

possession for a period exceeding the 10 years prescribed by the Limitations Act; and the relief which had been granted was simply a declaration that she was so entitled.

The question raised before this Court—apparently for the first time—as to the propriety of granting a declaratory judgment in the circumstances, besides being of general importance, was, in view of the numerous authorities, one of some nicety.

Reference to Chancery Order 538; also to sec. 16 (b) of the Judicature Act, R.S.O. 1914 ch. 56, first introduced by 48 Viet. ch. 13, sec. 5, and identical in language with the English Order XXV., Rule 5; *Bunnell v. Gordon* (1890), 20 O.R. 281; *Austen v. Collins* (1886), 54 L.T.R. 903, 905; *Stewart v. Guibord* (1903), 6 O.L.R. 262; *Ottawa Young Men's Christian Association v. City of Ottawa* (1913), 29 O.L.R. 574, 581.

But *Miller v. Robertson* (1904), 35 S.C.R. 80—the head-note of which says, “A Court of Equity will not grant a decree confirming the title to land claimed by possession under the Statute of Limitations nor restrain by injunction a person from selling land of another”—seems to be almost precisely in point, and is binding on this Court.

There can be no doubt, upon all the authorities, that now in all cases a discretion exists in the Court to grant or to withhold a mere declaration of right. That being so, a very proper case for the exercise of the discretion adversely to the plaintiff seems to be such a case as this.

*Foisy v. Lord* (1911), 2 O.W.N. 1217, 3 O.W.N. 373, considered and distinguished.

*Appeal allowed and action dismissed without costs.*

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FIRST DIVISIONAL COURT.

JANUARY 10TH, 1916.

\*RE SCARTH.

*Infant—Custody—Separation of Parents—Right of Father to Custody of Girl of Ten—Welfare of Infant—Conduct of Parents—Infants Act, R.S.O. 1914 ch. 153, sec. 2—Costs.*

Appeal by Amy H. R. Scarth from the order of LENNOX, J., ante 143, requiring the delivery by her to her husband, James Frederick Scarth, of their infant daughter, Mary Howitt Scarth, born in August, 1906.