Privy Council Appeal No. 157 *of* 1927.

The Attorney-General of Alberta	- - - - -	*Appellant*
	v.	
The Attorney-General of Canada	- - - - -	*Respondent*
The Attorney-General of Canada	- - - - -	*Appellant*
	v.	
The Attorney-General of Alberta	- - - - -	*Respondent*

FROM

THE SUPREME COURT OF CANADA.

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 19TH JUNE, 1928.

Present at the Hearing:

THE LORD CHANCELLOR.
VISCOUNT HALDANE.
LORD BUCKMASTER.
LORD WRENBURY.
LORD WARRINGTON OF CLYFFE.

[*Delivered by* LORD BUCKMASTER.]

The questions raised on these appeals are whether the Crown possesses in the right of the Dominion of Canada the title to (1) escheated lands and (2) *bona vacantia* within the Province of Alberta. The Supreme Court of Canada has decided the first question in the affirmative and the second in the negative. The appeal by the Attorney-General of Alberta is against this judgment on the first point and the cross-appeal of the Attorney-General of Canada upon the second.

The Province of Alberta was created pursuant to the British North America Act of 1871 by a statute of the Dominion passed in 1905 (4 & 5 Edw. VII, c. 3, called The Alberta Act). Before its constitution and apart from the effect of the Land Titles Act of 1894, there is no real dispute on this appeal as to the title of the Crown in right of the Dominion to escheated properties and *bona vacantia* in the territories that now form part of the Province.

The main features of the present dispute are, first the effect of the Land Titles Act of 1894; secondly, that of the Alberta Act, and thirdly, whether the Province had power to deal with the property in question. The actual statute by which the Province have purported to exercise the rights they claim is an Act entitled the "Ultimate Heir Act," passed in 1921, the essential provision of which is in the following terms:—

> "(1) When any person dies intestate in fact in respect of lands situate in the Province of Alberta, or being domiciled in Alberta dies intestate in respect of any moveable property or chose in action, and no person or corporation is otherwise than under the provisions of this Act entitled thereto as the heir or next-of-kin of the intestate, then the latter shall be deemed to have made a duly executed and entirely valid will, devising or bequeathing such land, moveable property or chose in action to the body corporate known as the Governors of the University of Alberta."

and it is this provision that has been held *ultra vires* so far as it relates to lands by the Supreme Court of Canada.

The facts that have given rise to this dispute are the deaths of three people named Wudwud, Malesko and Stevenson, who were domiciled in the province of Alberta, and died respectively on the 24th June, 1918, 24th April, 1921, and 8th November, 1919, leaving both lands and goods without heirs or next-of-kin. The administrators of the several estates made applications to the Supreme Court of Alberta for advice as to their distribution, alleging that no heir, next-of-kin or other person entitled to the property of the deceased had been found.

The three applications having been consolidated, the Appellate Division of the Supreme Court of Alberta, Ives, J., dissenting, declared the Ultimate Heir Act to be valid and to apply to the real and personal property of any intestate such as Malesko, who died after that Act came into force. In respect of the estates of Wudwud and Stevenson, who died after the constitution of the Province on 1st September, 1905, and before the Ultimate Heir Act came into force, the Court directed (*a*) that personal property was to be distributed as *bona vacantia* to His Majesty in the right of the Province, and (*b*) that lands granted by the Crown after 1st September, 1905, were to be distributed to His Majesty in the right of the Dominion. The Court also declared that, apart from the provisions of the Ultimate Heir Act, lands such as Stevenson's, granted before 1st September, 1905, and escheating after that date, were distributable to His Majesty in the right of the Province. The question of the property being chargeable with the debts of the deceased was left undecided with liberty to apply. On appeal to the Supreme Court of Canada this judgment was affirmed only as to (*b*) and as to the personal estate.

It follows from this statement that the Land Titles Act of 1894 first needs consideration. This Act replaced earlier legislation on the same subject and was, after the constitution of the Province, repealed as to Alberta, its terms being reproduced

in a Provincial Statute known as the Land Titles Act, 1906. It was an Act for the registration of title, and provides that a certificate of title granted pursuant to the statute shall be conclusive evidence as against His Majesty and all persons whomsoever that the person named on such certificate is entitled to the land included therein. It also provides that upon death of the owner of any land for which a certificate has been granted, the land shall vest in the personal representative of the dead owner, who upon a memorandum of probate or letters of administration being entered in the Register shall be deemed to be the owner of the land, and by section 3 it is enacted that the land should descend to the personal representative in the same manner as personal estate and be dealt with and distributed as personal estate. The argument of the appellants upon this Act is that the ownership effected by grant from the Crown followed by registration destroys the right of the Crown to escheated lands, and, further, that in order to assimilate the descent of real and personal estate it is necessary to exclude the right of escheat. Their Lordships think that this argument cannot be sustained. There is nothing in the statute to support the theory that on the registration of the title to land for the first time the character of the tenure under which it was originally held was changed, so that in case of the Crown being the grantor, the effect of the Act was to enlarge the ordinary ambit of the grant.

The reasoning of Anglin, J., in *The Trusts Guarantee Company* v. *The King*, 54 S.C.R., at pp. 126 and 127, upon this point, with which their Lordships agree, renders further elaboration unnecessary.

It is obvious that the title of the personal representative can be no greater than that of the owner whose estate he holds, and the provision as to the descent of land as personal estate does not affect the question, for escheated lands have not descended, and whether they can be sold and used for payment of debts, which has been left open, is not material, for even if they were so liable, to the extent to which they were not needed for this purpose they would still remain the subject of escheat, and though they might have been actually converted they would for this purpose retain the quality of real property by analogy to the doctrine of *Akroyd* v. *Smithson*. 1 Bro. C.C. 503.

Turning now to the Alberta Act of 1905, it is necessary to consider this in relation to the British North America Act of 1867. This Act united the Provinces of Canada, Nova Scotia and New Brunswick, each of which possessed separate legislatures at the time of the Union. It divided the Province of Canada into two provinces, Ontario and Quebec, and gave to each provincial legislature the right to make laws with regard to property

and civil rights within the Province. By section 109 it was provided :—

> "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."

The territory out of which the Province of Alberta is constituted was unaffected by this section, but on the admission of the North West Territories into the Dominion of Canada in 1870 and the passing of the British North America Act, 1871, became subject to the laws of the Parliament of Canada. It therefore followed that the Province could never, apart from statute, be in the position of owning lands, mines, minerals and royalties. Section 3 of the Alberta Act of 1905, however, made the provisions of the British North America Acts applicable to the Province of Alberta in the following words :—

> "The provisions of the British North America Acts, 1867 to 1886, shall apply to the Province of Alberta in the same way and to the like extent as they apply to the Provinces heretofore comprised in the Dominion, as if the said Province of Alberta had been one of the Provinces originally united, except in so far as varied by this Act, and except such provisions as are in terms made, or by reasonable intendment, may be held to be specially applicable to or only to affect one or more and not the whole of the said Provinces."

and by section 21 an exception in favour of Crown lands was made in the following terms :—

> "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."

"Royalties," within the meaning of section 109 of the British North America Act of 1867, has been held in the case of the *Attorney-General of Ontario* against *Mercer* (8 App. Cas. 767) to include escheats. The reasoning of that case was this : that an escheat is essentially a royalty, and the only difficulty lay in deciding whether the interposition of the words "mines and minerals" after the word "lands" was not sufficient to deprive the word "royalty" of its proper force. It was there declared that these words did not have that effect, and, in consequence, the escheated lands were included in the provisions of section 109 of the British North America Act, 1867, and belonged to the Crown in the right of the Province. The difference in the language between section 21 of the Alberta Act and section 109 of the British North America Act is not, in their Lordships'

opinion, sufficient to warrant any real distinction in effect. The royalties must in the latter, as in the former, case be taken to include escheats, and these are reserved to the Crown for the purposes of Canada. This conclusion applies to all lands whenever granted, for the argument that the royalties reserved were only those in relation to lands then held as Crown lands cannot be maintained, in the words of Duff, J., "Crown lands, mines and minerals" does not necessarily import "lands, mines and minerals" held by the Crown in full proprietorship, it may be read as including all interests of the Crown "in lands, mines and minerals within the Province," and this their Lordships think is the correct interpretation.

Considering now the case of *bona vacantia*, it is plain that they are unaffected by this argument. They are not incident to Crown lands, mines or minerals and are therefore not included in the reserved property mentioned in section 21. The Attorney-General for Canada, however, argues that they cannot belong to the Province, since they never had so belonged before the Province was constituted, and there is nothing in the Act of 1905 to confer such a title. Their Lordships think that this argument does not do justice to the fundamental provisions of section 3 of the Alberta Act. Reading the whole Act together they regard the effect of this section as placing the Province of Alberta in the same position as the other provinces in regard to property, except as varied by the statute, either by express terms or reasonable implication. Section 21 is only sensible on this hypothesis, for unless it was assumed that it was required for the purpose of preserving the Crown rights in the property to which it relates, it would be meaningless, but if that be once assumed it follows that the property to which it does not relate is vested in the Crown, not for the purposes of Canada, but for the purposes of the Province of Alberta.

They therefore are of opinion that the cross-appeal of the Attorney-General for Canada fails.

There remains the question of the power of the Province to affect the title to the escheated lands by virtue of their authority to make laws relating to property and civil rights within the Province. This right confers no power to deal directly with public property, which is expressly reserved by section 91 (1) to the Parliament of Canada. An Act, therefore, to declare that such property should vest in His Majesty in his right of Alberta would be void. This direct attack was indeed made by the Legislature of Alberta by an Act of 1915, c. 5, which was declared to be *ultra vires* by a judgment of the Supreme Court in *Trusts and Guarantee Company* v. *The King* (*supra*). This judgment was a majority judgment, from which Idington and Brodeur, JJ., dissented, but their Lordships think that the decision of the Supreme Court was right. The argument against the Act was most accurately stated at p. 110 in the following words of Fitzpatrick, C.J. :—"Judgment for the respondent on this

appeal does not involve any decision as to the rights of the Legislature of the Province to change the laws of inheritance and lands escheat to the Crown for defect of heirs, and this has nothing to do with the question of who are a person's heirs; but altering the law of inheritance is one thing, and appropriating the right of the Dominion on failure of heirs is quite another."

The Act now in dispute, passed in 1921 by the Provincial Legislature, proceeded on different lines to reach the same goal. It provided that the University of Alberta should be the ultimate heir to all property where descent failed. This it is sought to justify upon the ground that the Province had power to alter succession and could impinge upon the Crown rights by introducing illegitimate or adopted children into the line of succession; that as to the former this had been done, and the provision held valid so far as Saskatchewan was concerned, a province with similar rights to the Province of Alberta, in the case of *Re Stone* (1924), S.C.R. 682.

Their Lordships think that the conclusion in *Re Stone* may be safely accepted. The Provincial Government's power to control succession may be thus exercised provided that the statute is, when fairly regarded, designed solely for this end, but when under user of this power the Legislature attempts to defeat the Crown rights expressly reserved they have passed on to forbidden ground and cannot justify their intrusion by a colourable pretext for their acts.

The cases summarised in the judgment of Duff, J., in the case of *Attorney-General for Ontario* v. *Reciprocal Insurers* [1924], A.C. 328, at p. 337, show that where collision between the rights of the Provincial and Dominion Parliaments arise under any statute the real purpose of the Act must be regarded in forming an opinion as to the validity of the statute. To use the words of the judgment referred to:—"Where the lawmaking authority is of a limited or qualified character, obviously it may be necessary to examine with some strictness the substance of the legislation for the purpose of determining what it is that the Legislature is really doing."

In the present case, while the University of Alberta exists, and it is to be hoped it will continue for a time that knows no measurable limit, the right of the Crown is completely defeated.

It is not by varying or extending the ordinary rules of succession that this is accomplished, but by introducing outside all natural, lawful or conventional descendants or relations of a deceased an entirely foreign beneficiary and one, in part, at least dependent on the provincial revenues. There is no real difference in substance, and only partially in effect, between this and the Act of 1915, and in their Lordships' opinion it is equally open to objection. For these reasons they are of opinion that the appeal must fail and both the appeal and the cross-appeal should be dismissed without costs, and they will humbly advise His Majesty accordingly.

In the Privy Council.

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DELIVERED BY LORD BUCKMASTER.

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