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WILLIAM ALEXANDER FARMER.....APPELLANT;

AND

WILLIAM GUY LIVINGSTONE.....RESPONDENT.

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

Dominion Lands Act, 35 Vict., cap. 23, sec. 33, sub-secs. 7 and 8—Homestead Patent, validity of Bill—Equitable or statutory title—Demurrer—39 Vic., cap. 23, sec. 69.

The plaintiff in his bill of complaint, alleged in the 6th paragraph as follows:—"Prior to the 1st of May, 1875, the plaintiff made application to homestead the said lands in question herein, and procured proper affidavits, according to the statute, whereby he proved to the satisfaction of the Dominion lands agent in that behalf (and the plaintiff charges the same to be true), that the said defendant *Farmer* had never settled on or improved the said lands assumed to be homesteaded by him or the lands herein in question, but had been absent therefrom continuously since his pretended homesteading and pre-emption entries, and thereupon the claim of the defendant *Farmer* under the said entries became and was forthwith forfeited, and any pretended rights of the defendant *Farmer* thereunder ceased, and the plaintiff thereunder, on or about the 8th May, 1875, and then and there with the assent and by the direction of the Dominion Lands Agent, who caused the same to be prepared for the plaintiff, signed an application for a homestead right to the lands in question in this suit, according to Form "A," mentioned in 35 *Vic.*, cap. 23, sec. 33, and did make and swear to an affidavit according to Form "B," mentioned in sec. 33, sub-sec. 7 of the same Act, and did pay to the same agent the homestead fee of $10, who accepted and received the same as the homestead fee, and thereupon the plaintiff was informed that he had done all that was necessary or required for him to do under the statute and the regulations of the Department, and that the statute said: "Upon making this affidavit and filing it

* PRESENT—Sir W. J. Ritchie, C.J.; and Strong, Fournier, Henry, Taschereau and Gwynne, JJ.

and on payment of an office fee of $10 (for which he shall receive a receipt from the agent), he should be permitted to enter the lands specified in the application;) and thereupon and in pursuance thereof, and in good faith, the plaintiff did forthwith enter upon said land and take actual possession thereof, and has ever since remained in actual occupation thereof, and has erected a house and other buildings thereon, cleared a large portion of said lands and fenced and cultivated the same, and made many other valuable improvements thereon, costing in the aggregate $1,000."

On demurrer for want of equity.

Held, (reversing the judgment of the Court below, and allowing the demurrer) that the plaintiff had no *locus standi* to attack the validity of the patent issued by the Crown to the defendant, as he had not alleged a sufficient interest or right to the lands therein mentioned, within the meaning of section 69 or of subsections 7 and 8 of section 33 of 35 *Vic.*, cap. 23, there being no allegation that an entry of a homestead right in the lands in question had been made, and that plaintiff had been authorized to take possession of the land by the agent, or by some one having authority to do so on behalf of the Crown, or a sufficient allegation that the Crown was ignorant of the facts of plaintiff's possession and improvements (*Taschereau* and *Gwynne*, J.J., dissenting.)

Per *Strong*, J., that when the Crown has issued the letters patent in view of all the facts, the grant is conclusive, and a party cannot, as it said, set up equities behind the patent.

APPEAL from the Queen's Bench *Manitoba* on a demurrer by appellant to the respondent's bill of complaint.

The facts and pleadings appear in the judgments hereinafter given.

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

Mr. *Dalton McCarthy*, Q.C, for respondent.

The following cases were cited and commented on by counsel:—*McRory* v. *Henderson* (1); *Mutchmor* v. *Davis* (2); *Barnes* v. *Boomer* (3); *Lawrence* v. *Pomeryo*,

(1) 14 Grant 226. (2) 14 Grant 346.
(3) 10 Grant 532.

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(1); *Boulton* v. *Jeffreys* (2); *Cosgrave* v. *Corbett* (3); *Henderson* v. *Westover* (4); *Dougall* v. *Lang* (5); *Proctor* v. *Grant* (6); *Martyn* v. *Kennedy* (7); *Stevens* v. *Cook* (8); and *Attorney-General* v. *McNulty* (9).

RITCHIE, C.J.:—

This is an appeal from a judgment of the Court of Queen's Bench for *Manitoba.* The bill of complaint alleges that *William Guy Livingstone*, of *Boyne River Settlement:*

"1. On the eighteenth day of February, one thousand eight hundred and seventy-nine, the defendant *Farmer* commenced an action of ejectment in this honorable court against the plaintiff to recover possession of the south-west quarter of section thirty in the sixth township in the fourth range west of the principal meridian in the Province of *Manitoba* in the Dominion of *Canada*, containing by admeasurement one hundred and fifty-seven and forty-four one-hundredths acres, be the same more or less, of which the plaintiff was then and still is in lawful possession, and claiming title thereto under and by virtue of a patent from the Crown to the defendant *Farmer*, dated the twelfth day of December, one thousand eight hundred and seventy-eight.

"2. The said action was decided in this honorable court in favor of the plaintiff, but upon an appeal to the Supreme Court of *Canada*, it was there held the defendant *Farmer* had under his patent a legal right to the said land, and that the equities of the defendant hereinafter set forth to displace and invalidate the same, could not be set up by way of defence to the said action of

(1) 9 Grant 475.
(2) 1 Err. and App. Ont. 111.
(3) 14 Grant 117.
(4) 1 Err. and App. Ont. 465.
(5) 5 Grant 292.
(6) 9 Grant 26.
(7) 4 Grant 61.
(8) 10 Grant 416.
(9) 8 Grant 324.

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ejectment, but that independent proceedings would have to be taken to assist the said equities.

"3. By reason of the said decision of the Supreme Court, the plaintiff is in danger of being ejected from the said land by the defendant *Farmer*, and will be so ejected unless this honorable court restrains the further prosecution of the said action until the determination of this suit.

And his prayer is: "1. The plaintiff therefore prays that it may be declared that the said defendant *Farmer* is not entitled further to prosecute his said action by reason of his being patentee of the said lands; 2. That it may be declared that the defendant *Farmer* procured the issue of the said patent to himself unconscionably, and in derogation of the plaintiff's right to homestead the said lands, or that it might be declared that the said patent was issued improvidently, and in ignorance of the plaintiff's right in the premises, and that the defendant *Farmer* holds the said lands as trustee for the plaintiff.

The suit then seeks two things: first, that *Farmer* may be restrained from further prosecuting his ejectment suit by reason of being patentee of the lands; secondly, that it may be declared *Farmer* obtained the patent unconscionably and in derogation of plaintiff's right to homestead the lands, and that *Farmer* holds lands as trustee for plaintiff, or that the patent be set aside.

The grounds of demurrer set forth by the defendant are: That the plaintiff hath not in his bill shown any interest in or right to the lands therein mentioned, or any title to attack the patent of the defendant *Farmer*, and therefore he hath not by his said bill made and stated such a case as entitled him in a court of equity to any relief against the defendant *Farmer*, as to the

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matters contained in the said bill or any of the said matters.

As to enjoining the further prosecution of the ejectment suit, we all know that the simplest and most generally accepted test in determining whether one is a proper party complainant to a bill for an injunction, is whether he possesses a legal or equitable interest in the subject-matter in controversy. And it is equally clear that rights arising under Acts of Parliament are legal rights, and must be dealt with by courts according to ordinary rules and principles.

In the bill in this case, I find the plaintiff makes a great many statements impeaching the defendant's rights in the land, and his dealings with the Crown in respect thereof, but he carefully avoids any allegation that in pursuance of the statute 35 *Vict.* ch. 23, he was ever entered or permitted to be entered for the lands in question with a view of securing a homestead right therein, either in the book or records of the local land department of the Government or in any other book, or in any other way or manner whatsoever; but on the contrary, by section 7, the most that can be gathered from plaintiff's allegations is, that his application, affidavit, and office fee of $10 were lying in the office in the hands of the said land agent, with whom the defendant pretends he made the contract of purchase. Until he was so entered or was permitted to enter the land, he had no homestead, interest in, or claim to the land, and until all the provisions of the act had been complied with, he had no legal or equitable title, and the lands remained public lands of the government, and, in my opinion, his bill does not show any legal or equitable status, under the statute, capable of being enforced in a court of law or equity.

The lands until the provisions of the statute had

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been complied with, and such an entry was permitted to be made, were unappropriated Dominion lands, of which, as such, the Crown had the right of disposing, and which they did dispose of, as the bill alleges, to the defendant, for a valuable consideration paid by the defendant and received by the crown; the plaintiff then showing no statutory or other right or interest therein, how is it possible he can be permitted to interfere between the crown and the defendant in respect of such sale?

The learned Chief Justice says:

> The evidence of the plaintiff discloses at least a moral wrong done him, a prejudice, a grievance.

Now courts of law do not sit to redress moral wrongs, unless the moral is accompanied by a legal wrong, such as a court of law or equity can recognize.

Any mere moral wrongs invading no legal or equitable rights recognized by law must be left to be disposed of *in foro conscientiæ*. Before a defendant in an action at law can ask a court of equity to stay the execution on a judgment regularly and properly obtained in a court of law, he must have rights in the legal sense of that term. On this short ground I think the judgment of Mr. Justice *Miller* was right.

To declare this patent void, would be to interfere with and destroy the contract made by and between the Crown and the purchaser of Crown lands, it would in effect be determining that the Crown had no right to dispose of unappropriated Crown lands by permitting parties having no interest in or right to the land to interfere with the Crown dealing with the Crown estate and its grantees, and so destroy a sale, of which neither of the contracting parties complain, the letters patent of the Crown, and the title conveyed by the Crown for valuable consideration, and thus break up an arrangement with which, so far as the bill shows, the Crown is in no

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way dissatisfied and has never impeached, and for reasons of alleged impositions on the Crown, of which the Crown makes no complaint, thus leaving the purchase-money in the hands of the Crown, and at the same time revesting the legal title of the lands sold and paid for in the Crown. If a party has no legal or equitable rights enforceable in a court of law or equity, he cannot, in the eye of the law, be injured by the letters patent. He is a mere volunteer, and if so, not a proper party to seek the relief sought by this bill. He must show a title to the relief asked. This disposes of any right to an injunction.

But the plaintiff invokes the 35 *Vict.*, ch. 23, s. 69, and asks to have this patent declared void.

This section enacts that—

> In all cases wherein patents for lands have issued through fraud or in error or improvidence, any court having competent jurisdiction in cases respecting real property in the Province or place where such are situate, may, upon action, bill or plaint respecting such lands, and upon hearing of the parties interested, or upon default of the said parties after such notice of proceeding as the said court shall order, decree such patent to be void, and upon the registry of such decree in the office of the Registrar-General of the Dominion, such patent shall be void to all intents.

But the same reason that prevents his obtaining an injunction equally applies, in my opinion, to his impeaching the patent. If plaintiff never acquired any interest in the land, what *locus standi* has he to maintain an action, bill or plaint, either in a court of law or equity having competent jurisdiction in cases respecting real property, and if no *locus standi* to sustain an action, what *locus standi* to impeach under this statute the issue of a patent in respect thereof. It is only in an action, bill or plaint respecting such lands that the patent can, under this statute, be impeached. How can a party sustain an action, bill or plaint respecting such lands, unless he has a right or interest therein,

which a court of law or equity can recognize. If a plaintiff brings a suit, whether at law or equity, and does not show on the face of his declaration or bill a legal or equitable cause of action, he may be met at the outset by a demurrer, and I am at a loss to conceive the practitioner bold enough to urge on the court that though he has no legal or equitable claim that a court of law or equity can recognize, he has a moral claim which he chooses to designate "a grievance" or "a prejudice," and therefore can maintain his action. I am therefore of opinion that to enable a party to take proceedings under this act, he should have some legal or equitable status in connection with the land; that is to say, some interest therein or right thereto enforceable at law or in equity, and that it is only for the protection of such rights or interests, that a party can invoke the aid of a court of justice to repeal, under the statute, letters patent issued by the Crown in reference to Crown property.

I have looked through the cases relied on in the judgment of the court and by the counsel at the bar, but it appears to me that many of them are distinguishable and all can be reconciled with this doctrine, except those which recognize an interest under the established and recognized usage and practice of the lands department of *Ontario*, which apply only to that Province, and do not apply to the Province of *Manitoba*, where no such usage or practice exists.

In this view, it is not necessary to decide how far the court can look at the record in the ejectment suit, but I think it right to say, that while I admit to the fullest extent the principle that by demurring the defendant, for the purposes of the argument, admits all the matters of fact stated in the bill, as at present advised, I am not prepared to admit that, in a case like this, in which the judgment of this court is sought to be enjoined, and the bill refers to that judgment, and

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bases the right to succeed thereon as is set out in the 2nd and 3rd paragraphs of the bill (1): when, in truth and in fact, the court never decided that the defendant had any "equities" nor "that independent proceedings" would have to be taken to assist said equities, a majority of the court having unequivocally decided that the defendant had shown no legal or equitable title to the lands in question, this court is debarred from looking at its own record and judgment, but on the contrary, that by such an allegation it is so far virtually in possession of the suit sought to be enjoined and of its own judgment and proceedings thereon as to take judicial notice of such record and judgment to enable it to say whether or not, the present plaintiff is entitled to the relief he seeks as against such judgment. That when called on to stay the execution of one of its own judgments, it has from necessity the right to take judicial notice of its own records and proceedings, and is officially bound to take notice that the allegations referred to are incorrect and the contrary the fact. But in the view I take of this case, there is no necessity of looking at the record, except to negative the strong observations that have been made with reference to what are called the equities of the plaintiff, and to show that all the statements in his bill are directly at variance with the facts as disclosed by letters and documents under his own hand and the official documents of the land department.

The ejectment suit was brought for the lands in question, plaintiff claiming title under letters patent granting to him said lands, dated 12th December, 1878.

The defendant defended for the whole of the lands in question.

(1) The learned Chief Justice read the 2nd and 3rd paragraphs of the bill.

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In answer to the action of the plaintiff, the defendant, on legal and equitable grounds, says as follows:—

1. The defendant as against the plaintiff is entitled to the possession of the lands in question, under and by virtue of his homestead entry thereof, made in the month of May, 1875, under 35 *Vic.* ch. 23, sec. 33 of the Statutes of *Canada*.

2. The alleged purchase by the plaintiff from the Crown of the lands in question, on or about the fifth day of June, 1875, was directly contrary to the express provisions of 35 *Vic.* ch. 23, sec. 33, and the sub-sections thereof; and the subsequent issue to him from the Crown of the patent for the same lands, in pursuance of the said contract of purchase, was, and is, as against the defendant, fraudulent and void; and the same was issued through fraud, error or improvidence.

3. The plaintiff did not, on the eighth day of April, 1874, or at any other time, in good faith, make a homestead entry of the north-west quarter of section thirty, in township six, range four west, "for the purpose of securing a homestead right in respect thereof," and "for his exclusive use and benefit," and "for the purpose of actual settlement" within the true intent and meaning of the Public Lands Act of *Canada*—nor did he on the fifteenth day of February, 1875, or at any time, *bonâ fide* and according to the true intent and meaning of the statute in that behalf, pre-empt the south-west quarter of section thirty, township six, range four west, under and by virtue of the alleged homestead entry aforesaid; and defendant charges that both the said alleged entries were at the time they were made, and were before, and at the time he, the defendant, made his said homestead entry, in the first paragraph of this, his answer mentioned, void, and of no effect, and had, under the operation of 35 *Vic.*, ch. 23, sub-sec. 14, of sec. 33, become, and were forfeited, and the lands in question in this cause had become, and were "unappropriated Dominion lands," and were at the time the defendant so made his homestead entry, as aforesaid, subject, on application, to be entered by any eligible person "for the purpose of securing a homestead right in respect thereof;" and the defendant avers that the said lands so being open to be homesteaded as aforesaid, he duly homesteaded the same accordingly; and immediately went into actual possession and cultivation thereof, and has ever since remained in such actual possession and cultivation thereof, and has made large and extensive improvements thereon, and he is now with his family in such actual possession and cultivation.

4. By way of laying the foundation of cross relief, the defendant, in addition to the grounds mentioned in the preceding three paragraphs, states and shows to the court here that the alleged contract of pur-

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chase of the lands in question between the Crown and the plaintiff, in pursuance of which the patent for the same lands was granted to the plaintiff, and under which the plaintiff seeks in this cause to recover possession of the same from the defendant, was made by the Crown in ignorance and misapprehension of material facts affecting the right of the defendant, and in violation of the statute and contrary to the custom and usage of the Crown Lands Department and in fraud of the defendant, and the defendant submits that the said letters patent should be declared void; and the defendant prays that the said letters patent may, under the provisions of 35 *Vic.*, ch. 23, sec. 89, be decreed to be void, for having been issued through fraud, or in error or improvidence.

The plaintiff took issue on the answer of the defendant, and denied that he was on the facts or in law entitled to the relief he prays.

This case was without objection fully investigated in the court below, and all the facts alleged either as affording a legal or equitable defence fully gone into and adjudicated on without any objection or question being raised as to the mode of procedure, and the court of *Manitoba* decided defendant had made out an equitable defence.

On this case coming before this court on appeal, all the merits of the case were gone into as before the court of first instance, and it was held that the plaintiff had shown no right or title to the land in question, either at law or equity; the right of the plaintiff to the land was sustained, and judgment reversed.

In my opinion no other conclusion could have been arrived at, for the defendant did not show that he had any legal or equitable defence to the action independent of the statute, and he did not show any legal title or equitable interest in the land under any statutory provision. He had never been permitted to enter, was not in possession under the statute, nor had he any statutory right of possession nor any parliamentary title to, interest in or right to the possession, of the land. On the contrary, the facts as they appeared in the first case

showed that the Crown, after fully considering the conflicting claims of plaintiff and defendant, refused to entertain the defendant's (the now plaintiff's) application and to enter him as a homestead claimant on the lot, refused to keep his money and refused to give him a receipt therefor under the provisions of the act, but returned the same to him, and after exercising its judgment and discretion on a full knowledge of all the circumstances, deliberately sold the property to the defendant, received the consideration money, caused the patent to issue to the defendant, and so it was clearly established, to my mind at any rate, that the patent for the lands was not issued through fraud or in error, or improvidence, but on the contrary, on and after the fullest and most deliberate consideration with a full and perfect knowledge of the position of the said lands and the rights of all parties connected therewith or claiming to be interested therein.

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STRONG, J.:—

This appeal, being from an order overruling a demurrer, we are confined entirely to the facts as stated on the face of the bill. The allegations of the bill are sufficient to show that the appellant had forfeited any pre-emption right which he might have had to the lands in question, and that he cannot ascribe his right to the patent to any equitable or statutory title arising at a date earlier than that of the day on which the patent itself was issued. The important question, however, is whether the respondent shows any title to impeach the patent.

The allegations of the bill, material to be considered in this respect, are contained in the 6th paragraph, which is in the following words:

Prior to the 1st of May, one thousand eight hundred and seventy-five, the plaintiff made application to homestead the said lands in

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question herein, and procured proper affidavits according to the statute, whereby he proved to the satisfaction of the Dominion Lands Agent in that behalf (and the plaintiff charges the same to be true), that the said defendant *Farmer* had never settled on or improved the said lands assumed to be homesteaded by him or the land herein in question, but had been absent therefrom continuously since his pretended homesteading and pre-emption entries, and thereupon the claim of the defendant *Farmer*, under the said entries, became and were forthwith forfeited, and any pretended rights of the defendant *Farmer* thereunder ceased, and the plaintiff thereupon, on or about the 8th day of May, one thousand eight hundred and seventy-five, and then and there with the assent and by the direction of the Dominion Lands Agent, who caused the same to be prepared for the plaintiff, signed an application for a homestead right to the lands in question in this suit according to Form "A," mentioned in thirty-fifth *Victoria*, chapter twenty-three, section thirty-three, and did make and swear to an affidavit according to Form "B" mentioned in section thirty-three, sub-section seven of the same Act, and did pay to the same agent the homestead fee of ten dollars, who accepted and received the same as the homestead fee, and thereupon the plaintiff was informed that he had done all that was necessary or required for him to do under the statute and the regulations of the department, and that the statute said (thirty-fifth *Victoria*, chapter twenty-three, section thirty-three, sub-section eight): "Upon making this affidavit and filing it, and upon payment of an office fee of ten dollars (for which he shall receive a receipt from the agent) he should be permitted to enter the lands specified in the application," and thereupon and in pursuance thereof, and in good faith the plaintiff did forthwith enter upon said lands and take actual possession thereof, and has ever since remained in actual occupation thereof, and has erected a house and other buildings thereon, cleared a large portion of said lands and fenced and cultivated the same, and made many other valuable improvements thereon, costing in the aggregate one thousand dollars.

By the common law, "if a Crown grant prejudiced or affected the rights of third persons, the king was by law bound on proper petition to him to allow a subject to use his royal name to repeal it, on a *scire facias*, and it is said that in such a case the party may upon enrolment of the grant in Chancery have a *scire facias* to repeal it as well as the king" (1).

(1) Chitty Prer. of the Crown, p. 331.

The 69th sec. of the Dominion Lands Act, 35 *Vic.*, c. 23, provides a new remedy for the subject prejudiced by a grant from the Crown issued through fraud, error, or improvidence. That section is in these words:

[The learned judge then read section 69 (1).]

It is under this clause of the statute that the bill in the present case has been filed.

It will be observed that this section says nothing as to the title required to authorize a party to institute an action under its provisions. It must, however, be assumed that no one but a person having a title, or being interested in the subject of the grant, is entitled to attack the patent, as it never could have been intended to enable a stranger to take such a proceeding. The statute merely gives a new remedy for the old common law right, and a third person proceeding under it to set aside a patent must therefore show precisely the same title as was required to maintain a *scire facias* in the name of the subject, namely, that he had rights in the subject of the grant which have been prejudiced and affected by the patent. We have therefore to consider whether the plaintiff in the present case shows by his bill that he had any right or title to the land in question. The statements in the bill, showing the plaintiff's title, are to be found in the allegations of the sixth paragraph which I have before extracted.

From this it appears that the only foundation for this suit is the filing of an application for a homestead right in the form prescribed by Schedule A of the Dominion Lands Act, supported by the required affidavit and the payment of the office fee of $10, and the plaintiff's subsequent unauthorized possession of the lands as a squatter and the improvements he has made.

It is not alleged that any entry of a homestead right in the lands in question was ever made in the plain-

(1) Ubi Supra p. 146.

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tiff's name, nor in the words of the statute that he was "permitted to enter the lands specified in the application," nor that he was authorized by the crown or its officers to take possession. The provisions of the act relating to homestead entries, when made by persons applying as the plaintiff did, are contained in sub-secs. 7 and 8 of sec. 33, and are as follows:

A person applying for leave to be entered for lands, with a view of securing a homestead right therein, shall make affidavit before the local agent (Form B) that he is over twenty-one years of age, that he has not previously obtained a homestead under the provisions of this act, that to the best of his knowledge and belief there is no person residing on the land in question, or entitled to enter the same as a homestead, and that the application is made for his exclusive use and benefit and for the purpose of actual settlement.

Upon making this affidavit and filing it with the local agent, and on payment to him of an office fee of ten dollars, for which he shall receive a receipt from the agent, he shall be permitted to enter the land specified in the application.

It must altogether depend on the construction to be given to these provisions, whether or not the plaintiff has shown a sufficient title to maintain his bill. It is contended in support of the bill, that the words "shall be permitted to enter the lands specified in the application," give the party, who files an application and affidavit and pays the fee, an absolute right to be entered on the books of the land office as having a homestead right to the lands applied for, and therefore the want of an actual entry is immaterial, since the agent was bound to make the entry and had no option to refuse to do so. I do not accede to this proposition. Whether the agent was or was not bound to make the entry, the statute clearly confers no right on the homestead applicant until the entry is actually made. Even if the words "shall be permitted to enter" were to be construed as imperative on the agent, so as to leave him no discretion to refuse the entry, I should still be of opinion that no right in the land was required until the entry was

actually made. The very form of the application which, in the words of the seventh sub-section, is to be "for leave to be entered for lands with a view of securing a homestead right therein," imply that no homestead right is to be acquired until the entry is actually made, and leave to be entered has been accorded by the agent. The words of the eighth sub-section "shall be permitted to enter," also show that the filing the application and affidavit and payment of the fee are not to be considered as sufficient to give a title, but that the assent of the Crown, through the agent, is indispensable for the purpose. If the statute had intended that any person should acquire a homestead right by merely doing what the plaintiff alleges he did, it would have so provided, and the additional requirement of entry would not have been superadded. If it was the duty of the agent to make the entry upon the papers being filed and the fee paid, and nothing appearing to contradict the facts required to be sworn to in the affidavit, it might be that an action would lie for his refusal to complete the entry. I am, however, of opinion that the statute does not exclude all discretion of the agent. An application for leave to be entered implies that leave has to be given—this leave has to be given, by the agent and must involve the exercise of judgment and discretion on the part of the officer. Surely it would be out of the question to say that, if the agent knew that there was a prior application for the lands by a person who had applied, but had not been entered, for a homestead right, but whose application was in suspense, he would merely, on the applicant's affidavit to the contrary, be bound to authorize the entry last applied for; and yet, if the construction contended for on the plaintiff's behalf was to prevail, we should have to hold that, even with such a fact within the knowledge of the agent, he would be bound to make the

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entry. I think the words "shall be permitted to enter" are not to be construed in favor of the applicant as imperative. They are directions to a public officer as to the performance of his duty, and as such, even if that construction was not borne out, as it clearly is by the context, I should construe them as not conferring any right on third parties. A late writer on the principles of statutory construction (1) states the result of decisions which warrant this conclusion in these words:

> When the prescriptions of a statute relate to the performance of a public duty, they seem to be generally understood to be merely instructions for the guidance and government of those on whom the duty is imposed, or directory only. The neglect of them may be punishable indeed, but it does not affect the validity of the act done in disregard of them.

And he adds:

> It is no impediment to this construction that there is no remedy for non-compliance with the direction.

To hold otherwise would be to determine that the effect of the statute would be to enable parties to acquire the lands of the Crown without its assent, and even in direct opposition to the desire of the Crown to retain particular parcels of lands for public uses. To warrant a construction which would thus authorize an expropriation of crown lands adverse to the public interests and requirements nothing short of an explicit enactment by the legislature could possibly be sufficient, and no such express words are to be found in this statute.

There remains to be considered what effect is to be given to the allegation in the 6th section: that the plaintiff, after filing his application, entered into possession and made improvements. It has already been observed that it is not alleged that he was authorized to take possession by the agent, or by any one having

(1) Maxwell on Statutes, pp. 337, 338.

authority so to do on behalf of the Crown. Sub-sec. 5 of the 33 *Vic.* seems, however, to recognize a preferable right on the part of squatters who have made improvements to make a homestead entry; and this is further countenanced by the terms of the affidavit required under sub-sec. 7 for a homestead entry by a non-occupant. I cannot, however, agree that sub-sec. 5 recognizes any actual right or title upon entry in a squatter who has made improvements. Upon the principles already indicated as applicable to the construction of sub-sec. 7, it seems to be very clear, that although sub-sec. 5 does concede a preference to a person who has entered and improved, when claiming a right to a homestead entry in competition with a person who has not been in occupation, yet no right or title to the lands arises until the actual entry is made by the agent, and that the Crown is not so far bound as to exclude all discretion on the part of its officers in granting or withholding a homestead entry to a squatter.

Further, the bill does not show that the patent was issued by the Crown in ignorance of the plaintiff's possession and improvements. It does not therefore show that there was error or improvidence in this respect. It has been well settled by numerous decisions in *Ontario* in suits instituted under a provision similar to that of the statute now in question, that when the Crown has issued the letters patent in view of all the facts, the grant is conclusive, and a party cannot, as it is said, set up equities behind the patent.

Now, in the present case there is no sufficient allegation to show that the patent was issued by the Crown in ignorance of the facts of plaintiff's possession and improvements. It is true it is stated generally in the bill that the patent was issued in ignorance of his rights, but this allegation cannot, on the general rules applicable to equity pleadings, be construed

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as a sufficient allegation that the Crown was ignorant of the facts of the plaintiff's possession and improvements. There is, of course, no pretence for saying that the *Ontario* decisions, which proceed on the practice prevailing in the Crown Lands Department of that Province, and which also prevailed in the late Province of *Canada*, of recognizing a right of pre-emption in squatters, can have any application here. It is not alleged in the bill that any such practice prevails in the Dominion Lands Department, and the *Ontario* cases in which patents have been set aside for non-disclosure of possession and improvements all proceed on the practice referred to, which, it has been expressly decided, must be distinctly averred in the bill.

I am of opinion that the appeal must be allowed, and that the order over-ruling the demurrer must be vacated in the court below, and an order allowing the demurrer entered in lieu thereof, with costs to the appellant in both courts.

FOURNIER, J., concurred.

HENRY, J.:—

I do not consider it absolutely necessary, in the view I take of this case, to determine whether under the bill of the respondent, if it were the original proceeding in this suit, he could seek the relief prayed for. The first paragraph of it refers to the ejectment suit brought against him by the appellant to recover the possession of the land in question herein, which came to this court by appeal and in which this court gave judgment in June, 1880, for the present appellant.

Referring to that action, the respondent, in the second paragraph of his bill, alleges:

> That said action was decided in this honorable court in favor of the plaintiff, but upon an appeal to the Supreme Court of *Canada* it was there held the defendant *Farmer* had under his patent a legal right

to the said land, and that the equities of the defendant set forth to displace and invalidate the same could not be set up by way of defence to the said action of ejectment, but that independent proceedings would have to be taken to assert the said equities.

In the third paragraph the respondent alleges that he was in danger of being ejected from the land in question in the action of ejectment, and that he would be, unless the court, in which the bill was filed, should restrain the further prosecution of the said action until the determination of the suit.

The identity of the subject matter in dispute in the two suits is shown by the bill, and the fact stated that a judgment was given by this court on the appeal in the first action. This court decided that the appellant was entitled to the land in question, that the judgment below should be reversed, and that a verdict and judgment should be entered for him. To prevent that being done, the plaintiff filed his bill in the present suit, and the Court of Queen's Bench in *Manitoba* failed to give effect to the judgment of this court, and by injunction interposed to stay it. I have considered that course of procedure, and am of opinion that the Court of Queen's Bench exceeded its jurisdiction when interposing to prevent the legal consequences of the judgment of this court. And I am the more astonished when it was known to the Court of Queen's Bench that the respondent in the first case was permitted, rightly or otherwise, to set up and prove as a defence to the action of ejectment all the facts and circumstances upon which his alleged equities rested. On the trial of the action of ejectment, before the late Chief Justice of the Queen's Bench of *Manitoba*, an objection was raised to the equitable defence set up. His lordship dealt with that subject, and having decided against the objection, says, in his judgment—

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Thereupon the defendant went into evidence exhibiting the principal facts and circumstances connected with and surrounding the history of the lands in question, in so far as the plaintiff and the defendant were concerned.

The learned Chief Justice of the Court of Queen's Bench concludes an exhaustive judgment on the facts and circumstances in evidence and the law he alleged as applicable to them, as follows:

In every point of view, as it seems to me, as against the defendant, the purchase of the plaintiff fails, and the issue of the patent to him in pursuance of the purchase cannot be upheld. I think the patent must be declared to be void as having been issued in error and mistake.

An appeal was heard from that verdict and judgment to the Court of Queen's Bench, which appeal was heard by his lordship the Chief Justice and Mr. Justice *Betournay*. Another exhaustive judgment was delivered by his lordship the Chief Justice confirming his previous one, and that was concurred in by Mr. Justice *Betournay*. It was on an appeal from that judgment that it came before our court. On the argument before us the question of the right of the respondent to plead equitable defences was again raised, and the judgment of four out of the five judges of this court who heard the argument shows that the respondent got the full benefit of the equities he alleged as far as the evidence in the whole case warranted. It shows, too, that the allegations in the second paragraph of the bill, and upon which the respondent sought the interposition of the Court of Queen's Bench, were false and unfounded; and I may safely say that the language of the judgment was too plain to create any doubt, and I am free to add that the statement in that paragraph, if made by any intelligent person who read that judgment, must have wilfully misstated it.

Whether such was the case or not, the fact is patent on the face of the judgment, and must have been

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apparent to the learned judges of the Court of Queen's Bench. That this court had reversed their judgment on the equitable defence of the respondent did not, however, prevent the Court of Queen's Bench from reconsidering the case already decided by this court, and our judgment was by the Court of Queen's Bench reversed and the legal effect of it destroyed. It is true that the bill did not refer to the rebutting evidence of the appellant on the first trial, and if the judgment given by this court, and that of the court appealed from, had not been founded on a consideration of the evidence on both sides, the position of the case might have been wholly different. The judgment of this court being referred to in the bill, we are not only privileged but required also to refer to it, and when in doing so we find the whole case on the equitable defence disposed of, I do not consider we would be justified, as the highest court in the Dominion, in permitting a court of inferior jurisdiction in so direct a manner to reverse it.

The judgment of the majority of this court was delivered by our learned Chief Justice, and I will cite from it shortly in proof of the correctness of the position I have taken, as follows (1):

> I think it quite unimportant whether a defendant in *Manitoba* could or could not avail himself of an equitable defence in an ejectment suit, because the plaintiff made out a clear case under a Crown grant, and the defendant did not show that he had any legal or equitable defence to the action; he did not show any grant or conveyance from the Crown, nor any legal title or equitable interest in the land, under any statutory provisions—in other words, he showed no *locus standi* enabling him to attack the letters patent, even if they could be impeached in such a proceeding.

If the bill had truthfully referred, as it should have done, to the judgment of this court, it would have been patent that our judgment disposed of the whole case on the merits, in which case no court of inferior juris-

(1) 5 Can. S. C. R. 221.

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diction would have had any right to reverse it as has been done in this case. When that judgment was referred to as it was in the bill, it was, I think, the duty of the Court of Queen's Bench to have looked at and considered it, and when it was plainly shown by it that the whole of the alleged equities of the respondent were adjudicated on and disposed of, the Court of Queen's Bench should not have, in the most palpable manner as it did, disrespected it. By the judgment lastly appealed from, the two justices of the Queen's Bench have, in the most marked and direct manner, undertaken to reverse the judgment of this court, and virtually made their court an appellate one from the judgment of this court deliberately and clearly given. If such could be done, it would be in direct violation of the statutes under which this court was established, and it would be a precedent in other cases under which courts of inferior jurisdiction might seek to reverse the decisions of this court. I cannot see either what ultimate benefit it would be to the respondent to have the demurrer disallowed. If, instead of appealing to this court, the appellant had submitted to the last judgment of the Court of Queen's Bench, and issues as to the equities alleged in the bill were raised and evidence again taken, and this court were again called upon to decide upon them, the result would certainly be the same. Unless, indeed, the case were materially changed by other evidence as to the *locus standi* of the respondent, which, from the documentary and other evidence in the action of ejectment, I cannot believe to be possible. Not being able to conceive how the respondent could be benefited by such a course, I am strongly of the opinion, that is for the interests of both parties, that the last judgment of the court below should be reversed. If, however, the position I have taken be not tenable, I think our

judgment should be for the appellant on at least one ground.

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The statutes regulating the disposal of Crown Lands in *Manitoba* must be taken to control all matters of title under them. One provision requires that before an applicant can have a *locus standi* which would enable him to obtain a patent, he must pay to the proper departmental office the sum of ten dollars and be entered as such applicant. If he merely pays the required amount of money and he is not so entered, the ground, I take it, remains clear for another applicant to obtain a patent by fully complying with the statutory requirements. I think that is the legal consequence, whether the controlling departmental officer rightly or wrongfully failed to enter an applicant. It would be a grievance, if wrongfully refused, for the government but not a court of law to consider. The first applicant, therefore, failing to comply with such requirements has no sufficient *locus standi*. I consider the bill in this case defective, because it does not allege that the respondent was so entered as an applicant. It is not necessary for me to express any opinion as to the effect of such an entry, and to decide whether even had it been made the Crown would be legally bound to grant a patent in every case where all the requirements of the statutes had been complied with. That, however, is a question not involved in this case and need not be debated.

For the foregoing reasons, I think, the judgment below should be reversed and the demurrer of the appellant allowed with costs.

TASCHEREAU, J.:—

Upon this demurrer we have undoubtedly to take for granted that each and every one of the facts alleged by the plaintiff in his bill of complaint are true; and if they are true, the allegations of the bill seem to suf-

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ficiently warrant the judgment appealed from, which overruled the demurrer. I concur fully in the opinion given by my brother *Gwynne*, and am of opinion with him, and for the reasons given by him, that this appeal should be dismissed.

GWYNNE, J.:—

In giving judgment upon this demurrer we can look at nothing but the allegations contained in the bill in the light of the acts of Parliament therein referred to, and we must not criticise its expressions with too much preciseness. Our simple duty is to determine whether, looking at the substance of it, there are any facts stated in it which call for an answer. We cannot import into the case anything which may have come to our knowledge in the ejectment suit between the same parties for the same lot of land which not long ago came before us on appeal, least of all any matter in apparent or actual contradiction of any of the averments contained in the bill of complaint now before us, all the material averments in which are by the demurrer admitted to be true upon this record, and must therefore, for the purposes of our judgment herein, be conclusively regarded as true. The question which is raised by the demurrer now before us was not, and indeed could not have been in issue, so as to call for judicial decision in that case, which was an action of ejectment brought by the defendant *Farmer*, and which put in issue solely his legal title. Anything, therefore, which may have been said in that case seemingly decisive of the point now raised must, in my opinion, be considered as extra-judicial, and the question now submitted by this demurrer must be regarded as having been first brought *sub judice* by the demurrer, and must be treated as resting wholly upon the sufficiency of the substantial

allegation of material facts contained in the bill of complaint.

Now, the substance of the bill of complaint appears to me to be, that the plaintiff alleges that the defendant *Farmer*, being a resident upon a large farm of his own, distant about forty miles from the land in question in this suit, and without any *bonâ fide* intention of settling on, occupying, or cultivating, the lot adjoining the one in question, or of making it a home for himself and family within the intent and provisions of 35 *Vic.*, ch. 23, but with the view of acquiring it solely for purposes of speculation, made an affidavit as required by the above statute, as if he contemplated occupying the lot as a home, and procured his name to be entered for it as his homestead, but that in total disregard of the intent and provisions of the statute in that behalf he continued to reside upon his farm forty miles off, and never in fact, either by himself or any other person on his behalf, entered into possession or occupation of, or caused any other person to settle upon, cultivate, or improve such lot or any part thereof, but that the same remained wholly unoccupied and unimproved, whereby, according to the provisions of the statute in that behalf, all claim of the said *Farmer* to such lot upon which he had so fraudulently procured his name to be entered, or to have it treated as his homestead, became lost and forfeited. That after the passing of 37 *Vic*, ch. 19, the defendant, with the like fraudulent intent of acquiring lands of the Crown in the Province of *Manitoba* for purposes of speculation, under color and pretence of acquiring them for purposes of settlement within the provisions of the statute in that behalf, in the month of February, 1875, procured his name to be entered for the lot in question in this suit as what is called an interim pre-emption entry, but the plaintiff submits that under the provisions of the statute in that behalf such interim

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pre-emption entry was not one authorized by the statute, by reason of the defendant having so as aforesaid procured his name to have been entered for the adjoining lot as a homestead, without any intention of occuping it as such, and of his never having been, as the plaintiff alleges he never was, in the actual or constructive possession thereof, and that he never had made any cultivation or improvement thereon. The bill then proceeds to allege, that under these circumstances, and while the lot adjoining to the lot in question in this suit, for which the defendant had procured his name to be entered as and for a homestead, as well as the lot in question in this suit, remained wholly unoccupied, the plaintiff procured proper affidavits to be made in accordance with the provisions of the statute in that behalf, whereby he proved to the satisfaction of the Dominion Lands Agent in that behalf that the defendant never had in fact settled on or improved the said lands, which he had procured to be entered to him for a homestead, nor upon the land in question in this suit, and that he had, under the circumstances, lost all claim to the said lot entered for a homestead, and also to the said lot now in question in this suit; and thereupon and on the 8th May, 1875, the plaintiff, with the consent and by the direction of the Dominion Land's Agent, made an application in writing which the agent himself prepared for the plaintiff to sign, whereby the plaintiff applied for the lot now in question, as a homestead for his family under the provisions of the statute in that behalf, and paid to the said agent the homestead fee of ten dollars, which the said agent accepted and received from the plaintiff *as such homestead fee*, and thereupon that the plaintiff, having done all that was required by the statute to be done by him in order to acquire the said lot, as a homestead for himself and family, did forthwith in good faith enter upon the said

land, and took actual possession thereof, and erected a house and other buildings thereon, cleared a large portion of said land, and fenced and cultivated the same, and made many other valuable improvements thereon, costing in the aggregate $1,000,and that he has ever since remained in actual occupation thereof; that while the plaintiff was so in occupation of the said land, and after he had made large improvements on the same, of which the defendant *Farmer* had full knowledge, the defendant procured letters patent to be issued, bearing date the 12th December, 1878, granting to him in fee the said lands so occupied by plaintiff as his homestead, and had brought an action of ejectment therein to evict the plaintiff from the possession thereof; and the bill concludes with the allegation that the Crown issued the said patent to the defendant *Farmer* improvidently and through error in not being advised of the true facts as hereinbefore set forth—in not being advised of the facts and circumstances surrounding the defendant *Farmer's* pretended homesteading the one lot, and his making the pretended interim pre-emption entry of the lands in question, and in not being informed that the plaintiff had given up another homestead claim he had, as he alleges the fact is that he did, in order to homestead the lands in question herein, and that the defendant *Farmer*, although he well knew all and singular the premises and matters aforesaid, caused, procured and induced the Crown, in ignorance of the plaintiff's rights and position in regard to the lands in question in this suit, to issue to him, the defendant *Farmer*, the said letters patent; and the bill prays, among other things, that it may be declared that the said patent was issued improvidently and in ignorance of the plaintiff's right in the premises, and that the said patent may be set aside and be declared to be absolutely null and void and of no effect.

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Now, assuming the facts alleged in this bill to be true, as by the demurrer they are admitted to be, I must say that I cannot see how a doubt can be entertained that under the provisions of the Act 35 *Vic.*, ch. 23, sec. 33 and its sub-sections relating to homestead rights, the plaintiff, when he made his application for the lot in question, and paid his homestead fee and satisfied the local agent that the entry of the defendant on the books of the land office was in effect a fraud upon the provisions of the Act, was a person who, in the words of the Act, was entitled to be entered on the books of the land office for the lot as his homestead, and that having in good faith entered upon the lot as his homestead, which, upon the allegations in the bill admitted by the demurrer, I consider myself bound to regard him as having done, and that having, as is also admitted, made in good faith such improvements on the lot while he occupied it as a homestead and which he thought was secured to him by the statute, he is a person having such an interest in procuring the letters patent which have been issued to the defendant *Farmer* for the lot in question to be set aside, as having been issued either through fraud, or in error, or improvidence, as entitles the plaintiff to maintain this suit under the provisions of the 69th sec. of the Act, which enacts that

in all cases wherein patents for lands have issued through fraud, or in error or improvidence, any court, having competent jurisdiction in cases respecting real property in the province or place where such lands are situate, may upon action, bill, or plaint respecting such lands, and upon hearing of the parties interested, or upon default of the said parties after such notice of proceedings as the said court shall order, decree such patent to be void, and upon the registry of such decree in the office of the Registrar General of the Dominion, such patent shall be void to all intents.

If the allegations contained in this bill, admitted as they are to be true, are not sufficient within the provisions of this section to give to

the plaintiff a *locus standi* as a party interested in having the letters patent issued, as is admitted, in fraud of the provisions of the act,and by error upon part of the government, and in ignorance of such facts, and through improvidence set aside, I am, I confess, unable to conceive any case wherein a *locus standi* in maintenance of a bill to set aside letters patent, as issued through fraud, or in error, or improvidence, can be accorded to any complainant.

I am of opinion, therefore, that the defendant's demurrer was rightly disallowed in the court below, and that this appeal should be dismissed with costs.

Appeal allowed with costs.

Solicitors for appellant: *Ross, Killam & Haggart.*

Solicitors for respondent: *McKenzie & Rankin.*