HIS MAJESTY THE KING UPON THE INFORMATION OF THE ATTORNEY-GENERAL OF CANADA, PLAINTIFF; 1912 Nov. 21.

AND

JOSEPH LARENCE, JULIAN LARENCE, ESTHER MARION, SARA MARION, GENEVIEVE GENTHON, MARGUERITE LARENCE, HILAIRE TARDIF, JOSEPH GOBEIL, LOUIS WITT, MARIE J.A.M. DE LA GICLAIS, AND GENEVIEVE GENTHON, EXECUTRIX OF THE LAST WILL AND TESTAMENT OF ELIE GENTHON, DECEASED, DEFENDANTS.

Dominion Lands—Lands within territory of present province of Manitoba granted to person who died before province became part of Dominion—Heirs and assignees—Effect of 60-61 Vict. chap. 29—Cancellation.

Under the provisions of the *Dominion Lands Act*, 60-61 Viet. c. 29 where a patent to lands had been issued to a person who died before the date of the patent the same was not void but the title to the land designated therein became "vested in the heirs, assigns, or other legal representatives of such deceased person according to the laws of the province in which the land is situate as if the patent had issued to the deceased person during life."

By letters-patent dated 30th April 1906, the Crown purported to grant to one Charles Larence the lands in question, now part of the City of St. Boniface, Man. Charles Larence had died in the year 1870, without having made any will and leaving children all of whom died intestate and unmarried save a son, Jean Baptiste Larence, and two daughters, Genevieve Genthon and Marguerite Larence, two of the defendants herein. Jean Baptiste Larence died in or about the year 1866 leaving children all of whom died intestate and unmarried, save two sons, the defendants Joseph Larence and Julien Larence and two daughters Esther Marion and Sara Marion, defendants herein. The other defendants claimed under those especially mentioned above.

Held, that as the lands in question were not situate in any "province" at the date of the death of Charles Larence (to whom the grant purported to be made) the *Dominion Lands Act* did not apply so as to enable the defendants or any of them to make title under him either by assignment or by descent under the English law of primogeniture as it obtained in the territory in which the lands were situated in virtue of the provisions of the charter of the Hudson Bay Company granted in the year 1670.

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2. That upon the facts the Crown was entitled to an order for the cancellation of the patent in question.

3. In the absence of statutory authority therefor no part of the public domain can be disposed of by the Crown.

Larence v. *Larence*, 21 Man. R. 145, considered and followed.

THIS was an information exhibited by the Attorney-General for Canada, asking for the cancellation of a patent for lands.

The facts are stated in the reasons for judgment.

October 15th, 1912.

The case was heard at Winnipeg before the Honourable Mr. Justice Audette.

H. P. Blackwood and *A. Bernier* for the plaintiff;

A. C. Campbell and *N. F. Hagel*, K.C. for the defendants.

AUDETTE, J., now (November 21st, 1912) delivered judgment.

This is an information exhibited by the Attorney-General of Canada, whereby it appears, *inter alia*, that:—

2. On the 30th day of April, 1906, His late Majesty King Edward the Seventh, by Letters-Patent purporting to be issued under an Act passed in 60-61 Victoria, chaptered 29 (a certified copy thereof for greater particularity and certainty, will be referred to at the trial hereof) granted, conveyed and assured in the name of or unto one, Charles Larence, his heirs, and assigns forever, all that parcel or tract of land situate, lying and being in the St. Boniface Common, in the Parish of St. Boniface, in the Province of Manitoba, in the Dominion of Canada, and being composed of lots numbered seventeen and twenty-five of said St. Boniface Common, which is a subdivision of lot numbered eighty-two in the said Parish and as shown

on a map or plan of survey of said St. Boniface Common approved and confirmed, at Ottawa, on the 5th day of September, A.D. 1900, by Edward Deville, Surveyor-General of Dominion Lands and of record in the Department of the Interior under number 8542.

3. The said Charles Larence, above referred to, died in the month of February, 1870, without having made any last will and testament and leaving children, all of whom died intestate and unmarried, save and excepting a son, Jean Baptiste Larence, and two daughters, Genevieve Genthon and Marguerite Larence, two of the Defendants herein.

4. The said son, Jean Baptiste Larence, died in or about the year 1866, leaving children, all of whom died intestate and unmarried, save and except two sons, the Defendants, Joseph Larence and Julien Larence (the said Joseph being the oldest son of said Jean Baptiste Larence), and two daughters, Defendants herein, Esther Marion and Sara Marion.

5. The said Tardif claims to have received from the said Elie Genthon, deceased, what purports to be an instrument by way of bargain and sale, dated on or about the 13th day of February, 1902, granting to said Tardif Lot Seventeen (17) aforesaid, or some interest therein, and the said Tardif claims an interest in said Lot Seventeen (17) or in a portion thereof under said instrument.

6. The said Tardif registered the said Instrument purporting to be by way of bargain and sale, in the Registry Office at Winnipeg, on or about the 15th day of February, 1902.

7. The said defendant Gobeil claims to have received from the said Tardif what purports to be an instrument by way of bargain and sale, dated on or about the 30th June, 1906, granting to said Gobeil

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a portion of said Lot Seventeen (17) or some interest therein, and said Gobeil claims or did claim an interest in said Lot Seventeen (17) or a portion thereof under said instrument.

8. The said Gobeil registered the said instrument, purporting to be by way of bargain and sale, in the Registry Office at Winnipeg, on or about the 10th day of July, 1906.

9. By indenture dated the third day of April, 1905, the said defendant Tardif agreed to sell to the Defendant Louis Witt, and said Witt agreed to purchase from said Tardif, all that part of said Lot Seventeen (17) aforesaid, more particularly described as follows:

Commencing at the intersection of the South boundary of said Lot Seventeen (17) with the East boundary of St. Mary's Road, thence Easterly along the South boundary of said Lot Seventeen (17), a distance of One Hundred and Sixty (160) feet, thence Northerly at right angles with the said last mentioned course forty-nine and one-half ($49\frac{1}{2}$) feet, thence Westerly parallel with the South boundary of said Lot Seventeen (17) aforesaid, to the East boundary of St. Mary's Road, thence Southerly along the East Boundary of St. Mary's Road to the point of commencement.

10. The said Defendant Witt claims to have ever since been and to be now in possession of said parcel of land in the preceding paragraph described.

11. The Defendant de la Giclais claims to have received from his co-Defendants, Joseph Larence and Julien Larence, what purports to be an instrument by way of bargain and sale dated on or about the 18th day of July, 1911, granting to said de la Giclais all the said Joseph and Julien Larence's interest in said Lot Seventeen (17) and said de la Giclais regis-

tered said instrument purporting to be by way of bargain and sale in the Registry Office at Winnipeg.

12. The Defendant de la Giclais claims to have received from his co-Defendants, Joseph Larence, Julien Larence, Esther Marion, and Sara Marion, what purports to be instruments by way of Quit-Claim Deed, granting, releasing and quitting claim all their interests, or some of their interests in said Lots Seventeen (17) and Twenty-five (25), and said de la Giclais registered said instrument purporting to be by way of Quit Claim in the Registry Office at Winnipeg.

13. The said Defendant de la Giclais claims an interest in said Lots Seventeen (17) and Twenty-five (25) or a portion thereof.

14. In or about the year 1856, Charles Larence aforesaid, claimed to be entitled to Hudson Bay Lots Six Hundred and Eighty-seven (687) and Six Hundred and Eighty-eight (688), in the Parish of St. Boniface, and claimed to have conveyed the same to the late Archbishop Taché, and by a contemporaneous Agreement claims to have retained to himself (the said Charles Larence) the right of sharing in the subdivision of St. Boniface Common, as if he were still the owner of said Lots aforesaid.

15. The said Lots Seventeen (17) and Twenty-five (25) being portions of the St. Boniface Common aforesaid, as subdivided, are the said Lots allotted in respect of any such right (if any) claimed as aforesaid.

16. The said Letters-Patent aforesaid were issued through fraud, improvidence and error, and in ignorance of the rights of others and upon information by which the Crown has been deceived, and by mistake.

"17. The said Charles Larence had no right or interest in said above described parcels of land and no right or title to receive a grant by way of Letters-Patent from the Crown therefor.

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18. The said Letters-Patent contain misrecitals and the grantee under said Letters-Patent cannot be ascertained."

"The said Letters-Patent were not issued pursuant to, or by virtue of, the provisions of any Act of the Parliament of Canada.

"20. His Majesty, the King, is not aware of any other facts material to the consideration and determination of the said questions involved in the matter aforesaid.

The Attorney-General on behalf of His Majesty, claims as follows:—

1. An order and judgment setting aside and cancelling said Letters-Patent, and adjudging said Letters-Patent to be void.
2. A declaration as to whether any person other than the Crown has any legal right or interest in such lands and premises, and if so, who is entitled to such lands and premises:
3. Such further and other relief as to this Honourable Court may seem meet.

From the several affidavits of service of the said information filed of record herein, it appears that the defendants Esther Marion, Sara Marion, Genevieve Genthon, as well in her own personal capacity as Executrix of the last will and testament of her deceased husband Elie Genthon, Marguerite Larence, Joseph Gobeil, Louis Witt were personally served with an office copy of the said information.

At the opening of the trial, Mr. Blackwood, of counsel for plaintiff, moved for judgment by default against these last mentioned defendants, who although being duly served made default in pleading and in appearing at trial. This motion will be hereafter disposed of.

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The defendants Joseph Larence, Julien Larence and Marie J.A.M. de la Giclais filed one joint plea whereby they say that Charles Larence, referred to in the 2nd paragraph of the information, was entitled as of right to an interest in the Saint Boniface Common in respect to Hudson's Bay Co's Lots 687 and 688, in the Parish of St. Boniface, and that Joseph Larence is heir-at-law of the said Charles Larence and as such succeeded to the rights of the said Charles Larence in the Saint Boniface Common, and that the same have become vested in the said de la Giclais by virtue of the instruments referred to in paragraphs 11 and 12 of the information. Each of these defendants claim that de la Giclais is entitled to receive letters-patent to the lands allotted in respect of the right aforesaid on the sub-division of the said Common And these defendants further claim that it may be declared that Marie J.A.M. de la Giclais is entitled as of right to letters-patent conveying to him from the Crown Lots 17 and 25, being portions of the Saint Boniface Common, as shown on a map or plan of survey of the said Common, approved and confirmed at Ottawa, on the 5th day of September, A.D., 1900, by Edward Deville, Surveyor General of Dominion Lands and of Record in the Department of Interior under No. 8542.

The plaintiff joins issue with the defendants Joseph Larence, Jnlien Larence, and Marie J.A.M. de la Giclais and objects that paragraphs three and four of their statement in defence are bad in law and practice; as to paragraph three, on the ground, among others, that it raises no answer or defence to the information; as to paragraph four, on the ground, among others, that these defendants have no right in law and under the practice to make claim or pray the declaration therein

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set forth, because the above defendants have not been granted a fiat for any such claim and that they cannot raise or ask for such relief as prayed.

The defendant Hilaire Tardif severs in his defence, files a separate plea and appears at trial by counsel. He admits the letters-patent in question were issued through improvidence and submits his rights to a grant from the Crown to that portion of the land referred to in paragraph 5 of the information to the judgment of the Court and the grace of the Crown, claiming that he has been, as the fact is, in the actual, physical and exclusive possession of the said land for upwards of 10 years, and that he purchased the same in good faith and entered into possession thereof while no dispute existed as to it, and improved the same to the extent of many thousands of dollars by erecting buildings thereon and otherwise, at all times fully believing that the title was properly vested in the person from whom he purchased, and he submits that he is entitled to the exercise of the grace of the Crown in his behalf, and to a grant of letters-patent to him of that portion of the land in question described in paragraph 5 of the information.

An action having been taken in the Court of King's Bench, in the Province of Manitoba, between Larence and Larence, to recover possession of the said lots 17 and 25, and judgment having been given upon the same by His Lordship the Chief Justice, all parties appearing at trial herein cited and relied upon that judgment in respect of the facts or the history of the case. Mr. Campbell, however, of counsel for the defendants Joseph Larence, Julien Larence and Marie J.A.M. de la Giclais, admitted that the facts stated in that judgment were true,—with the addition, however, that he held title not only under the grace of the

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Crown, but as of right. Counsel for the Crown also admitted that Charles Larence made no will and that the property under the law as then in force, passed to the eldest son.* * * *

Having quoted at length the judgment of Mathers, C. J. in *Larence* v. *Larence*, 21 Man. R. 145, His Lordship proceeded as follows:—

This Court, adopting, without any hesitation the conclusion of His Lordship's view, has come to the conclusion—taking it also for granted as being conceded by all parties—that the letters-patent in question in this case should be set aside, cancelled and declared null and void.

Coming now to the second branch of the case whereby a declaration is asked as to whether any person other than the Crown has any legal right or interest in such lands and premises, and if so, who is entitled to such lands and premises, this court hereby declares that the defendants mentioned at the opening as having made default in pleading and from appearing at trial, have no legal rights or interest in the lands in question and are not entitled to the same.

Dealing with the issue as between the plaintiff and the defendant Joseph Tardif, it may be said that the latter's counsel admitted that the letters-patent should be cancelled, that Tardif had no legal right, and was entirely at the mercy and grace of the Crown; but that he should have a grant from the Crown of the land purchased in good faith. Tardif being subsequently heard as a witness testified that it is now going on to nine years since he had come from Crookstown to St. Boniface, and that he expended $4,500 upon the property in question. He has three houses erected upon the land,—he lives in one and has sold another for $1,500, but has not been paid for the same.

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The Crown, by counsel, admits that Tardif bought in good faith as having bought from a person whom he believed had title—that he was in possession since some time in 1904, and resided on the property ever since, and that he erected thereon three houses, stables and woodsheds.

Notwithstanding this expenditure by Tardif and his good faith, this Court must come to the necessary conclusion that this defendant has no legal rights or interest in the land in question.

Dealing next with the issue as between the plaintiff and the three defendants Joseph Larence, Julien Larence and Marie J.A.M. de la Giclais, it may be said that the laws in force in Manitoba, in February, 1870, at the date of Charles Larence's death, were the laws of England as they were at the time of the granting of the Hudson Bay Charter, on the 2nd May, 1670 (22 Charles II). Whatever rights Charles Larence had, at the time of his death, in lot 82,—and lots 17 and 25 are parts thereof,—passed and descended, under the laws of the inheritance by primogeniture then in force, to his eldest son Jean Baptiste, and at the death of the latter to his (Charles) grand-son of Joseph Larence, under whom these three last defendants claim title. Without going into the full details of the contention that, under the Order in Council of 1877 (Exhibit No. 8) and the case of the Attorney-General of Canada vs. Fonseca (1) these three defendants have a right to some commutation in the shape of lands, sufficient it is to say that this Court has come to the conclusion, accepting also as *res judicata*, under the case of *Larence* vs. *Larence* (2) that the defendants de la Giclais et al., have failed to establish satisfactory title outside of the Letters Patent, and that

(1) 17 S. C. R., 612. (2) 21 Man. Rep. 145.

their rights, if any, are not legal rights, but may be undefined rights only that might appeal and commend themselves to the bounty of the Crown.

Moreover, the view of His Lordship, the Chief Justice, must be adopted and accepted with respect to the construction of the statute under which the Letters-Patent issued, (60-61 Vict. Ch. 29) and it must be held that, as the lands in question were not in any province at the date of Charles Larence's death in February, 1870—Manitoba having become part of the Dominion of Canada only on the 15th day of July, A.D., 1870—this Dominion statute does not apply or avail to validate a patent issued under it in the name of this deceased person who did not then reside in the Dominion of Canada, and such patent without the support of some statute is a nullity. And as Larence was unable to establish a title to the land independently of the patent, he must fail. His Lordship, the Chief Justice, went further and decided that although satisfied that there must have been some error or oversight in drafting the statute, that the Court could not correct the error or supply the omission, because that would be legislating and not interpreting the law. This conclusion must also be accepted by this court.

It will result from the above that Tardif and the three defendants who defended together, have no legal rights or interest in the land in question. This Court, was, however, requested at the close of the trial, to make a declaration that if these parties could not in strict law recover, they were in equity and in justice morally entitled to the exercise of the mercy and bounty of the Crown in their favour. However true that may be, this Court fails to see of what avail this could be to these parties, and it takes it that is a matter that

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should be more properly dealt with by the law officers of the Crown, bearing in mind the occupation and expenditure by Tardif and the rights claimed by the defendant de la Giclais.

These two defendants are left with a claim which might commend itself to the benevolence of the Crown, but it is not enforcible in a court of law.

There will be judgment by default, as prayed, against the several defendants who did not plead or appear at trial.

Judgment will be further entered as follows:1st. Ordering that the letters-patent mentioned in the information are set aside, and cancelled and void.

2nd. That no person, other than the Crown, has any legal right or interest in the lands and premises mentioned in the said letters-patent.

3rd. That there be no costs to plaintiff or defendants.

Judgment accordingly.

Solicitors for plaintiff: *Bernier, Blackwood & Bernier.*

Solicitor for defendants other than H. Tardif: *A. C. Campbell.*

Solicitor for defendant H. Tardif: *N. F. Hagel.*