The defendant and several others having claimed that some right of common over lot 35 had been conferred upon them by Lord Selkirk conveyed it, in 1872, to certain trustees, of whom the defendant was one, for the purpose of having it divided into town lots and sold for their benefit. The trustees then employed a surveyor, who made a subdivision plan of a portion of the common, after which the trustees made what they considered to be an equitable distribution of the lots on the plan to which the interested parties agreed. The trustees then executed deeds in favour of some of those parties, said lot H, together with the adjoining lot A, being, with other property, conveyed to the defendant. He admitted the conveyance by him to Clarke of lot H, but denied that the purchase money had been paid in full.

Subsequently, McPhillips, another surveyor, made a subdivision plan covering the same territory, in which, as the learned judge found, lot A was given a wider frontage, overlapping about 43 feet of lot H, according to Sinclair's survey. After this the defendant made an application personally at Ottawa for a patent for lot A, according to McPhillips' survey, basing his claim on the trustees' conveyance to himself. The arrangement entered into by the trustees was recognized by the Department of the Interior, and a patent was issued in 1883 accordingly.

The plaintiff had no notice or knowledge of the application for it. It recited that the lands therein described were Dominion lands, that the defendant had applied for a grant thereof, that his claim had been duly investigated, and he had been found duly entitled thereto. It granted lot A, as shown on McPhillips' plan, without further defining its boundaries and size.

The defendant disputed the plaintiff's right to any relief in equity, and, in addition, set up that he had been in possession of the 43 feet in dispute for over ten years, but this was found against him on the evidence.

The defendant's deed to Clarke was made before May 14th, 1875, when the first statute of Manitoba relating to short forms of indentures was passed. It purported to be made in pursuance of the Act respecting Short Forms of Conveyances, and was otherwise in the form in the first schedule to The Short Forms Act, now R.S.M., c. 141, with the covenants in column 1, but contained no recitals.

It was assumed upon the hearing, though not expressly admitted by the counsel for the defendant, that the effect of the deed, under section 2 of the Act, was to make the defendant's covenants equivalent to those in the second column of the first schedule to that Act, and the plaintiff's counsel contended that this worked an estoppel against the defendant.

In view of the date of the instrument, it did not come within The Estoppel Act, R.S.M., c. 52.

Held: (1) That a defendant is not estopped by his mere grant from setting up a title subsequently acquired, at least when it does not appear that he had no title at all at the time of his grant.

Doed. Oliver v. *Powell*, 1 A. & E. 531; *Right d. Jefferys* v. *Bucknell*, 2 B. & Ad. 278.

2) That, in the absence of legislation, covenants do not estop: *Heath* v. *Crealock*, L.R. 10 Ch. 22; *General Finance, etc., & Co.* v. *Liberator Society* 10 Ch. 15.