from error, applies to cases where the grant has been to the prejudice of the commonwealth or the general injury of the public, or where the rights of any individual in the thing granted are injuriously affected by the letters patent; and F.'s title having been recognized by the government as good and valid under the Manitoba Act, and the lands granted to him in recognition of that right, the letters patent could not be set aside as having been issued improvidently except upon the ground that some other person had a superior title also valid under the act.

3. Letters patent cannot be judicially pronounced to have been issued in error or improvidently when lands have been granted upon which a trespasser, having no color of right in law, has entered and was in possession without the knowledge of the government officials upon whom rests the duty of executing and issuing the letters patent, and of investigating and passing judgment upon the claims therefor; or when such trespasser, or any person claiming under him, has not made any application for letters patent;

or when such an application has been made and refused without any express determination of the officials refusing the application, or any record having been made of the application having been made and rejected.

4. Per Patterson J.—That in the construction of the statute effect must be given to the term improvidence as meaning something distinct from fraud or error; letters patent may, therefore, be held to have been issued improvidently if issued in ignorance of a substantial claim by persons other than the patentee to the land which, if it had been known, would have been investigated and passed upon before the patent issued; and it is not the duty of the court to form a definite opinion as to the relative strength of opposing claims.

5. *Semble* per Gwynne J.—There is no sound reason why the Government of the Dominion should not be bound by the judgment of a court of justice in a suit to which the Attorney-General, as representing the Government, was a party defendant, equally as any individual would be, if the relief prayed by the information is sought in the same interest and upon the same grounds as were adjudicated upon by the judgment in the former suit.

APPEAL from a decision of the Court of Queen's Bench, Manitoba (1), reversing the judgment at the hearing by which the information was dismissed.

The facts of this case may be found in the report of the decision of the court below and in the judgment of Mr. Justice Gwynne herein.

J. S. Tupper and *Glass* for the appellants. The evidence shows that the facts were misrepresented to the Attorney-General when he granted his *fiat* for the information in this case.

Fonseca acted in entire good faith, and his patent will not be set aside except on the clearest evidence. *Attorney-General* v. *McNulty* (2); *Attorney-General* v. *Garbutt* (3); *Martyn* v. *Kennedy* (4).

The learned counsel also referre to *Lake* v. *Bailey* (5); *Farmer* v. *Livingston* (6); *Barnes* v. *Boomer* (7).

(1) 5 Man. L. R. 173.
(2) 8 Gr. 324; 11 Gr. 282.
(3) 5 Gr. 186.
(4) 4 Gr. 99.
(5) 5 U. C. Q. B. 136.
(6) 5 Can. S. C. R. 221; 8 Can. S. C. R. 140.
(7) 10 Gr. 538.

1889

FONSECA v. THE ATTORNEY GENERAL OF CANADA.

Ewart Q.C. for the respondent.

STRONG J. concurred in the judgment of Mr. Justice Gwynne.

FOURNIER J.—I am in favor of allowing this appeal for the reasons stated by the late Chief Justice Wallbridge and also for reasons given by Mr. Justice Gwynne in his judgment.

TASCHEREAU J.—I concur with my brother Gwynne and for the reasons by him given I think this appeal should be allowed.

GWYNNE J.—In 1861 the defendant Fonseca settled in Rupert's Land, upon part of a piece of land known as lot No 244 of the Hudson Bay Company's survey, now known as lot No. 35, in the parish of St. John, in the city of Winnipeg. From the time of his entry he occupied about three or four acres as a homestead, and in 1862 erected a dwelling house in which he thenceforth lived. The piece so occupied by him extended the distance of ten chains, measured in a direction from north to south, or nearly the fourth part of the width of the lot 244, its length being in the direction from east to west. The piece so enclosed and occupied as his homestead was of a triangular shape, the eastern extremity of which was a line ten chains in length from north to south, and which separated the piece occupied by Fonseca from a lot owned and occupied by one Neil McDonald, which was one of a number of lots laid out on a bend of the Red River and known as the Point Douglas lots. In 1864 Fonseca purchased from Neil McDonald a triangular piece of about two acres of this point, immediately adjoining Fonseca's homestead enclosure which, added to the piece, made

his homestead a rectangular piece of land of about 5 or 6 acres. He also purchased three of those Point Douglas or river lots, comprising among them from 50 to 55 acres. In 1869 Fonseca took possession also of two other small pieces of said lot 244 on the west side of a road or highway crossing said lot about 300 yards to the west of his homestead, on which he also erected buildings, consisting of stores and dwelling houses; the pieces so taken possession of are now known as two town lots on the west side of Main street, in the City of Winnipeg. In or about the month of November, 1870, one Sinclair, a surveyor, laid out a portion of the said lot No. 244 into town lots upon the employment of Fonseca and of certain others of the holders of Point Douglas lots. The piece so surveyed comprehends what are now known as lots C, D, E and F, on block 14, according to the official plan of the City of Winnipeg. The owners of these Point lots appear to have claimed to have had some interest in the lot No. 244 as a common prior to the surrender of Rupert's Land to the crown, but under what title such claim was asserted does not clearly appear. After the surrender of Rupert's land to the crown one William Logan, who is a brother-in-law of the defendant Fonseca, and who was not an owner of any of the Point Douglas or river lots, without any claim of title entered upon a part of the said lot 244, apparently just before the above-mentioned survey made by Sinclair; and as it is in virtue of this his entry that the present information is filed upon the relation of, and in the interest of, Eliza Mercer, and in the interest also of one T. Gray, who severally claim only by title derived from Logan, it will be convenient to state from the information the grounds upon which the relief asked by the information is based. The information, commencing at its 14th paragraph, alleges that:

1889

FONSECA v. THE ATTORNEY GENERAL OF CANADA.

Gwynne J.

In or about the year of our Lord, 1870, (in paragraph 21 it is stated to have been after the 15th July of that year), one William Logan, who was one of the said Point Douglas holders, in respect of his ownership of the lot of land on the river known as the Hupé lot, and afterwards as lot No. 24 of the Dominion Government Survey of the Parish of St. Johns, as one of the persons interested in the Point Douglas Common, took possession of said southerly ten chains of said lot thirty-five which portion may be more familiarly known and described as follows, that is to say: Lots C, D, E and F in block number fourteen according to the official plan of the City of Winnipeg made by George McPhillips, D.L.S., and filed in the Registry Office in and for the County of Selkirk.

Afterwards the said Logan conveyed to various persons various portions of the said lots C, D, E and F, and some of those persons conveyed to others, and there are now various persons in possession of the said lots claiming to be entitled thereto, and to receive patents therefor by virtue of long possession and improvements placed upon the property. Among such persons *the relator claims to be entitled to:*

First.—A portion of said lot D having a frontage of about ninety-two feet on Main street and running back along Fonseca street, with a uniform width of ninety-two feet to a depth of one hundred and sixty-five feet.

Second.—A portion of said lot E having a frontage of ninety-two feet on Austin street and running back along Fonseca street the same width to a depth of one hundred and thirty feet more or less. And the said Thomas Simon Gray claims to be entitled to parts of the lots C and F in the plan hereinafter mentioned, and more particularly described as follows:

Here follows a description which it is not necessary to set out at large. Then the information proceeds:—

The relator and the said Thomas Simon Gray each claim title to their respective portions of the said lands through the said William Logan and they and those through whom they claim were for many years prior to the issue of the said patent, (that is a patent granting the land to Fonseca previously mentioned in the information), continuously in possession of the said portions of the said lands, claiming to be entitled thereto by reason of such possession and in the absence of title in any person or persons other than the crown.

The information then prays that the letters patent to Fonseca for the lands in question may be declared to have issued, in respect of these lands, improvidently and through error and in ignorance of the rights of

the several persons aforesaid, and that the said letters patent may be set aside as far as they affect the said lands, and be declared absolutely null and void and of no effect so far as regards these lands. That an agreement of the 12th November, 1879, mentioned in the information, made between the defendants Fonseca and Schultz for the sale and conveyance by the former to the latter of one undivided half share in the lands on the said common for which Fonseca should obtain letters patent from the Government, be declared null and void as to the lands in question, and

that all the conveyances of the said lands and premises through which the said relator claims title to the said lands and premises may be confirmed.

The object of this latter clause is not very apparent. It could scarcely have been supposed that the court could rectify any defect there might be in the relator's title. It was inserted, perhaps, with the view of obtaining the judgment of the court to the effect that her claim and title to have the land she claims granted to her is preferable to any claim that Fonseca had, so as to justify the court in acceding to the prayer of the information by granting a decree avoiding the letters patent issued in favor of Fonseca. This appears to me to be the only purpose contemplated by the insertion of this clause in the prayer; but whatever may have been the object of its insertion, it plainly appears by the information that it was filed, and thereby the present suit was instituted, in assertion of a claim and right in the relator, Eliza Mercer and in Thomas Simon Gray severally to certain parts of the land in question, to have such parts granted to them respectively preferably to the claim of Fonseca in right of which the lands were granted to him; and it is for this reason only that a decree is asked that the letters patent granting the lands to him may be declared to be null

1889

FONSECA v. THE ATTORNEY GENERAL OF CANADA.

Gwynne J.

and void as issued improvidently, in error and in ignorance of the rights of the several parties aforesaid; and the present Deputy Minister of the Interior, upon whose suggestion alone the information appears to have been authorized to be filed by the Attorney-General, says in his evidence that in point of fact the suit is prosecuted for the benefit of Eliza Mercer who is the sole relator, making no mention of Thomas Simon Gray. Gray's claim is mentioned in the information, but the evidence of the Deputy Minister is as above—that the suit is prosecuted for the benefit of Eliza Mercer—and she is the person at whose sole expense the suit has been instituted. There can, therefore, be no doubt that the suit is founded upon a claim of right in the relator Eliza Mercer and Thomas Simon Gray respectively, which is asserted to be preferable to any right or claim Fonseca had, to obtain a grant of the lands in question, and not upon any suggestion or complaint made by the Attorney-General that the letters patent granting the lands to Fonseca were issued either improvidently or in error, otherwise than in so far as they may have been, if they were, issued in ignorance of some superior right which the relator and Gray respectively had, or have, if any such they have, in the pieces claimed by them respectively, through Logan, to obtain a decree annulling the letters patent to Fonseca, in order that letters patent may be issued to them respectively in recognition of such their claims as preferable to any Fonseca had.

Now, the allegation in the information as to the right in virtue of which Logan is said to have entered upon the lands in question, upon which right alone is now rested the preferable claim asserted on behalf of the relator and Gray, as claiming through Logan, to have the letters patent issued to Fonseca annulled as to the

lands in question, and those lands granted to them respectively, is not supported by the evidence. On the contrary, it is shown by the evidence to be an allegation not founded on facts, and this is the second time in which this allegation has been made in a legal proceeding, for a bill was filed by the relator Eliza Mercer against the present defendants and the Attorney-General of the Dominion, which prayed for the same relief as that which is prayed for in this information founded upon the same allegation coupled with another, namely, that Logan's possession of the lands in question had commenced prior to the 15th July, 1870, and that bill was dismissed upon the ground that the allegations upon which the then plaintiff—the present relator—based her claim to the relief prayed for were disproved. It is now claimed upon behalf of the relator that the Attorney-General, as representing the Government of the Dominion, although a defendant in the former suit, as representing the Government, cannot in the present suit be affected by the judgment in the former. I can see no sound reason why the Government of the Dominion should not be bound by the judgment of a court of justice in a suit to which the Attorney-General as representing the Government was a party defendant equally as any individual defendant would be, if the relief prayed by the information is sought in the same interest and upon the same grounds as were adjudicated upon by the judgment in the former suit; and I am not prepared to admit the proposition that, in such case, the Government would not be affected by the judgment in the former suit to be well founded in law. It is not, however, I think, necessary to decide the point in the present suit. The question now is not so much whether the Government as represented by the Attorney-General is or is not estopped by the judgment in the former suit, as whether a court

1889

FONSECA v. THE ATTORNEY GENERAL OF CANADA

Gwynne J.

of justice should, in the interest of the relator, in whose interest and in assertion of whose title the present suit has been instituted, entertain as sufficient ground upon which to grant the relief prayed, namely, to avoid letters patent, a claim of the relator's, which in the former suit, (in which the same relief was prayed for and could have been granted if a right thereto had been established, as is prayed for and could be granted in the present suit), was adjudged to have been not only not proved, but to have been disproved.

Gray, however, in whose interest also, as well as in the interest of the relator, the information shows the present suit to have been instituted, was not a party to the former suit. I propose, therefore, to deal with the case upon the evidence taken in the case as we have it before us. In some respects it is not perhaps quite as full as was the evidence in the former case, but the conclusion which should be arrived at seems to me to be the same.

Logan, in his evidence in the present case, although he said on his examination-in-chief that he put up a log building on the land in question in the spring of 1870, and another in the fall of that year, was obliged to admit, upon his cross-examination, that the first log building he ever put upon any part of the land was in the month of September, 1870.

The log building he then put up was of the dimensions of 14 x 16 feet. He brought it from some other place; it did not take quite a week to put it up. In 1871 he put an addition to it and built a small stable. Whether he went to reside upon the lot prior to 1872 is not perhaps quite clear; but this is immaterial. Then, as to the right in virtue of which he says he entered upon the land. He took possession, he says, in right of his being the owner of a Point Douglas river lot, then known as the Hupé lot, now

lot 24. He took possession without the authority of or consultation with any one. His right so to take possession he explains in this manner : He bought, he says, the Hupé lot, and having bought it that, he says, gave him a right to the common, that is, to some part of it, and to the particular part in question, "simply because he located it," that is to say entered upon it and took possession of it, his right to do so being, as he says, solely in virtue of his having been the owner of the Hupé river lot at Point Douglas. Now, in point of fact, it appears by the evidence which was given of certain deeds upon registry in the registry office at Winnipeg that Logan did not own the Hupé lot until the month of October, 1872. Hupé by a deed upon the 17th October, 1872, conveyed the lot to Logan by the description following, that is to say : as situate at Point Douglas, in the county of Selkirk, measuring four and one-half chains in width by all the depth between the Red River by which it is bounded in front and the road leading from the Point Douglas ferry, which road forms the rear boundary. The lot belonging to John Sutherland bounds the said land on one side, and E. L. Barber's lot bounds it on the other. The whole of this lot Logan, upon the 26th June, 1873, by deed of that date, sold and conveyed to one David H. Thomas. It is obvious, therefore, that the possession taken of the lands in question, as part of the common, by Logan, in September, 1870, was not in virtue of his having been the owner of the Hupé river lot ; indeed he admits that he did not at the time claim possession in virtue of title as owner of any river lot ; this is an idea which he must have first entertained at some subsequent period, but when does not appear. Now, it is in evidence that Fonseca always entertained the idea of acquiring title, if and when he could, for a strip of this lot 244, ten chains in width—that is, running

1889

FONSECA v. THE ATTORNEY GENERAL OF CANADA.

Gwynne J.

north and south, by the length of the lot measured from the eastern extremity where his house was built to the western extremity. It would seem also that there were other persons who had like possession of other parts, subject always to the common rights claimed by the owners of the Point lots. Dr. Schultz in his evidence says that at the time of the transfer of Rupert's Land to the crown, on the 15th July, 1870, the persons having actual possession of parts of lot 244 were himself, John McTavish, Eli Barber, the defendant Fonseca, and the Hon. John Sutherland; and he says that for seven or eight years prior to 1870 Fonseca's possession of this southern ten chains of the lot measured as aforesaid was so far recognized by the persons claiming common rights in virtue of their being owners of Point lots that these common rights were exercised over the portion of the said southern ten chains in width by the length of the lot from east to west lying outside of Fonseca's homestead enclosure with the consent of Fonseca. In 1870 the owners of the Point lots had a survey made of a small portion of the lot 244 adjoining a road then called the Highway, now Main street, in the City of Winnipeg, into town lots, with the view of selling the lots for the benefit of the owners of the Point lots. The piece so surveyed comprised within it a portion of the southern ten chains of the lot adjoining Fonseca's homestead enclosure, and the erections he had made in 1869, about 300 yards west thereof, including the lots now known as lots C, D, E, and F, on the Government survey made some years subsequent. A meeting of the owners of the Point Douglas river lots was held on the 24th July, 1872, at which an agreement was come to as to the action of the claimants to common rights in the lot 244. This agreement was reduced into the shape of a deed executed by the several owners, seventeen in

number, of whom the defendant Fonseca was one, and the defendant Schultz another, and bearing date the 15th October, 1872, by which five of their number, of whom Fonseca was one, became trustees under and for the purposes of the deed. The deed purported to convey to the trustees the lot No. 244 known as the reserve in common belonging to the owners, occupiers and possessors of Point Douglas, and the trust purpose was declared to be to sell the town lots laid out on the survey made by the owners of Point lots in 1870, for the benefit of the several parties interested in proportion to their interests. The trustees made sales of some of the town lots to certain persons who purchased from them, and to enable them to make good those sales, and to obtain title to the whole lot in order that it might be sub-divided by them in accordance with their knowledge of the proportions to be allotted to each person entitled, they applied to the Government for letters patent granting the lot to them. The grounds upon which they based their application will sufficiently appear when we come to see the action taken by Government thereon in 1877, after several years taken for the consideration of the claim. Now, upon the 12th May, 1870, the act 35 Vic. ch. 3, to establish and provide for the government of Manitoba, was passed. That act was passed in anticipation of the transfer of Rupert's land from the Hudson Bay Company to the crown being shortly thereafter perfected, and it enacted, among other things, as follows :—

Sec. 32. For the quieting of titles and assuring to the settlers in the Province the peaceable possession of the lands now held by them, it is enacted as follows :—

1. All grants of land in freehold made by the Hudson's Bay Company up to the 8th day of March, 1869, shall, if required by the owner, be confirmed by grant from the Crown.

2. All grants of estates less than freehold in land made by the Hudson's Bay Company up to the 8th day of March aforesaid shall, if re-

1889

FONSECA v. THE ATTORNEY GENERAL OF CANADA.

Gwynne J.

quired by the owner, be converted into an estate in freehold by grant from the Crown.

3. All titles by occupancy with the sanction and under the license and authority of the Hudson's Bay Company up to the 8th day of March aforesaid, of land in that part of the Province in which the Indian title has been extinguished shall, if required by the owner, be converted into an estate in freehold by grant from the Crown.

4. All persons in peaceable possession of tracts of land at the time of the transfer to Canada in those parts of the Province in which the Indian title has not been extinguished shall have the right of pre-emption of the same on such terms and conditions as may be determined by the Governor in Council.

5. The Lieutenant Governor is hereby authorised under regulations to be made from time to time by the Governor in Council, to make all such provisions for ascertaining and adjusting on fair and equitable terms the rights of common and the rights of cutting hay held and enjoyed by the settlers in the Province, and for the commutation of the same by grants of land from the Crown.

The transfer of Rupert's Land to the crown became perfected on the 15th July, 1870. It is now obvious that Logan never acquired any right or claim whatever to have had any part of the land now in question granted to him under the provisions of the above act. Evidence was given at the trial that a notice which was issued from the office of the Surveyor General of the Dominion, then kept in Winnipeg, and signed by the Surveyor General, and bearing date the 21st March, 1873, was at that time very extensively circulated in Winnipeg and throughout the Province, in the terms following :—

Notice is hereby given that claims, by squatting on, or otherwise, to any Government lands within the settlements of the Red River and the Assiniboine River without the authority of this Department previously obtained will not be recognised by the Government. Persons are hereby required to govern themselves accordingly.

(Signed) J. S. DENNIS,
Surveyor General.

It appeared in evidence by abstracts of, and extracts from, deeds on registry in the registry office at Winnipeg (for this is the only way, as far as I can see upon

the appeal case laid before us, the deeds upon which the relator and Gray rest their respective claims were proved), that on the 26th June, 1873, after the publication and circulation of the notice of the 21st March, 1873, Logan executed a deed purporting to convey to one David H. Thomas a piece of land in the City of Winnipeg, described as being:

One chain frontage on Main street, Winnipeg, by which it is bounded on one side, *i.e.*, the west side running eastward four chains, and bounded by the common or reserve on Point Douglas, on which said lot of land is situate, and on the north by an adjoining lot and property of said William Logan, where he resides, and on the south by the property of E. L. Barber, on which his store or place of business is.

This deed is relied upon as the foundation of Gray's claim. At the time of its execution Thomas must be taken to have been aware of the notice of the 21st March previous, and to have been aware that the deed would pass nothing more than Logan's possession, which was that of a squatter only. In like manner, it appears that upon the 13th October, 1874, Thomas executed a deed of that date by which he purported to convey to one John Freeman a part of the piece conveyed by Logan to Thomas by the following description:

Commencing at the north-west point of letter B in the survey of said Point Douglas Common made by Douglas Sinclair, Esquire, Provincial Land Surveyor, on the east side of Main street in said city, which said survey, by a plan or map thereof, has been duly registered, thence northerly forty feet, thence in a line parallel with the boundary line of said lot B and lot letter C—in the same survey in an easterly direction to Austin street, thence southerly along the front of lot letter F, where the same fronts on Austin street forty feet, thence along the southern boundary line of lots letters C and F in said survey to the place of beginning.

Then, upon the 7th December, 1875, Logan executed a deed of that date by which he purported to convey to the said David H. Thomas the whole of lots D and

1889

FONSECA v. THE ATTORNEY GENERAL OF CANADA.

Gwynne J.

E, extending from Main street along Fonseca street to Austin street.

Then, upon the 22nd March, 1876, the said David Thomas executed a deed of that date, by which he purported to re-convey to the said Logan a portion of the said lots D and E by the following description:

Commencing at the north-west angle of lot D, fronting on Main street and Fonseca street, thence in an easterly direction along Fonseca street four chains, thence in a southerly direction at right angles 92 feet, thence in a westerly direction parallel with Fonseca street to Main street, thence along Main street 92 feet to the place of beginning.

Then on the 20th June, 1876, Logan executed a deed of that date, by which he purported to convey the same piece, by the same description, to one Frederick C. Mercer. Upon the 19th June, 1876, David Thomas executed a deed of that date by which he purported to convey to the said Frederick C. Mercer a portion of the said lot E in block 14, by the following description.

Commencing at a point on the south side of Fonseca street, distant four chains in a course S. 50° 30' 50" from the intersection of the south side of Fonseca street with the east side of Main street; thence southerly at right angles to Fonseca street 92 feet; thence easterly parallel to Fonseca street one chain more or less to the west side of Austin street, thence northerly along the west side of Austin Street 92 feet to the south side of Fonseca street thence N. 50° 30' 50" W. along the south side of Fonseca street one chain, more or less, to the place of beginning.

On the 28th March, 1876, by a deed of that date, the said David Thomas purported to convey to the said Logan that portion of lots F and E in block 14, described as follows,

Commencing at a point on the west side of Austin street forty-one feet northerly from the line between lots F and G, thence in a westerly direction parallel to the line between lots F and G, 90 feet, thence at right angles northerly 30 feet, thence easterly parallel to the said line between lots F and G to the line defining the westerly side of Austin street, thence southerly along the said westerly side of Austin street 30 feet, more or less, to the place of beginning.

Then, on 31st March, 1876, by deed of that date Logan purported to convey this lastly described piece of land to two persons of the name of McLean and McDonald. And, on the 20th September, 1876, the said David Thomas executed a deed of that date, by which he purported to convey to one Thomas Manley a piece of land which, by the abstract, appears to be a small piece of lot E, which lay between the south-easterly angle of that lot on Austin street and the boundary of the piece described in the deed from Thomas to Mercer, dated the 19th June, 1876. Then by deed, dated the 19th December, 1876, executed by the said David Thomas, he purported to convey to the defendant Schultz a portion of the said lots C, D, E and F. by the following description,

Commencing at a point forty feet in a northerly direction along Main street from the line dividing lots B and C, thence in an easterly direction 260 feet, more or less, running along the line and property of one John Freeman, thence at right angles in a northerly direction one hundred and thirty-five feet, more or less, running along the lines and property of one Thomas Manley, tradesman, and Messrs. McLean and McDonald to the line and property of Frederick Mercer, thence in a westerly direction 300 feet, more or less, running along the line and property of the said Frederick C. Mercer to Main street, thence in a southerly direction 42 feet, more or less, along Main street to the place of beginning.

The piece here described covered all the remaining portions of the lots C, D, E and F. not covered by the descriptions in the deeds to Freeman, Mercer, Manley, McLean and McDonald and from this time forth Logan had no possession. so far as appears, of any part of these lots C, D, E, or F.

Now, upon the 8th of April, 1875, the act 38 Vic. ch. 52 was passed in which it was enacted as follows:

Whereas it is expedient to afford facilities to parties claiming land under the third and fourth sub-sections of the thirty-second section of the Act thirty-third Victoria chapter three, to obtain letters patent for the same: Be it enacted that persons satisfactorily establishing

1889

FONSECA v. THE ATTORNEY GENERAL OF CANADA.

Gwynne J.

undisturbed occupancy of any lands within the Province prior to, and being by themselves or their servants, tenants or agents or those through whom they claim in actual peaceable possession thereof on the fifteenth day of July 1870 shall be entitled to receive letters patent therefor granting the same absolutely to them respectively in fee simple.

Upon the passing of this act the trustees of the Point Douglas Common seem to have appealed to it in support of their application to the Government for letters patent granting the lot No. 244 to them. Upon the 10th May, 1877, an Order in Council was passed adopting a report of the Minister of the Interior upon the application of the trustees. In that report the Minister submitted for the approval of His Excellency in Council:—

The land claimed consists of lot No. 35 Dominion Land Surveys, or No. 244 according to the Hudson's Bay Company's Survey and Registry Book situate formerly in the parish of St. John now included within the limits of the city of Winnipeg and contains $667\frac{2}{10}$ acres. Its precise boundaries are indicated on the diagram A herewith which also shows its position in relation to the small holdings embracing the frontage on the Red River at Point Douglas owned severally by the applicants by virtue of which ownership they claim the lands in question as tenants in common.

The claimants apply for a patent for this land and support their application by certain allegations as follows:—

1. That the late Lord Selkirk at or about the time he founded the Red River settlement laid out on the river lots on Point Douglas and gave the same to certain of his servants or retainers marking off the large tract in rear to be held as a common by and for the benefit of the Point owners. Two of the claimants have stated their belief that Lord Selkirk actually conveyed this land to the settlers at the same time that he granted them the small lots.

2. That they have always asserted their claim thereto, and have with slight interruption enjoyed the continuous and exclusive right of way and common over the same, and that the latter right has always been recognized in the surrounding community.

3. That the right so claimed and enjoyed by them is superior in all respects to that conceded by the law of the Assiniboia council to the owners of the river lots, between the two mile and the four mile lines.

5. They further claim a patent for the land under the provisions of the act 38 Vic. ch. 52.

The report then states, among other things, as follows :—

On an attentive perusal of all the evidence adduced and the voluminous papers in the case, it appears to the undersigned ;

1. It may be conceded that the claimants had, for many years previous to the transfer, enjoyed a right of common and of cutting hay over the land, but the enjoyment of such right can only be regarded as having been exclusive in the same light as the hay and common right in the outer two miles enjoyed by settlers on farm lots in the old parishes was exclusive.

2. As regards the right of the claimants to a patent under the act 38 Vic. ch. 52, it is clear to the undersigned that the "undisturbed occupancy" and "actual peaceable possession" of the common either at the time of, or previous to, the transfer by the Point holders, was not of a character contemplated by the statute and, therefore, not such as would entitle the claimants to a grant of the land. The undersigned is of opinion that the claimants were at the time of, and previous to, the transfer in the enjoyment of a right of common and of cutting hay over the land in question, and generally in the Province, the ascertaining and adjusting which is provided for in the act 33 Vic. ch. 3, and that the same should be commuted by a grant of land from the crown. He is of opinion, however, that the applicants are unreasonable in their demands.

Upon a full and earnest consideration of all the circumstances, the undersigned is of opinion that the applicants would be fairly, indeed liberally, dealt with, were they to receive in commutation of their rights a grant of acre for acre out of that part of the common next toward the river which is the most valuable part of the property.

The total acreage of the small holdings embracing the Point is 226·07 acres.

The undersigned recommends that a patent for an equal quantity issue to such persons as may be indicated with that view by the claimants, in trust for the benefit of the several owners of the Point lots. The land so patented should be bounded next to the river by the rear of the lots as originally laid out (the lot owned by the family of the late Neil McDonald to be considered as one of such lots), but not to be held to include any land for which a right to a patent may be established under the Manitoba act or the act 38 Vic. ch. 52, on the said property.

It should be understood, further, that the Government is to be entirely relieved from any trouble or responsibility connected with the division of the grant among the claimants, and finally the patent not to issue to the trustees until the written consent to such step shall

1889

FONSECA v. THE ATTORNEY GENERAL OF CANADA.

Gwynne J.

have been filed in the Dominion Lands office of the several parties to whom the Point holders or any of them may have sold lots on the common.

This latter clause was inserted, as it would seem, for the protection of the parties to whom the trustees of the Point holders may have sold lots under the trust deed of the 15th October, 1872. Upon the adoption of that report by His Excellency in Council, the order in council passed for that purpose had plainly the effect, as it appears to me, of setting apart, for the benefit solely of the owners of Point lots, that part of lot 244, now lot 35, next adjoining the Point Douglas lots (including the lots now in question), to which no right to a patent could be established under the Manitoba act, or 38 Vic. ch. 52, to the extent of 226 acres. If a right to a patent could be established either under the Manitoba act or 38 Vic. ch. 52, to any part of lot 35 next adjoining the Point lots, such part was excluded from the computation of the 226 acres reserved for the benefit of the owners of Point lots; but if no such right could be established then the 226 acres next adjoining the Point lots were reserved for the benefit of the owners of such lots.

Upon this report and order in council becoming known, Fonseca, apparently regarding himself as one of the persons therein alluded to as having a claim under the Manitoba act, as amended by 38 Vic. ch. 52, in the month of July, 1877, presented a petition addressed to the Minister of the Interior for a grant of the southern part of lot 244, now 35, measured from the eastern extremity of the common where his homestead enclosure was to the western extremity, and ten chains in width. The petition is as follows:—

The petition of the undersigned respectfully sheweth that prior to and on the 15th day of July, 1870, he was by himself and through his servants, tenants and agents in actual peaceable possession of a portion of lot No. 35, in the parish of St. John, according to the Dominion

survey of river lots to wit: the southern ten chains of said lot, commencing in the rear of the land or lot owned by the late Neil McDonald, and thence running back the usual distance to the two mile limit, and therefore prays that letters patent therefor may issue to him for the same.

This petition was accompanied with Fonseca's declaration, as follows:—

I, William Gomez Fonseca, of the City of Winnipeg, in the county of Selkirk, gentleman, do solemnly declare:

1. That in the year one thousand eight hundred and sixty-one I, with the permission of the Hudson's Bay Company, through the late Governor McTavish, located and settled on part of now lot number thirty-five, according to the Dominion survey of river lots, immediately in rear of that portion of land then occupied by the late Neil McDonald, having a width of ten chains, and bounded on the southerly side by the land of Alexander Logan, Esquire; and, within a few years thereafter, not exceeding four, I fenced in a portion of said lot on the east side of the highway, and built thereon a dwelling-house, which I have ever since lived in, and occupied and cultivated, and I also, in the year 1869, built a store and outhouses on a portion of said lot, within the range of ten chains, aforesaid, extending back from the river on the west side of the highway, which I used for a store until about four years ago, and the same has since been occupied and is now occupied by my tenants.

That my occupancy of said ten chains has been peaceable and without interruption, and that, to the best of my knowledge and belief my claim to the crown patent for that portion of said lot thirty-five, in the rear of the late Neil McDonald's holding, having a width of ten chains and extending back to the two mile limit, is just and well founded.

That in the year 1867 I employed Herbert L. Sabine, an authorized surveyor under the Assiniboian Government, to survey for myself and others the whole of the lot 35, aforesaid, and I assisted in such survey, and planted the pickets, and we surveyed to the whole extent of the outer two mile limit, and I paid him therefor my proportion, equal to the ten chains in width aforesaid; and I make this solemn declaration, believing it to be true, and by virtue of the act passed in the 37th year of Her Majesty's reign, for the suppression of voluntary and extra-judicial oaths.

Herbert L. Sabine, the surveyor therein referred to, also made a like declaration, affirming in every particular the statements in Fonseca's declaration; and

1889

FONSECA v. THE ATTORNEY GENERAL OF CANADA.

Gwynne J.

one Alexander Dubé also made a similar declaration, affirming Fonseca's declaration in every particular, save only that in relation to the survey of the lot in 1867, as to which Dubé said nothing. With these declarations accompanying the petition, it was presented to the Government.

At this time the Government was recognizing the right of persons settled on land in Rupert's Land, prior to the 15th of July, 1870, to letters patent granting to them the land extending back from their actual location to the extent of what was called the two mile limit; and upon the strength of this action of the Government Fonseca and others similarly situated with him upon this lot 244, now 35, made application for letters patent to be granted to them respectively.

We now see that when Fonseca's petition was presented asking for letters patent to be issued granting to him the southerly ten chains of lot 244, which included the whole of the lots now in question, Logan was not in apparent or actual possession of any part of the lots now in question. He himself admits that he knew of Fonseca's application, and that it covered lots C, D, E and F, and that he never did make any application himself until the month of May, 1882, more than three years after the letters patent to Fonseca had been issued; and in that application he based his claim under the Manitoba act, as amended by 38 Vic. ch. 52, upon the allegation that he was in actual peaceable possession prior to and upon the 15th July, 1870, and that he had been in possession of a part as far back as 1863. We have already seen that there was no foundation whatever for such an allegation, and that its falsity has been established in part from his own lips, and by other means. All claim in him based upon any such foundation has been disproved, not only by the evidence given in the present case, but by that given in the case

instituted by the present relator against the present defendants and the Attorney General, in which judgment has been rendered against the relator; but whether Logan had or had not any pretence of claim, he never made any claim to the Government or took any steps whatever to interfere with Fonseca's application for letters patent granting to him land including, as Logan knew, these very lots C, D, E and F, while that application was before the Government, a period of about 18 months; neither did any person assert any claim to the land now claimed by the relator, either in virtue of a transfer derived from Logan of any claim or possession which Logan had or was supposed to have, or otherwise. The present relator only acquired the interest under which she claims in 1882, long after the letters patent to Fonseca were issued; but her husband, Frederick C. Mercer, in and from the month of June, 1876, until the month of November, 1880, as to part, and until the month of October, 1882, as to other part, was possessed of whatever claim or possession or right of possession Logan ever had in those parts of lots D and E, which are now claimed by the relator. Her claim rests upon three deeds, the first of which is dated the 8th November, 1880, executed by the relator's husband, whereby he purported to convey to one Charles H. Pattison parts of lots D and E in block 14, described as follows:—

First, commencing at the north-west corner of lot D, at the intersection of Main and Fonseca streets, thence easterly along the northern boundary of said lot D 132 feet, thence southerly and at right angles to the northerly boundary of said lot D 92 feet, thence westerly and parrallel with the northerly boundary of said lot D 132 feet, more or less, to Main street; thence along the westerly boundary of said lot D 92 feet to the place of beginning; and,

Secondly, commencing at a point on the southern boundary of Fonseca street at the distance of 198 feet easterly from the north-west corner of lot D, thence easterly and along the northerly boundary of lot E 132 feet, more or less, to Austin street; thence southerly along

1889

FONSECA v. THE ATTORNEY GENERAL OF CANADA.

Gwynne J.

the easterly boundary of said lot E 92 feet, thence westerly and parallel with the northerly boundary of lot E 132 feet; thence northerly 92 feet to the place of beginning.

This description left on lots D and E still unaffected by this deed 35 feet on lot D, measured on Fonseca street, at the eastern extremity of lot D, by 92 feet back at right angles with Fonseca street, and 35 feet on lot E, measured on Fonseca street, at the western extremity of that lot by 92 feet back. The second deed is dated the 31st January, 1882, whereby Pattison purported to convey to the relator the pieces of land above described in the deed of the 8th November, 1880, and the third is dated the 9th of October, 1882, whereby Frederick C. Mercer purported to convey to his wife, the relator in the present proceeding, that portion of lot D having a frontage on Fonseca street of 35 feet by 92 feet back at right angles with Fonseca street, not included in the deed of the 8th November, 1880, leaving thus 35 feet on Fonseca street by 92 feet back at the western extremity of lot E still unaffected. Now, Frederick C. Mercer, who was the only person who had any claim as derived from Logan in the land now claimed by his wife, the relator in the present case, never made any claim for letters patent to be granted to him, nor has any reason been given or suggested why he did not if he supposed that he had any. For all that appears, he may have known that Logan's possession consisted merely in his having squatted, as it is called, without any authority or color of right, and subsequently to the 15th July, 1870. He may, for all that appears, have had knowledge of the publication of the notice of the 21st March, 1873, and have thereby or otherwise known that he could not substantiate any right to have letters patent issued to him in virtue of any possession derived from Logan; but, however this may be, the fact remains that he never made any claim or application for let-

ters patent to be granted to him. If he had any claim he had it from the moment of his getting his deeds in June, 1876. Yet he never asserted it, and he does not appear to have been prevented from doing so by Fonseca, who, so far as appears, may have been utterly ignorant of his having obtained any interest derived from Logan, and in point of fact it is now clear beyond question that he never had any claim, the recognition of which is sanctioned and directed by the Manitoba act, 33 Vic. ch. 3, as amended by 38 Vic. ch. 52, to be recognized. Nor does the evidence afford any reason for concluding that he ever believed or supposed that he had any such or any claim to have letters patent issued granting the land in question to him.

Now as to Fonseca's application, that it was made in assertion of the existence of a right under the Manitoba act as amended there can be no doubt, neither do I think there can be any doubt that it was entertained as such, or that the letters patent issued to Fonseca were issued in recognition of such right, although not to the actual extent which, in the case of country lots away from towns, was then the practice. At this time the Government was in the habit, in recognition of claims under the act, of making grants to persons who, prior to the 15th July, 1870, were in peaceable possession of lands in country places which constituted parts of lots as subsequently surveyed by the Government, back to the extent of what was called the two mile limit, and Fonseca and others similarly situated with him upon the lot 244 made their applications founded upon a knowledge of this practice. Now that Fonseca's claim was recognized by the Minister of Justice (whose office it appears to have been to pronounce first upon the validity of the claim) as being valid under the act, appears from a reference to the opinion of the Deputy Minister of Justice upon that point in a memorandum

1889

FONSECA v. THE ATTORNEY GENERAL OF CANADA.

Gwynne J.

signed by the then Surveyor General, in February, 1879. The Department of Justice, and not that of the Surveyor General, or any other department, would seem to be the department to pronounce upon the validity of the claim, and this is what the Department of Justice appears to have done in the case of Fonseca, submitting to the Department of the Interior a question as to the *quantum* of the demand. The memorandum of the Surveyor General contains what appear to be some strange mistakes as to some matters of fact, and some opinions upon questions of law seemingly at variance with the view taken by the Department of Justice, and the expression of which opinions cannot, I think, be appealed to or adopted to the prejudice of the defendants. In that memorandum he says :—

> In the matter of the claim preferred by Mr. W. G. Fonseca for a grant to him under the Manitoba act of a certain portion of Point Douglas common, the undersigned has the honor to report that the Deputy Minister of Justice has, on the evidence submitted to him, approved the recognition of the claim, but gives the opinion that the extent of land to be granted is a matter for the decision of the Right Honourable the Minister of this department.
>
> In common with others making similar claims, Mr. Fonseca applies for the full depth of the "inner two mile" belt remaining in rear of the Neil McDonald property, and a width throughout of ten chains from the outline of the river lot next adjoining to the westward.
>
> It is to be observed that the Point Douglas common lot was not surveyed either by the Hudson's Bay Company, or subsequently by the Dominion Lands.
>
> Under these circumstances the possession of Mr. Fonseca under the Manitoba Act could not be affirmed to include any greater extent than his own actual enclosures, and did not therefore carry with it the occupation of any definite one of a system of lots.
>
> If, therefore, anything beyond the ground actually enclosed by him be granted to Mr. Fonseca, such concession will be purely an act of grace on the part of the Minister ; and in view of the relatively great value of the land in question, the undersigned is of the opinion that Mr. Fonseca would be most liberally treated were he given such an additional area to that actually occupied as would make the whole 25 acres.

As it will be advisable in public interest to recognise the private surveys which have been registered in the registry office at Winnipeg, subdividing certain portions of the common into building lots and laying out streets thereon ; and furthermore, that already action has been taken upon them by the department in giving patents to individuals who bought building lots from the trustees for the Point holders; therefore it would be well that the grant to Mr. Fonseca should be described to conform to the outline of certain streets to include certain blocks so laid out, and in doing this it may be necessary to depart slightly in defect or in excess from the area of 25 acres above specified.

It should be borne in mind in estimating the consideration that Mr. Fonseca would so receive, that it is but comparatively lately that he has preferred a claim on the present basis ; that he had with others, for a long time, advanced an antagonistic claim to this same piece of ground as one of the original Point holders, and therefore necessarily has himself to a certain extent weakened the force of the claim for consideration which he now advances. The information in this office is not yet sufficiently detailed and complete to enable the undersigned to know what parts of the common covered by this claim have already been disposed of to other parties, either by Fonseca acting for himself alone and receiving the equivalent therefor or by the trustees for the Point holders. In the latter case a proportionate additional extent in the rear would require to be added to make up for any such land sold for which Fonseca received no equivalent.

The allegation that the Point Douglas common had not been surveyed either by the Hudson Bay Company or the Dominion Government appears to be quite erroneous, as appears by the report of the Minister of the Interior, adopted in Council in May, 1877, where the common is referred to as being called lot 244 in the Hudson's Bay Company's survey and registry book, and the Dominion survey is referred to in the letters patent to Fonseca as of record in that branch of the Department of the Interior, known as the Dominion Lands Office, where the lot is designated as No. 35 on a plan signed by John Stoughten Dennis, Surveyor General of Dominion Lands, and dated 1st January, 1875. The allegation upon which the Surveyor General rested his opinion that Fonseca had no claim under the Manitoba act for any more than his actual home-

1889

FONSECA v. THE ATTORNEY GENERAL OF CANADA.

Gwynne J.

stead enclosure, and that if anything beyond that should be given to him, it should be a mere act of grace on the part of the Minister, being erroneous, the opinion based upon such material cannot be entitled to much consideration, and the opinion of the Minister of Justice may, I think, be allowed to prevail, namely, that Fonseca's claim was valid and should be recognized, but that it was for the Minister of the Interior to determine the quantity of land to be granted in recognition of it. So, likewise, not much weight can be attached to the opinion that the claim by Fonseca and co-trustees reported on by a former Minister of the Interior, in May, 1877, was so antagonistic to Fonseca's claim for a grant to himself under the Manitoba act that his claim under the act was weakened thereby. Weakened it might be, without being reduced to the condition of a mere petition for the exercise of the grace and favor of the Minister. However, the Surveyor General does not appear to me to have appreciated accurately the object of the parties to the trust deed. Their intention was to sell the town lots as surveyed by the trustees in 1870 ; and as to the residue their object, as testified by Dr. Schultz, was to obtain a grant, in order that the parties interested might be in a position to apportion the land among themselves in an equitable manner, according to their knowledge of the proportion that should be allotted to each. When the Government refused to recognize the application of the trustees, as they did by the order in council of May, 1877, by which, at the same time, they reserved the rights of all persons having exclusive claims under the Manitoba act, it was natural that Fonseca and such others as were similarly situated should have made the applications they did ; and their having made the former application cannot in fairness be said to prejudice their rights under the act.

The Surveyor General, however, appears to have touched the material point when he suggested that to recognize the practice as to what was called "the inner two mile" belt as applicable to a case affecting property in the town of Winnipeg, where it was very valuable, would be unreasonable, and it may be admitted that the 25 acres as suggested by him as sufficient would be to the full as liberal as, if not more so than, a grant in a country lot up to the two mile belt would be. The quantity suggested may have been very liberal but it was no less a grant in recognition of Fonseca's claim under the act; and so, indeed, it is in most express terms shown to be in the letters patent, where the Government speaks as of record in well considered language. That Fonseca's grant, then, was in recognition of a claim valid under the act cannot, in my opinion, admit now of question.

The Surveyor General's memorandum, however, shows that when he was not expressing a legal opinion he knew thoroughly what he was about, and what his suggestion was as to the position of the land to make up the 25 acres he has not left in obscurity. The land to be granted was plainly to be adjoining to the homestead enclosure—it was to cover all the land now in question. It was to comprehend all the land surveyed into town lots by the trustees, except such as they had sold, or any, if any there was, that Fonseca had himself sold on his own account and received the benefit, which, it may be observed, he could only have done as a person in actual possession under circumstances recognized by the act, and it may be further observed that no trespasser could substantiate a claim against a claim valid under the act. He had before him the plan as registered by the trustees as well as the plan of the Government official survey of the town lots, He had also the abstracts of all deeds on the registry.

1889

FONSECA v. THE ATTORNEY GENERAL OF CANADA.

Gwynne J.

including those under which the relator's husband had, whatever title he ever had; with these documents his department, under his supervision, if not he himself personally, inserts in Fonseca's grant these four lots C, D, E and F.

After the letters patent issued it appeared, however, that some few of the lots sold by the trustees were, by mistake, included in the grant. This mistake Fonseca immediately pointed out, and had rectified, he confirming the purchasers' titles and receiving other lots from the Government. It was contended that Fonseca in a letter addressed by him in October, 1878, to Mr. Dennis, the then Surveyor General, had admitted Logan's claim to lots C, D and E. The force of the argument founded on this letter I have not been able to see. It would seem to have been urged in the nature of an estoppel against his now denying it, but there is no question here of estoppel, and notwithstanding anything in that letter it appears conclusively, by abundant evidence, that in point of fact Logan had not the title which Fonseca in that letter attributed to him, nor any title. There appears to be no doubt that Fonseca was trying to serve Logan, who was his brother-in-law. If the Government, upon the strength of Fonseca's letter, had withheld the lots C, D and E from Fonseca's grant he could not have complained, although, perhaps, others who had an interest in the common could; but the Government having included these lots in his patent, and Logan not having had any title to the lots, as now appears beyond all question, I do not see how Fonseca, having said in that letter that Logan had a title to those lots, when in truth he had not, and Fonseca was mistaken upon that point, can affect the letters patent with the infirmity of having been granted in error or improvidently and in ignorance of a right which did not exist. In so far, then, as

this letter is concerned, it seems to me, instead of being prejudicial to Fonseca in the present case, to remove all possibility of any deceit or concealment of facts to the prejudice either of the public or of any individual, or malpractice of any kind being imputed to him.

Now, as to Gray's case: he claims under a deed executed by a Mr. Belch, dated the 2nd August, 1881, or a year and seven months after the letters patent to Fonseca were issued. At the time of Gray's purchase there were no improvements on the piece in question. Belch, with full knowledge of the imperfection of his claim, refused to give anything but a quit claim deed, and Gray, with like knowledge it may be presumed, was content with such a deed. When Gray proceeded to make improvements on the lot he was expressly forbidden to do so by Fonseca, claiming under his letters patent, so that whatever improvements Gray made he made them at his own peril with full notice of Fonseca's title. This Mr. Belch, from whom Gray purchased, obtained a deed from one Freeman, under whom he claimed, upon the 13th of August, 1877. Freeman had never made any claim for letters patent to be issued granting the land to him, and for all that appears he may have well known that he had no claim whatever for such grant. Mr. Belch, however, at the time of his purchase and for some time previously, but for how long does not appear, was a clerk in that branch of the Department of the Interior known as the Dominion Lands Office, at Winnipeg. He, at least, must be held to have had full knowledge that no clerk in the Lands' Office could be permitted to traffic in doubtful land claims, squatters' claims, &c. He must be charged with knowledge of the circulation of notices, such as that of the 21st March, 1873. He must have known that squatters' claims upon the land in question would not be recognized by

1889

FONSECA v. THE ATTORNEY GENERAL OF CANADA.

Gwynne J.

the departments having charge of the duty of issuing letters patent therefor, and that, in fact, none but claims under the Manitoba act could be entertained. He never made application for letters patent until the month of July, 1879, and when he did he based his claim on the Manitoba act, well knowing, doubtless, that this was the only way by which he could get it to be recognized. He succeeded in procuring Fonseca to support his application. Fonseca could not truly say and, in point of fact, did not say in his declaration, that Logan, from whom Belch traced the origin of his title, had been in occupation on the 15th July, 1870, but, willing to assist Belch, he did say that he was in occupation in 1870, and he added that he knew of no claim adverse except one of his own, as to which he said :—

> Which I release and forego as to the said portions of lots.

Fonseca's declaration, in fact, upon its face, would convey to the experienced mind that Logan's possession had not existed on the 15th July, for if he had been then in possession his claim would have been valid under the act, and Fonseca would have had no claim to release and forego ; this could not well have escaped the notice of the Government officials having to deal with the application, who appeared to be the Minister of Justice, the Surveyor General and the Minister of the Interior, and that it did not escape them may fairly be concluded, I think, from a letter produced from the Surveyor General's Department in July, 1881, to Mr. Belch's solicitors, when his application was then renewed under circumstances which shall shortly appear. In that letter Mr. Belch's solicitors are informed that the Surveyor General regrets :—

> That looking through the evidences they fail to establish any title, under the Manitoba act, on the part of Mr. Belch's assignors.

And after pointing out the defect in Fonseca's declaration the letter concludes :—

Under the circumstances that the evidences filed, where they are to the point, are informal- - and that, when they are in proper form, they are either not to the point, or clash with each other—I could not, consistently with my duty, report the case to the Minister as one in fit shape for decision as to the right of the claimants.

The defect alluded to has never since been and never could be removed, for it related to the want of proof that Logan had possession on the 15th July, 1870, so as to establish a claim under the Manitoba act, which in a passage in the letter is referred to "as the all-important point."

Now, I do not think it can be doubted that the Surveyor-General had come to the same conclusion in 1879, when the selection of the lots for Fonseca's patent was proceeding in his department, under his supervision. And here it may be observed that the Surveyor General, to whom chiefly any mistake or improvidence in the matter, if there has been any, is imputed, and who could have testified clearly upon this point, and who could also, perhaps, if pressed, have said that he never could have sanctioned or recognized a traffic in land claims of this nature by a clerk in his department, was not called; so that in fact, as to this point, we are asked on behalf of the Government to render a solemn judgment declaring these letters patent to have been issued in error and improvidently, not upon the production of the best evidence to establish the charge of error and improvidence, namely, that of the officer of the land department upon whom devolved the duty of selecting the lots to be mentioned in the letters patent, but we are asked, in the absence of his evidence, to impute to the officer and his department the error and improvidence necessary to be established by the informant (upon

1889

FONSECA v. THE ATTORNEY GENERAL OF CANADA.

Gwynne J.

whom the whole burthen of proving the error and improvidence rests) in order to justify our judgment.

In the case of Mercer against these defendants and the Attorney-General Mr. Dennis, who had been Surveyor General part of the time that Fonseca's application was before the Government, was examined as a witness, and he being dead his evidence then given was read in the present case, and is before us. As to it I may say that it is clear to my mind it must be read as having relation to the claim then made before the court, namely, that Logan had a claim which was valid under the Manitoba act, as a person who had been in actual possession peaceably on the 15th July, 1870 as to which Mr. Dennis repeatedly says that if such a claim had been presented, and was true, then the letters patent to Fonseca were issued in error. The mass of his evidence has little bearing in the present case, but in the view which I take there is a portion of it which has a very important bearing. He says that it was the duty of a Mr. Lang (then an officer of the department), in connection with the Surveyor General, to classify and to look into all claims; that when he (Col. Dennis) was Deputy Minister he would not go into details himself, that they would be entered into by Lang and the Surveyor General; that Lang was sent up to Manitoba to investigate all claims, and that he thought that after his return he (Lang) at Mr. Dennis's instance, made out a list of the lots that should go to Fonseca, Sutherland, Schultz, and so on, parties whose rights were to be commuted. Again, that Mr. Lang was the person with whom he had most intercourse; that his (Lang's) duty was to ascertain what lots the Government were in a position to grant. In that case Lang's evidence also was taken, but this is not brought before us except in so far as some questions were put to Mr. Dennis on

cross-examination in relation to it. For example, this passage occurs: The examining counsel says:—

> I am reading now from Mr. Lang's examination:—
>
> Fonseca never asked me to select any particular lots. Col. Dennis gave me instructions as to selecting.

Then he goes on to say:

> Was Col. Dennis personally acquainted with the holdings on the Point Douglas common? Yes; Col. Dennis told me he was. I think I got instructions to draw the references for patents from Col. Dennis. I had no written instructions. I was also directed to select an area of land as near to the land actually in occupation of Fonseca as possible, not including any land sold by Fonseca or the Point Douglas trustees to make up the quantity to be granted to Fonseca.

This portion of Lang's examination having been read to Col. Dennis, and he having been asked if what Lang had there stated was correct, replied in effect it was—his exact answer was, "precisely so." Then he says that both he and Mr. Lash, who was then Deputy Minister of Justice, spent until two or three o'clock in the morning for weeks together, weighing and considering all the different claims, and that before letters patent issued the Department of Justice had to approve the fiat. Col. Dennis does not appear to have been asked any questions about Belch's claim; in his examination the whole inquiry was as to Logan's claim, which was alleged to be prior to the 15th July, 1870, but which in that case was disproved. Now, there is a point to which I desire to draw particular notice in this connection, and it is one which I can only conceive to have arisen by reason of the relator having had, as I think she must have had, the control of the conduct of the case upon behalf of the informant. It is this; this Mr. Lang, who appears to have had such important duties to discharge, and to have known so much in relation to the lands in question and to the including them in Fonseca's patent, appears to have been examined in the former case of Mercer against these defendants and

1889

FONSECA v. THE ATTORNEY GENERAL OF CANADA.

Gwynne J.

the Attorney General, and to have been able to give very important evidence in the matters now under discussion, and judging from the above extract from his examination read to Col. Dennis seems to have given very important evidence. He seems to have been in a most favorable position to supply evidence as to points in relation to which the present Deputy Minister of the Interior says he cannot find what he calls "a record" in the department. Notice of intention to read Lang's evidence as well as Col. Dennis's (Lang having since his former examination left the country as is believed), was served on the defendants, yet Lang's evidence has not been read by or on behalf of the Attorney General, although from a report made by him upon Logan's claim, when made in 1882, and which does appear to be in possession of the department if it cannot be said to be "on record," the following extract is supplied :—

Memo.—*Re* claim of Wm. Logan to part of lot 35, St. John.

DEPARTMENT OF THE INTERIOR,

OTTAWA, 13th September, 1883.

The land referred to herein was patented to W. G. Fonseca as part of his claim under the Manitoba Act on the 3rd December, 1879. It was known in the department at the time that there were others who had squatted upon the land patented to Fonseca, but Fonseca's claim was considered to be the one which should prevail over all the others.

(Signed) R. LANG.

There is just one other point which I cannot refrain from referring to. The Deputy Minister of the Interior has said in his evidence that by a record in his department it appears that Belch's application was received in the Department of the Interior on the 30th July, 1879, and that on the 13th August, 1879, it was transmitted to the Inspector of Surveys at Winnipeg, to be dealt with in the usual course which was to make a report upon the claim, and he said that it was not received back until the 18th June, 1881. No evidence

of any kind was offered as to what was done with the papers at Winnipeg, or how they come to have been put away where they were said to have been found. If Mr Belch was, in August, 1879, still in the Winnipeg Lands Office he could probably have thrown some light upon the subject. Neither was any evidence given as to who found them, or how them came to be found. The only information on the subject is contained in a telegram received in Ottawa the 13th June, 1881, from Winnipeg, from a Mr. E. M. Wood, who was not called as a witness to give any information upon the subject. The telegram is addressed to Lindsay Russell (who was Surveyer General), and is as follows :—

Re Belch.—Point Douglas common papers found accidentally here in Land Office to-day. Will forward. E. M. WOOD.

Now Mr. Lang, to whom, as would seem from Col. Dennis' evidence, the papers were most probably given to report upon in pursuance of the duty imposed on him, if he had been consulted upon the point could probably have given a satisfactory explanation. So, no doubt, could Mr. Lindsay Russell, for from a letter addressed to him, dated the 19th July, 1881, as well as from the letter addressed from his department to Mr. Belch's solicitors shortly previously, I think it very probable that in addition to explaining that he had in 1879 found that the claim could not be entertained he could have added a most excellent reason why the papers should have been relegated to, and suffered to remain in, the pigeon-holes of the department at Winnipeg, where they are said but not proved to have been found accidently, namely, that the public interests forbid the possibility of the department recognising the improper traffic by a clerk in the department in land speculations of the character of the one under consideration. The following is the material part of Mr.

1889

FONSECA v. THE ATTORNEY GENERAL OF CANADA.

Gwynne J.

Belch's letter of the 19th July, 1881, and this was before he executed the deed of quit claim in favor of Gray:

DOMINION LANDS,

BIRTLE, MAN., July 19th, 1881.

DEAR SIR,—On my return from Winnipeg in February last I wrote you a note in which, I think, I stated I had reached that point on my return to resume my official work at Birtle, not having, however, succeeded in the business object of my visit to Winnipeg, which was principally to dispose of certain property on Point Douglas common I purchased from one John Freeman.

After the transaction was closed I discovered the chain of title was imperfect, having no responsible beginning, William Logan and wife having conveyed without first obtaining title from the crown. I then made application by myself and wife to the department for these lots, together with another property on McWilliam street where my family reside. This application was made by Messrs. Aikins & Monkman, barristers, on 23rd July, 1879, and by them forwarded to Ottawa. The papers were duly received at the H. O. and returned to the office in Winnipeg, in order that they might be dealt with in the ordinary way.

Mr. Whitcher acknowledged the receipt of them. In the letter register it is noted that the papers were handed to Mr. Lang, but such is not the fact, as they were found accidentally on the 11th ultimo, stored in an out of-the-way place in the vault upstairs in the Winnipeg office. In consequence of the state of things I have described, is it unreasonable for me to ask the department to interfere to make my title marketable? What is required is a quit claim deed from Fonseca and one from Schultz. * * * *

In the meantime I have sold the Point Douglas property for a little over $3,000.00 and make title clear. Will the Department help me to do so?

(Signed) A. J. BELCH.

Upon this letter it is to be observed that Gray's claim is, in fact, made on behalf of Belch, and in order to try and get his title made good which was known to the department not only to be defective in respect of its origin derived from Logan, but as an improper traffic by a clerk of the department in squatters' titles.

It appears, moreover, that there is a record in this department that Mr. Lang was instructed to investi-

gate this claim. Mr. Belch, for a very insufficient reason, asserts this record to be false. It certainly is a very unfortunate state of things if the records of the department are not only imperfect in not being preserved so as to be produced when required to show that the officials of a time past were not guilty of error and improvidence in the discharge of their duties, but also that those which are preserved cannot be relied upon as correct.

These imputations only serve to show the greater importance of Mr. Lang's evidence being produced by the informant, upon whom the whole burthen rests in this case. It is not improbable that he may have made a verbal report in this case, as he appears by Col. Dennis' evidence to have done in other cases ; or that he relegated the papers, not, perhaps, without Belch's knowledge, to the place where they are suggested to have been accidentally found because it was clear that the claim could not be entertained. If Lang had, as it now appears he had, these papers to report on, and if he had investigated it as directed (and that he did not do so cannot be assumed), then it is clear that Lang, whose duty it was, in conjunction with the Surveyor General, to select the lots to be inserted in Fonseca's patent, had the fullest information on the subject, and cannot be assumed to have been guilty of error or improvidence in inserting in it the land now claimed on behalf of Belch through the intervention of Gray.

Now, I think it is free from doubt that a judgment avoiding letters patent upon an information of this nature can only be justified and supported upon the same grounds being established in evidence as would be necessary to be established if the proceeding were by *scire facias*, namely, either 1st, for the misrecitals in the letters patent (1), or 2, for false suggestions or mis-

(1) Moore 318 ; Hob. 224.

1889

FONSECA v. THE ATTORNEY GENERAL OF CANADA.

Gwynne J.

information by which the Queen has been deceived (1); or

3. Where there has been granted more than lawfully might be (2); or

4. When the grant may be to the prejudice of the commonwealth, or to the general injury of the public (3); or

5. Where the same thing has been granted to others.

All of these grounds are comprehended under the terms fraud, error and improvidence. In the present case there is no suggestion of fraud; as to error, there is none in point of law suggested.

What is the distinction between "error" and "improvidence" it is difficult to say with preciseness. That these letters patent were granted in error and improvidently, and in ignorance of the right of others, is what the information alleges as the grounds upon which the letters patent are sought to be avoided by a judicial decision. If the letters patent were granted "improvidently" they may, in a certain sense, be said to have been granted "in error," but not in the same sense as where the same thing has been granted to other persons or where more has been granted than lawfully might be. The term "improvidence," in so far as it is distinguishable from "error," as applied to letters patent which are sought to be avoided and set aside as issued "improvidently," seems to me to apply to cases coming within the 4th of the above grounds in the enumeration of the grounds of objection open in a proceeding by *scire facias* by the crown to revoke letters patent, namely, where the grant has been made to the prejudice of the commonwealth or to the general

(1) Com. Dig. Grant G. 8-9, Patent F. 2; 11 Co.9 A; 4 Inst.88; 1 Co. 52 A.

(2) Com. Dig. Grant G. 8; 1 Co. 49 b; Hindmarch Patents 39–48.

(3) Com. Dig. Patent F. 4; 11 Co. 86 b; 1 Stra. 43; Dyer 276 b; Hindm. Patents 62.

injury of the public, with this superaded—or of any individual having any rights in the thing granted which are injuriously affected by the letters patent. It is difficult to define affirmatively all the acts or defaults that will constitute "improvidence" in the issuing of letters patent granting land so as to justify the avoidance of the letters patent. It is easier to say what will not, and even to attempt to do that, so as to include all cases, would be difficult. It is sufficient for us to consider only the acts and defaults which are suggested by the information as existing in the present case; and first, I think we must regard Fonseca's right to the lands granted as having been recognized by the Government as good and valid under the Manitoba act, and that the lands granted to him were so granted in recognition of that right; and this being so, I think it follows as a proper, if not a necessary, conclusion that those letters patent cannot be assailed by the Government that issued them in recognition of such a valid and statutory right as having been issued in error or improvidently as to any of the land thereby granted, except upon the ground that some other person had a better title—that is to say, one which was also valid under the act, and superior to that of the patentee. It is upon this ground alone, as it appears to me, that adjudication in support of the prayer of the information would be justifiable.

Secondly,—When lands have been granted upon which an intruder and trespasser having no color of right in law has entered and was in possession, of whose possession the Government officials, upon whom rests the duty of executing and issuing letters patent and of investigating, and passing their judgment upon, the claims therefor, were ignorant, or when such intruder and trespasser has not, nor has any person as

1889

FONSECA v. THE ATTORNEY GENERAL OF CANADA.

Gwynne J.

claiming under him, made application for letters patent to be issued granting any part of the land to him or her; or, when the possession of the intruder and trespasser, or some person under him or her, was known to such officials, and the intruder and trespasser, or some person claiming under him or her has made application for a grant of some part of the land upon which the trespasser had so intruded and entered, and notwithstanding letters patent have been issued granting the land so applied for to another, without any express determination of the officials refusing the application of the intruder and trespasser, or of the person claiming under him or her, or without any record having been made of the application having been made and rejected; the letters patent which have been issued granting the land to another cannot, at the instance of the Government, be judicially pronounced to have been issued in error or improvidently in any of the above instances, or because the officials did not make an express decision refusing the application of the trespasser or of the person claiming under him. For the determination of the present case it is sufficient, in my opinion, to say that the burden of proving by clear testimony, of an unquestionable character, that the letters patent, as regards the lots in question, were granted in error and improvidently rested wholly upon the Attorney General, and that for the reasons already hereinabove indicated such evidence has not been given.

From the evidence which has been given sufficient, I think, appears to show that Lang's evidence, which, although taken in the case of Mercer, the present relator, against these defendants, was suppressed in the present case, and the evidence of the Surveyor General and of the material upon which the Department of Justice proceeded when the Minister signed the fiat for the letters patent to issue, were most

material, and should have been produced and given if the prayer of the information could have been thereby supported, before a court of justice would be justified in adjudicating that letters patent, in which is recorded the declaration that the claim of the patentee to the lands granted under the Manitoba act had been duly investigated, and that he had been found entitled thereto, were issued in error and improvidently. Such a declaration manifested by matter of record cannot be so easily avoided. It is impossible that the letters patent in the present case should be adjudged to be avoided as issued in error and improvidently upon the suggestion, eight or ten years afterwards, that in one of the departments of the Government whose duty it was to take part in investigating and determining upon the validity of the claim of the patentee to the lands granted, and of issuing letters patent to him if his claim should be recognised as valid, there is said to be no "record" showing that the officials, upon whose authority the letters patent were issued, had given due consideration to all the matters which should have been considered by them. The charge of error and improvidence must be proved, and clearly proved, by positive affirmative evidence; notwithstanding the statement that the records of the Department of the Interior are defective, inasmuch as they do not show what was done in respect of Logan's possession, or of that of those claiming under him, sufficient does, I think, appear to show that the officials who authorised the issue of the letters patent to Fonseca had knowledge of the character of Logan's possession and of that of those claiming under him, and that it was only that of squatters, without any legal right—and that they had knowledge also of the fact that neither Logan nor any person claiming under him had made any application for letters patent in assertion of such

1889

FONSECA v. THE ATTORNEY GENERAL OF CANADA.

Gwynne J.

possession, and that the letters patent to Fonseca were authorized to be issued for the lands therein intentionally and deliberately, and with the intent of treating such possession as not having attached to it any right whatever to recognition, or entitling Logan or any person claiming under him to be maintained in such possession. There is, therefore, enough to show that the letters patent were not issued in error or improvidently.

In so far as the claim of Gray is concerned, representing as he does simply that of Belch, it would be a public scandal if these letters patent should be avoided in the interest and for the benefit of a clerk in the Lands Department who had speculated in squatters' claims. As to Mrs. Mercer, the Government has it in its power to indemnify her equally as it would have had to indemnify Fonseca if the letters patent to him had been avoided in the interest and for the benefit of Mrs. Mercer.

For the reasons given I think the appeal must be allowed with costs, and the information be dismissed in the court below with costs.

PATTERSON J.—I am not disposed to quarrel with the conclusion arrived at by the other members of the court, though I cannot take credit for having assisted in reaching it.

The reasoning of the present learned Chief Justice of Manitoba on which the judgment proceeded seems to me to be correct, and the judgment of the late Chief Justice to be influenced by what I think a somewhat erroneous reading of the clause R.S.C. ch. 54 sec. 57, which reading appears to overlook the word "improvidence" and to give it no effect in the operation of the clause. Instruments may, under that clause, be adjudged void if issued through fraud, error, or impro-

vidence. Fraud needs no definition. Error exists when something not intended is done, as if a patent were issued for Blackacre when Whiteacre was meant to be granted, or where, as in *Stevens* v. *Cook* (1), land to which one person is entitled is by inadvertence granted to another. It would be only consonant with sound principles of construction to understand "improvidence" to denote something which is not necessarily covered by the terms fraud or error, as if a patent is ordered to be issued without facts being present to the minds of those who deal with the matter which, if known and considered, might have affected the decision to advise the making of the grant. This is the force given to the term by Esten V.-C. and Spragge V.-C. in the cases cited to us of *Attorney-General* v. *McNulty* (2) and *Attorney-General* v. *Contois* (3).

The assertion here is that conflicting claims existed and were traceable by documents in the department, but that they were not considered or adjudicated upon.

In ordinary affairs it may be, and is, often proper to treat one as knowing what he has the means of knowing or what he is proved to have once known. But that is not a rule of universal application. In the well known case of *Raphael* v. *The Bank of England* (4) the bank was held to have taken a bill without notice of the invalidity of the title of a previous holder, notwithstanding that a formal notice of the facts invalidating the title had been given to the bank a year before. I do not understand the question before us to be a question of title. The grant might, even if the present patent were avoided, be again made to Fonseca, but whether made to him or to any one claiming under Logan or Belch, it would still be made by the grace of the crown and not necessarily as a recognition of any legal title. The determination is for the department and is not appealable to this court.

(1) 10 Gr. 410.
(2) 11 Gr. 281.
(3) 25 Gr. 346.
(4) 17 C. B. 161.

1889

FONSECA v. THE ATTORNEY GENERAL OF CANADA.

Patterson J.

On the question of improvidence, considered apart from fraud and error, it is not our duty, as I apprehend, to form a definite opinion as to the relative strength of opposing claims.

In this case I entertain no doubt of the admissibility of the evidence of Col. Dennis given in the action of *Mercer* v. *Fonseca*, and the conclusion to be drawn from his evidence and that of Mr. Burgess seems plainly to be that the parts of lots C, D, E, and F now in question would not have been included in the patent to Fonseca without further inquiry, and possibly would not have been granted to him if the conflicting claims had been present for consideration.

For these general reasons I should have been inclined to hold that the patent was issued by improvidence as far as those lands are concerned, and should, to that extent, be declared void.

My opinion would, of course, have assumed that there were really conflicting claims for consideration, and claims which, whether sustainable or not, were advanced in good faith and were not entirely frivolous.

It is not quite clear that the claims in respect of which the Attorney-General has allowed this information to be filed in his name are of that character, or, if they were, that they can properly be said to have been overlooked; and under the circumstances I do not apprehend that the decision now arrived at involves, in strictness, a construction of the statute different from that given to the cognate statute in the Upper Canada cases which have been cited.

I do not say that the opinions expressed in those cases will not bear reconsideration. The true effect of the statute may be found to be a question open for discussion in some case where the facts are more distinct.

With this explanation of my views I do not dissent from the judgment of the court allowing the appeal.

Appeal allowed with costs.

Solicitors for appellants: *McDonald, Tupper & Phippin.*

Solicitors for respondent: *Patterson & Baker.*