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 TYLEE, *et al v.* THE QUEEN.

[E.C.] 1877

Nov. 14.

*Petition of Right Act 1876, s. 7—Statute of Limitations—32 Henry VIII., c. 9—Buying pretended titles—Public Works—Rideau Canal Act, 8 Geo. 4, c. 1—6 Wm. IV., c. 16—Trustee, contract by—Compensation for lands taken for canal purposes—2 Vic., c. 19—7 Vic., c. 11, s. 29—9 Vic., c. 42.*

Under the provisions of 8 Geo. IV., c. 1, passed on the 17th February, 1827, by the Provincial Parliament of Upper Canada, and generally known as the Rideau Canal Act, Lt.-Colonel By, who was employed to superintend the work of making said canal, set out and ascertained 110 acres or thereabouts, part of 600 acres or thereabouts theretofore granted to one Grace McQueen, as necessary for making and completing said canal, but only some 20 acres were actually necessary and used for canal purposes. Grace McQueen died intestate, leaving Alexander McQueen, her husband, and William McQueen, her eldest son and heir-at-law, her surviving. After her death, on the 31st January, 1832, Alexander McQueen released to William McQueen, all his interest in the said lands, and on the 6th February, 1832, William McQueen granted to Col. By all the lands previously granted to his mother. Col. By died on the 1st February, 1836.

By 6 William IV., c. 16, persons who acquired title to lands

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used for the purposes of the canal after the commencement of the works, but who had purchased before such commencement, were enabled to claim compensation.

By the Ordnance Vesting Act, 7 Vic., c. 11, (Can.), the Rideau Canal and the lands and works belonging thereto, were vested in the principal officers of H. M. Ordnance in Great Britain, and by sec. 29 it was enacted : " Provided always, and be it enacted, that all lands taken from private owners at Bytown under the authority of the Rideau Canal Act for the uses of the canal, which have not been used for that purpose, be restored to the party or parties from whom the same were taken."

By the 9th Vic., c. 42, (Can.) it was recited that the foregoing proviso had given rise to doubt as to its true construction, and it was enacted that the proviso should be construed to apply to all the land at Bytown set out and ascertained and taken from Nicholas Sparks under 8 Geo. IV., c. 1, except certain portions actually used for the canal, and provision was made for payment of compensation to Sparks for the land retained for canal purposes, and for the re-investing in him and his grantees of the portions of lands taken but not required for such purposes.

By the 19th and 20th Vic., c. 45, the Ordnance properties became vested in Her Majesty for the uses of the late Province of Canada, and by the British North America Act they became vested in Her Majesty for the use of the Dominion of Canada.

The suppliants, the legal representatives of Col. By, brought a petition of right, alleging the foregoing facts, and seeking to have Her Majesty declared a trustee for them of all the said lands not actually used for the purposes of the said canal, and praying that such portion of said lands might be restored to them, and the rents and profits thereof paid, and as to any parts sold that the values thereof might be paid, together with the rents and profits, prior to the selling thereof.

By his statement in defence the Attorney-General contended, among other things, that (par. 5) no interest in the lands set out and ascertained by Col. By passed to William McQueen, but the claim for compensation or damages for taking said lands was personal estate of Grace McQueen, and passed to her personal representative ; that (par. 6, 7 and 8,) the deeds of the 31st of January and 6th February, 1832, passed no estate or interest, the title and possession of the lands being in His Majesty, but that such deeds were void under 32 Hy. VIII., c. 9 ; that (par. 9) Col. By was incapable, by reason of his position, from acquiring any beneficial interest in said lands as against His Majesty ; that (par. 10, 11, 12 and 13,) Col. By took proceedings under 8 Geo. IV., c. 1, to ob-

tain compensation for the lands in question, but the arbitrators, and also a jury summoned under the act, decided that he was entitled to no compensation by reason of the enhancement of the value of his other land and of other advantages accrued by the building of the canal, and that this award and verdict were a bar to the suppliants claim; that (par. 14 and 15,) the proviso 9 Vic., c. 42 was confined to Nicholas Sparks and did not extend to the lands in question; that (par. 16, 17, 18 and 19,) by virtue of 2nd Vic., c. 19 (Upper Canada), and a proclamation issued in pursuance thereof, all claims for damages which might have been brought under 8 Geo. IV., c. 1, by owners of lands taken for the canal, including claims of the said Grace McQueen or Col. By, or their respective representatives, were, on and after the 1st April, 1841, forever barred; that (par. 26, 27 and 28,) the suppliants were barred by their own laches; and that (par. 27) they were barred by the Statute of Limitations.

On a special case stated on the pleadings for the opinion of the court,—

- Held*: 1. The Statute of Limitations was properly pleadable under sec. 7 of the Petition of Right Act of 1876.
2. William McQueen took the lands by descent from his mother, if she died before the lands were set out and ascertained for the purposes of the canal. If she died afterwards, he did not, as they were vested in the Crown under 8 Geo. IV., c. 1, ss. 1 and 3, and her right was converted into a claim for compensation under the 4th section.
3. This right of compensation or damages, if asserted under the 4th sec. of Geo. IV., c. 11, would go to Grace McQueen's personal representatives, but if the land was obtained by surrender under the 2nd sec. of the statute, then the heir-at-law of Grace McQueen would be the person entitled to receive the damages and execute the surrender.
4. The deeds of the 31st January, 1832, and 6th February, 1832, are void as against the Crown so far as they relate to the acres in dispute, except so far as the same may be considered as a surrender to the Crown under the 2nd sec. of the Rideau Canal Act.
5. The 9th paragraph of the statement in defence is a sufficient answer in law to the petition.
6. The defence set up in the 10th, 11th, 12th and 13th paragraphs of the statement would be sufficient in law, supposing the statement therein to be true.
7. The proviso of 9 Vic., c. 42, s. 29 was confined in effect to the lands of Nicholas Sparks only.
8. If the claim is to be made by Grace McQueen's personal represen-

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tatives under the 4th sec. of the Rideau Canal Act, (and any claim by her could only be under that section) the Acts referred to in the 16th, 17th, 18th and 19th paragraphs of the statement in defence have an application to this case and would constitute a bar against all claims to be made under the Rideau Canal Act. As to the claims to be made by the heirs of Col. By, they have no claims under any of the statutes.

9. If the Ordnance Vesting Act vested the 110 acres in question in the heirs of Col. By, the court was not prepared to say that their claim had been barred by laches on the statement set out in the petition. But the statute had not that effect, nor had Col. By, or his legal representatives, ever had for his or their own use and benefit any title in or to these 110 acres. See Can. S. C. R., vol. VII., p. 651 (Appendix).