THE KING, ON THE INFORMATION OF THE ATTORNEY-GENERAL OF CANADA, 1916 Jan. 16.

PLAINTIFF;

AND

THE TRUSTS AND GUARANTEE COMPANY, LIMITED.

DEFENDANT.

Provincial Rights—Title to Land—Dominion lands—Intestacy—Failure of heirs and next of kin—Escheat—Bona Vacantia.

R., a resident of and domiciled in the province of Alberta, was at the time of his death the registered owner of a certain parcel of land in said Province under a patent issued to him by the Department of the Interior of Canada on the 25th July, 1911. He died on November 18th, 1912, leaving no heirs or next of kin. Letters of administration to his property, both real and personal, were granted to the defendant as public administrator under the law of the Province, and a certificate of title to the land in question was granted to defendant under the *Land Titles Act* of Alberta. The land was thereafter sold by the defendant and the provincial government claimed the proceeds of the sale, except in so far as they were amenable to debts and administration expenses as belonging to it under the provisions of the Alberta statute, 5 Geo. V, c. 5, sec. 1. Upon an information being exhibited by the Attorney-General of Canada to have it determined that such proceeds belonged to the Crown in right of Canada.

Held, 1. That the right of escheat to the lands in question (or if the principle of escheat did not apply and the lands were to be treated as *bona vacantia*, then the right to them as such bellonged to the Crown in right of the Dominion as *jura regalia*.

2. That in so far as rights of the Dominion Crown to escheated lands or *bona vacantia* in the Province are concerned the provisions of the Alberta Statute 5 Geo. V, c. 5, sec. 1, purporting to vest the property of intestates dying without next of kin or other persons entitled thereto in the Crown in right of the Province, are to be regarded as *ultra vires*.

Attorney-General of Ontario v. *Mercer*, (1883) 8 App. Cas. 767; *Church* v. *Blake*, 2 Q.L.R. 236; *The King* v. *Burrard Power Co.* 12 Ex. C. R. 295; *Dyke* v. *Walford*, 5 Moo. P. C. 434, referred to.

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THIS was an information exhibited by the Attorney-General of Canada seeking a declaration of escheat to the Crown in right of the Dominion of Canada of certain lands situate within the province of Alberta.

The facts of the case are stated in the reasons for judgment.

October 30th, 1915.

The case was heard at Ottawa before the Honourable Mr. Justice Cassels.

W. D. Hogg, K.C. for the plaintiff:

Frank Ford, K.C., for the defendants.

CASSELS, J. now (January 26th, 1916) delivered judgment.

The information in this case was exhibited on behalf of His Majesty by the Attorney-General of the Dominion of Canada. The case was argued before me on an admission of the facts. Mr. Hogg, K.C., appeared for the plaintiff; Mr. Ford, K.C., of the Alberta Bar, for the defendant. The statement of facts agreed upon is as follows:

"1. Prior to his death Yard Rafstadt was a resident "of and domiciled in the Province of Alberta.

"2. During his lifetime and at the time of his death "the said Yard Rafstadt was the registered owner of "the southeast quarter of Lot Thirty, Township "Forty-four, Range Seventeen, west of the Fourth "Meridian in the Province of Alberta, he having "obtained a certificate of title therefor under the "Land Titles Act of Alberta, the patent for the said "lands having been issued to the said Yard Rafstadt

"by the Department of Interior of Canada on the "25th day of July, 1911.

"3. The said Yard Rafstadt died on or about the "18th day of November, 1912, leaving no heirs or next "of kin.

"4. A grant of letters of administration to the property of the said Yard Rafstadt was made by the proper Court in that behalf in the Province of Alberta "to the defendant as public administrator under the "Statutes in force in the said Province and the said "property was taken possession of and administered "by the defendant as such public administrator under "the laws of Alberta, the defendant having obtained "a certificate of title to the said lands in its name under "the said Land Titles Act of Alberta.

"5. The said grant of letters of administration has "never been revoked.

"6. The property of the said Yard Rafstadt "consisted of the said land above described and a "small amount of personal property which latter is not "in question in this action.

"7. The said land above described was sold and "disposed of by the defendant company as public "administrator as aforesaid, and the sum of fourteen "hundred and five dollars was realized therefor. "The defendant as public administrator paid the "debts of the deceased and also the costs and charges "incurred in the administration of the estate and there "remains a balance of five hundred and sixty-three "dollars and twenty-five cents in the hands of the "defendant company as such public administrator.

"8. In view of the fact that the said land has been "sold and it is not the desire of either party to disturb "the title of the purchasers, the parties to the action "are content to treat in the alternative the said

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"balance of proceeds remaining in the hands of the "defendant as public administrator to the extent that "it represents the land, as the subject matter of the "action, and that the judgment to be delivered in the "suit may dispose of and award the said balance to "one or the other of the parties in the action."

At the opening of the case, I made the suggestion that the Attorney-General of the Province of Alberta should be notified, as a question might arise as to the validity of a Statute of the Province of Alberta. Mr. Ford stated that he had authority to represent the Attorney-General of Alberta, and appeared for him as well as for the defendant.

Although the amount in question is small, the point raised is one of very considerable importance. The contention of the Crown, represented by the Attorney-General for the Dominion, is that Yard Rafstadt, having died inestate without heirs, the lands in question escheated to the Crown in right of the Dominion of Canada, and thereupon became and is now under the provisions of the Dominion Statute 4-5 Ed. VII, cap., 3, sec. 21, the property of His Majesty the King in such right.

The defendant on the other hand denies the contention of the plaintiff, and alleges that the said Yard Rafstadt was at the time of his death a resident of and domiciled in the Province of Alberta; and was during his lifetime and at the time of his death, which occurred on the 18th November, 1912, the owner of the lands in question.

The defendant admits that the said Yard Rafstadt died intestate leaving no heirs or next of kin, but says that a grant of administration to the property referred to in the statement of claim was made by the proper court in that behalf to the defendant, as public admin-

istrator under the statutes in force in the Province of Alberta, and that the said property was taken possession of and administered by the defendant as such public administrator under the law of Alberta. The defendant further alleges and contends that if the land in question did escheat, it escheated to His Majesty in the right of the Province of Alberta. In the alternative the defendant alleges that the property referred to in the statement of claim immediately on the death of the said Yard Rafstadt vested in His Majesty in his right of the Province of Alberta, under Chapter 5 of the Statutes of Alberta, 1915, being an Act respecting the property of intestates dying without next of kin.

The lands which now comprise the Province of Alberta were formerly the property of the Hudson's Bay Company. The Royal Charter incorporating the Hudson's Bay Company was signed on the 2nd day of May in the 20th year of the reign of Charles II. It will be found in full in the work published by Mr. Archer Martin (now Mr. Justice Martin) in 1898, intituled "The Hudson's Bay Company's Land Tenures."(1) It was a very extensive grant by the Crown and contains the following: "To have, hold, possess "and enjoy the said Territory, Limits, and Places, "and all and singular other the premises hereby "granted as aforesaid, with their, and every of their "Rights, Members, Jurisdictions, *Prerogatives*, * * * "*Royalties* and Appurtenances whatsoever, to them "the said Governor and Company, and their Succes- "sors forever, to be holden of us, Our Heirs, and "Successors, as of Our Manor of East Greenwich in "our County of Kent, in free and common Soccage, "and not in Capite or by Knight's service."

(1) At p. 163.

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Section 146 of *The British North America Act*, 1867, provided for the admission of other Colonies than those originally constituting the Union. After expressly providing for the admission of Newfoundland, Prince Edward Island, and British Columbia, it is further provided:

"And on addresses from the Houses of the Parliament "of Canada to admit Rupert's Land and the North "Western Territory or either or them into the Union "*on such terms and conditions* in each case as are in the "addresses expressed, and as the Queen thinks fit to "approve subject to the provisions of this Act."

By the *Rupert's Land Act*, 1868 (31-32 Vic., U.K. Cap. 105) to be found in the R.S.C., 1906, vol. 4, 3125, the Hudson's Bay Company were authorized to surrender all or any of the lands, territories, rights, etc., granted or purported to be granted, by the Letters Patent to the Governor and Company of Adventurers of England, trading into Hudson's Bay, and known as the Hudson's Bay Company, unto Her Majesty Queen Victoria, and Her Majesty was authorized to accept the surrender upon the conditions to be set forth in an Order in Council. It was further enacted that Her Majesty by an order in council on addresses from the Houses of Parliament of Canada might declare that the lands so surrendered should be admitted into and become part of the Dominion of Canada, and that thereupon it should be lawful for the Parliament of Canada to make all such laws as might be necessary for the peace, order and good government of Her Majesty's subjects and others therein.

The lands of the Hudson's Bay Company were duly surrendered to Her Majesty the Queen on the 19th day of November, 1869, and Her Majesty by an

instrument under her sign manual and signet bearing date at Windsor the 22nd day of June, 1870, duly accepted the surrender of the said lands.

The Queen's order in council (R.S.C. 1906, 4 vol., p. 3142) was passed on the 23rd day of June, 1870, under which the lands of the Hudson's Bay Company so surrendered as aforesaid and accepted by Her Majesty were admitted into and became part of the Dominion of Canada, with full power and authority to the Dominion Parliament to legislate for the future welfare and good government of the territory in which said lands were situated.

Subsequently by section 2 of *The British North America Act*, 1871, (34–35 Victoria, Cap. 28) intituled *An Act respecting the establishment of Provinces in the Dominion of Canada*, it was provided as follows:—

"The Parliament of Canada may from time to time "establish new provinces in any territories forming for "the time being part of the Dominion of Canada but "not included in any province thereof, and may at the "time of such establishment make provision for the "constitution and administration of any such province "and for the passing of laws for the peace, order and "good government of such province and for its rep- "resentation in the said parliament."

By sec. 3 of 51 Vict., c. 20, as amended by 57–58 Vict., c. 28, sec. 3, the Dominion Parliament enacted as follows:—

"Land in the territories shall go to the personal "representatives of the deceased owner thereof, in the "same manner as personal estate now goes" and be dealt with and distributed as personal estate—and

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when the statute establishing the Province of Alberta was enacted this statute still remained in force.*

It becomes necessary to consider carefully the provisions of *The Alberta Act*, 4–5 Ed. VII, cap. 3. It created the Province of Alberta. No public lands were given or granted to the Province—they still remained the property of the Dominion; and in consequence thereof Section 20 was enacted which provides as follows:

"Inasmuch as the said province will not have the "public land as a source of revenue, there shall be "paid by Canada to the province by half-yearly "payments in advance, an annual sum based upon the "population of the province as from time to time "ascertained by the quinquennial cen us thereof, as "follows:

"The population of the said province being assumed to be at present two hundred and fifty thousand the "sum payable until such population reaches four "hundred thousand, shall be three hundred and "seventy thousand dollars;

"Thereafter until such population reaches eight "hundred thousand, the sum payable shall be five "hundred and sixty-two thousand five hundred dollars;

"Thereafter, until such population reaches one "million two hundred thousand, the sum payable shall "be seven hundred and fifty thousand dollars;

"And thereafter the sum payable shall be one "million, one hundred and twenty-five thousand "dollars.

"As an additional allowance in lieu of public lands, "there shall be paid by Canada to the province annually

*EDITOR'S NOTE:—See also 63–64 Vict. c. 21. The enactment is now in Sec. 5 of R.S.C., 1906, c. 110. But so far as the Provinces of Saskatchewan and Alberta are concerned the Dominion Parliament by 4–5 Edw. VII, c. 18, authorized the Governor in Council to repeal the above enactment. Orders or this purpose were passed on 23rd July, 1906, while both the Acts constituting the provinces mentioned came into force on the 1st September, 1905.

"by half-yearly payments in advance, for five years "from the time this Act comes into force, to provide "for the construction of necessary public buildings, "the sum of ninety-three thousand, seven hundred and "fifty dollars."

Section 21 of *The Alberta Act*, provided as follows:

"All Crown lands, mines and minerals and *royalties* "incident thereto, and the interest of the Crown in "the waters within the province under the North West "Irrigation Act, 1898, *shall continue* to be vested in "the Crown and administered by the Government of "Canada for the purposes of Canada, subject to the "provisions of any Act of the Parliament of Canada "with respect to road allowances and roads or trails "in force immediately before the coming into force of "this Act, which shall apply to the said province with "the substitution therein of the said province for the "North West Territories."

This section would not vest in the Crown, represented by the Government in question, the royalties incident to the Crown lands unless such royalties (including the rights to lands escheated or to *bona vacantia*) were vested in the Crown as represented by the Government of the Dominion.

It is a clause relating to the administration of the particular lands and royalties, etc., and would not have the effect of vesting such property in the Crown represented by the Dominion unless such rights were otherwise so vested. It is a provision enacted on the assumption that *The Alberta Act* did not divest the Crown, as represented by the Dominion, of any royalties or *jura regalia* theretofore the property of the Dominion. It may be contended, however, that as far as Alberta is concerned the province accepted its incorporation as such with this stipulation in favour

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of the Dominion; and that it cannot now be heard to contend to the contrary.

Section 1 of cap. 5, 5th Geo. V of the Legislature of Alberta, assented to on the 17th April, 1915, is as follows:

"When any person dies inestate owning any real or "personal property and without leaving any next-of-"kin or other person entitled thereto by the law of "Alberta, such property shall immediately on his "death vest in His Majesty in his right of Alberta, and "the Attorney-General may cause possession thereof "to be taken in the name of His Majesty in his said "right; or if possession is withheld may cause an "action to be brought in the Supreme Court of Alberta "for the recovery thereof.

"(2) The proceedings in the action may be in all "respects similar to those in other actions in the said "Court."

If in point of fact the right to lands escheated, or to *bona vacantia* (which at the time of the passing of *The Alberta Act* were part of the revenues and properties of the Dominion) did not pass as property of the province, then I think it obvious that such legislation as affecting the property of the Crown, represented by the Dominion of Canada, would be *ultra vires* of the legislature of the Province as purporting to vest in His Majesty in his right of Alberta property or revenues of the Crown as represented by the Dominion.(1)

After the best consideration I can give to the case I am of opinion that 51 Vict., c. 20, sec. 3, as amended by 57–58 Vict., c. 28, sec. 3 (Dom.) above recited at length, does not, as contended for by Mr. Ford, take away this right of escheat, whether belonging to the

(1) See remarks of Patterson J. in his reasons for judgment in *Attorney-General* v. *Mercer*, 3 Cart. Cas. 90. Also *The King* v. *Burrard Power Co.*, 12 Ex. 295; 43 S.C.R. 27; (1911) A.C. 87.

Crown as represented by the Dominion, or by the Province, as if the lands were not real estate but personal estate possessed by the owner at the time of his death intestate and without next of kin.

Furthermore if the argument be well founded, the proceeds of the lands in question would be *bona vacantia* and consequently *jura regalia*, and would belong to the Crown represented by the Dominion or the Province as the case may be, as in the case of escheat.

In vol. 3 of "Cartwright's Cases on the *B.N.A. Act*" p. 1, will be found reported in full the decisions of the Privy Council, the Supreme Court of Canada, the Court of Appeal of Ontario and of Proudfoot V.C. in the *Mercer* case; also the reasons for judgment in the Court of the Province of Queen's Bench, Quebec, in *Attorney-General of Quebec* v. *Attorney-General of the Dominion* (*Church* v. *Blake*).

These judgments and the arguments of counsel deal at great length with the history of the law relating to escheats. In many of the reasons for judgment, the question raised in the *Mercer* case is treated as depending upon the true construction of *The B.N.A. Act.*

In his reasons for judgment, Lord Chancellor Selborne is quoted as stating that in "its primary and "natural sense, 'royalties' is merely the English "translation or equivalent of 'regalitates,' 'jura "regalia', 'jura regia,' etc.; and he adds:

"The subject was discussed with much fullness of "learning in *Dyke v. Walford*(1) where a Crown grant "of *jura regalia* belonging to the County Palatine of "Lancaster, was held to pass the right to *bona vacantia.* "That it is a *jus* said Mr. Ellis in his able argument, "is indisputable; it must also be *regale*; for the

(1) 5 Moore P.C. 434.

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"Crown holds it generally through England by Royal "prerogative, and it goes to the successor of the Crown, "not to the heir or personal representative of the "Sovereign. It stands on the *same footing as the right "to escheats, etc., etc.* With this statement of the law, "their lordships agree and they consider it to have "been in substance affirmed by the judgment of Her "Majesty in Counsel in that case."

The first point to consider is to whom the rights of escheat or *bona vacantia* belonged prior to the creation of the Province of Alberta. They must have belonged (I am employing the word as used in *The B.N.A. Act*) to the Crown of Great Britain and Ireland or to the Crown represented by the Dominion. I think, having regard to the judgment in the *Mercer* case (*supra*) that they belonged to the Crown represented by the Dominion.

I have previously referred to the grant to the Hudson's Bay Co. If at and previous to the creation of the Province of Alberta, the rights belonged to the Crown represented by the Dominion, how did such rights pass to the Crown represented by the Province of Alberta? I have set out in a previous part of these reasons, the Statute creating Alberta as a Province. No lands were conveyed to it. The lands remained the property of the Crown represented by the Dominion and to be administered for the benefit of the Dominion. Alberta obtained a money subsidy.

In the *Mercer* case (*supra*) where it was decided that the right of escheat belonged to the Crown represented by the Province of Ontario, the question turned upon the construction of a section of *The British North America Act*, 1867.

Section 109 of that Statute provides that:

"All Lands, Mines, Minerals, and Royalties belonging "to the several Provinces of Canada, Nova Scotia, "and New Brunswick at the Union, and all sums then "due or payable for such Lands, Mines, Minerals, or "Royalties, shall belong to the several Provinces of "Ontario, Quebec, Nova Scotia, and New Brunswick "in which the same are situate or arise, subject to "any Trusts existing in respect thereof, and to any "interest other than that of the Province in the same."

Lord Chancellor Selborne referring to sec. 102 of the Act is reported as stating:(1)

"If there had been nothing in the Act leading to a "contrary conclusion, their Lordships might have "found it difficult to hold that the word 'revenues' in "this section did not include territorial as well as other "revenues; or that a title in the Dominion to the "revenues arising from public lands did not carry with "it a right of disposal and appropriation over the "lands themselves. Unless, therefore, the casual "revenue arising from lands escheated to the Crown "after the Union '*is excepted and reserved*' to the "Provincial Legislature within the meaning of this "section, it would seem to follow that it belongs to "the Consolidated revenue fund of the Dominion."

The "royalties" referred to in section 109 according to this judgment covered escheats as "jura regalia' and therefore belonged to the Province of Ontario.

In the present case, I am of opinion that the right to the escheat in the lands in question, to the *bona vacantia*, never passed to the Province of Alberta, but belong to the Crown represented by the Dominion as *jura regalia*. The patent to the lands in question was a grant from the Dominion.

There will be judgment declaring that the plaintiff

(1) 3 Cart. Cas. p. 9.

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is entitled to be paid the surplus in the hands of the defendant, the amount thereof being agreed upon.

This being the first case in which the question has arisen, the parties having agreed upon the facts, I think each party should bear its own costs.

Judgment accordingly.

Solicitors for plaintiff: *Hogg & Hogg.*

Solicitor for defendants: *Frank Ford.*