

IN THE MATTER OF THE PETITION OF RIGHT OF
 ELIZABETH ANN OLIVER.....SUPPLIANT;

1921
 May 23.

AND

HIS MAJESTY THE KING,

RESPONDENT, BY THE PETITION;

AND

GEORGE H. FUNK AND HOMER CANFIELD,

RESPONDENT (BY NOTICE) IN POSSESSION.

*Constitutional Law—Exchequer Court Act—Provincial Laws affecting
 limitation of actions—Jurisdiction*

Held: That O. having invoked legislation on her behalf, cannot escape from any obligation upon her arising out of such legislation or amendments thereto.

2. That under section 33 of the Exchequer Court Act, the provisions of the Real Property Limitation Act, of the Province of Manitoba, would apply in respect to the limitation of actions to recover land situate in the said province.

The fact that the land patents had been signed in Ottawa, would not make the law of prescription or limitation of Ontario applicable.

Quaere: Where suppliant, who alleged a claim to certain lands in Manitoba under the Manitoba Act, 33 Vict., c. 3, sec. 32, by reason of possession and occupancy of a predecessor in title in 1870, took no steps to assert her claim until some 49 years had elapsed after the last mentioned date, although in the meanwhile, namely, in 1908, the Dominion Government had issued letters-patent for portions of the said lands to other parties, must she not be held by her laches to have acquiesced in the title given by the patents issued in 1908?

1921

OLIVER
2.
THE KING
AND
FUNK AND
CANFIELD.

Reasons for
Judgment.

Audette J.

PETITION OF RIGHT seeking to have certain land patents, granted by the Crown, set aside by reason of being issued in error and inadvertently, and to have suppliant's estate converted into freehold by the Crown.

February 9th, 1921.

Case now heard before the Honourable Mr. Justice Audette, at Winnipeg.

W. S. Morrisey, for suppliant.

H. M. Hanneson, for the Crown.

J. C. Freeman, for Geo. Funk.

E. D. Honeyman, for H. Canfield.

The facts are stated in the reasons for judgment.

AUDETTE J. now (this 23rd May, 1921) delivered judgment.

The suppliant, by her Petition of Right, seeks to set aside and have declared void five land patents, with respect to lots 47, 48 and 49 in the parish of St. Peter, in the province of Manitoba, alleged to have been issued, by the Crown, inadvertently and in error and improvidently; for a declaration that she is the owner in fee simple of these lands and further that she is entitled to have her title confirmed by a grant from the Crown, or to have her estate in the said lands converted into an estate of freehold by grant from the Crown.

I may state, *in limine*, that owing to the total absence of proof of occupancy, etc., with respect to lot No. 47, the suppliant fails to establish any claim to relief in respect of that lot; and add that all which is hereafter said applies to lots 48 and 49 only.

This claim is based upon an alleged occupation of the lands in question by the suppliant's predecessor in title, now over 50 years ago and rests mainly upon sec. 32 of the Manitoba Act (33 Vict., ch. 3).

With respect to documentary title, the suppliant has failed to establish the same and were it satisfactory in some respects the chain of title is not brought up to her. This view has been amply acquiesced in although not actually admitted at bar and the action undoubtedly now rests upon occupancy and possession.

Under 33 Vict., ch. 3, sec. 32, sub-sec. 3 of the Manitoba Act:—"All titles by *occupancy* with the sanction and under the license and authority of the Hudson's Bay Company up to the eighth day of March aforesaid (1869), 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 of freehold by grant from the Crown."

Now, the utmost that the vague, meagre and unsatisfactory evidence on record—evidence that I may call inferential rather than positive—could establish is that Sinclair was in possession of or occupying some land, which might be ascribed to lots 48 and 49 in question herein at the time the soldiers came up the Red River on the occasion of the North West Rebellion. However, there is no date mentioned in evidence except such as might be derived from such a general allegation. One counsel at bar stated that would be around the 24th August, 1870. At any rate it would be in the summer of 1870.

1921

OLIVER
v.
THE KING
AND
FUNK AND
CANFIELD.

Reasons for
Judgment.

Audette J.

1921

OLIVER
v.
THE KING
AND
FUNK AND
CANFIELD.

Reasons for
Judgment.

Audette J.

Therefore, upon that point it clearly results that the suppliant fails to establish any such occupancy "*up to 8th March, 1869,*" as required by the above recited section.

However, failing to succeed upon that section, suppliant relies upon the Acts of 1874 or 1875. The section of the Act of 1874, in respect to the section in question was repealed in 1875 and replaced by 38 Vict., ch. 52, sec. 1, which purports to be an amendment of the section above recited (33 Vict., ch. 3, sec. 32, sub-sec. 3) and reads as follows:

"3. Whereas it is expedient to afford facilities to parties claiming land under the 3rd and 4th subsections of the thirty-second section of the Act, 33 Vic., ch. 3, to obtain Letters Patent for the same:—

"Be it enacted, that persons satisfactorily establishing undisturbed occupancy of any land within the Province prior to, or those through whom they claim, in actual peaceable possession thereof, *on the 15th July, 1870,* shall be entitled to receive Letters Patent therefor, granting the same absolutely to them respectively in fee simple."

This amendment deals with parties claiming under the 3rd section first above referred to, which section enacts that the occupancy alleged must be one "with the sanction and under the license and authority of the Hudson's Bay Company." If such sanction, license and authority be necessary, there is not a tittle of evidence establishing the same.

It is true this Act of 1875 requires the occupancy only prior to 15th July, 1870, instead of 8th March, 1869, as provided by the original section, but it is claimed that all legislation by the Parliament of Canada in respect of the Act constituting the Province of Manitoba, subsequent to the Manitoba Act (33

Vict., ch. 33) and the Imperial Act confirming the same (34 & 35 Vict. 28), is *ultra vires* of the Parliament of Canada and illegal. It is so contended in view of the enactment, under the Manitoba Supplementary Provisions Act, ch. 99 R.S.C. 1906, sec. 22, whereby the suppliant's claim would "be barred as fully and effectually as if it had not been made, if the claimant in respect thereof did not establish his claim before the 1st November, 1886, etc." If that Act has force of law the claim is obviously prescribed and barred by this limitation.

If the suppliant accepts the legislation subsequent to the Manitoba Act extending the occupancy prior to the 15th July, 1870, she must also accept the legislation, by the same power, in respect to this limitation which is legislation dealing only with procedure, and under both views she is out of court.

Moreover, the evidence adduced, unsatisfactory as it may be, could not be regarded as establishing occupation before the 15th July, 1870—the most it could establish would be occupation somewhat around the 24th August, 1870, if it at all does establish that fact. The case has not been proved.

This action, although in respect of a claim relying upon possession and occupancy in 1870, has only been instituted in December, 1919—that is 49 years after. Would not such great laches, such delay in asserting such claim shut the door to an applicant who was content to thus sleep upon her imaginary rights until it is discovered the property has increased in value? Should a Court assist under such circumstances and is not the suppliant estopped by such laches to set up such a claim? Has the suppliant by her delay not acquiesced in the title given by the Lands Patent in 1908?

1921
OLIVER
v.
THE KING
AND
FUNK AND
CANFIELD.
Reasons for
Judgment.
Audette J.

1921

OLIVER
v.
THE KING
AND
FUNK AND
CANFIELD.

Reasons for
Judgment.

Audette J.

Furthermore, the lands in question are situate in Manitoba and the laws with respect to the statute of limitation, under sec. 33 of the Exchequer Court Act, must be the laws in force in Manitoba, The fact, as contended, that the Patents were signed in Ottawa, would not make the laws of Ontario applicable when the lands are situate in Manitoba.

Under the "Real Property Limitation Act" of the Province of Manitoba (R.S.M., ch. 116, secs. 4, 5, and 17) an action to recover land is limited to ten years. The evidence in respect of the possession, adverse to the suppliant in the last ten years is not as satisfactory as might be desired, yet with the explanation given, the absence of the real owner serving in France during the war, it should under the circumstances of the case, coupled with the Patent, be accepted as sufficient on behalf of innocent third parties purchasers for value.

There were several other interesting and important questions raised at bar, and much might be spread upon record in respect of the same; but, in the view I take of the case, it becomes unnecessary to consider them here. The action must be dismissed for want of evidence. The case has not been proven and therefore fails.

There will be judgment ordering and adjudging that the suppliant is not entitled to any portion of the relief sought by her Petition of Right.

Judgment accordingly.

Solicitor for suppliant: *W. D. McKerchan.*

Solicitor for the Crown: *H. M. Hanneson.*

Solicitor for Funk: *Campbell Reid.*

Solicitors for Canfield: *McWilliams, Gunn & Co.*