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 *Mar. 8, 11.
 *Mar. 26.

HIS MAJESTY, THE KING, *Ex rel.* }
 THE ATTORNEY-GENERAL OF } APPELLANT;
 QUEBEC (PLAINTIFF) }

AND

THOMAS MONTGOMERY ADAMS }
 (DEFENDANT) } RESPONDENT.

ON APPEAL FROM THE COURT OF QUEEN'S BENCH,
 PROVINCE OF QUEBEC, APPEAL SIDE.

Scire facias—Crown Lands—Grant made in error—Adverse claim—Cancellation—32 V. c. 11, s. 26 (Que.)—R. S. Q. 1299.

The provisions of the Quebec Statute respecting the sale and management of public lands (32 Vict. ch. 11, R. S. Q. Art. 1299) do not authorize the cancellation of letters patent by the Commissioner of Crown Lands where adverse claims to the lands exist.

APPEAL from the judgment of the Court of Queen's Bench, appeal side, (Bossé and Cimon JJ. dissenting), reversing the judgment of the Court of Review, at Quebec, which set aside the judgment of the Superior Court, District of Quebec (1), and declared the letters

* PRESENT :—Taschereau, Gwynne, Sedgewick, King and Girouard JJ.

patent of grant of the lands in question to the defendant null and void.

The facts of the case and questions at issue on this appeal sufficiently appear from the statement in the judgment of the court delivered by His Lordship Mr. Justice Girouard

Fitzpatrick K.C. (Solicitor-General of Canada) and *L. A. Cannon* for the appellant. The information seeks the cancellation of the letters patent granted to the defendant on the ground that they were so granted in error, the former letters patent granted of the same lands to the representatives of the late Hugh and John Montgomery having been illegally cancelled by the Commissioner of Crown Lands for the purpose of giving effect to an adverse claim. See 32 Vict. ch. 11, sec. 26; R. S. Q. art. 1299.

J. A. Lane for the respondent. The first letters patent issued were clearly wrong and consequently the commissioner had jurisdiction to cancel them. The information merely alleges that they were not legally revoked "by indorsement;" there is no allegation of the existence of any "adverse claim" nor any proof of such to demonstrate that the commissioner had so exceeded his jurisdiction. This was a new point first raised on the appeal to the Court of Review and should not have been entertained. That judgment was *ultra petita*.

The judgment of the court was delivered by :

GIROUARD J.—On the 13th of February, 1888, certain letters patent for lots twenty-eight and twenty-nine of the Township of Restigouche, were cancelled by the Commissioner of Crown Lands for the Province of Quebec, upon the ground that they had been issued by error to the legal representatives of John and Hugh Montgomery, instead of to the representa-

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tive of Thomas Montgomery, and subsequently, to wit on the 28th of April, 1888, new letters patent for the same lots were issued in favour of the said representative of the late Thomas Montgomery, who is the respondent. The commissioner alleged in his decree of revocation that he was empowered to do so by section twenty-six of the Quebec Statute, 32 Vict. ch. 11. He admits himself, and it is proved beyond doubt, that the representatives of the late John and Hugh Montgomery had an adverse claim. He therefore acted without jurisdiction, and his act is *ultra vires* and utterly void. He should have left the parties to their remedy in the ordinary courts of the province.

The section in question reads as follows :

Whenever a patent has been issued to, or in the name of the wrong party, through mistake in the Crown Lands Department, or contains any clerical error, or misnomer, or wrong description of the land thereby intended to be granted, the Commissioner of Crown Lands, (there being no adverse claim) may direct the defective patent to be cancelled and a correct one to be issued in its stead which corrected patent shall relate back to the date of the one so cancelled and have the same effect as if issued at the date of such cancelled patent.

For this reason, which is more fully developed by Mr. Justice Andrews in the Court of Review, and Mr Justice Cimon in appeal, we are of opinion that the appeal must be allowed. The judgment of the Court of Review is restored and the said letters patent granted on the 28th of April, 1888, to the respondent for the said lots of land are annulled and declared void and of no effect, but without costs as both parties were in error, the Commissioner of Crown Lands in exercising a power he did not possess, and the respondent in contending before all the courts that he had such power.

Appeal allowed without costs.

Solicitors for the appellant: *Fitzpatrick & Taschereau.*
 Solicitor for the respondent: *J. A. Lane.*