CASES

DETERMINED BY THE

EXCHEQUER COURT OF CANADA

HIS MAJESTY THE KING, ON THE INFORMATION OF THE ATTORNEY-GENERAL OF CANADA..... PLAINTIFF;

1921
April 4.

AND

THE WESTERN TRUST COMPANY, THE ATTORNEY-GENERAL OF THE PROVINCE OF SASKATCHEWAN, AND HENRIETTA SHULZE..... DEFENDANTS.

Constitutional Law—Bona Vacantia—B. N. A. Act, secs. 102-109—Saskatchewan Act, sec. 3—Interpretation—Jurisdiction.

In 1916 one A. H. then domiciled in the province of Saskatchewan died leaving no heirs or other persons legally entitled to his estate. The estate consisted principally of lands in the province of Saskatchewan sold under an agreement of sale, which by equitable conversion, made it personal property. The Western Trust Company was appointed administrator and realized assets amounting to $8,123.71. Both the Dominion and the Province claimed this estate as *bona vacantia* enuring to them by right of escheat. The Dominion suggested that to settle the controversy, it should exhibit an information in this court, making the administrator and the Attorney-General of the province co-defendants, to which the latter agreed. This was done, and subsequently a defence was filed to the information claiming the *bona vacantia* in question,

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without raising therein any objection to the jurisdiction. At trial, for the first time, it was argued by the Attorney-General of the province that section 32 of the Exchequer Court Act only conferred jurisdiction in the matter of a controversy between the Dominion and the province when the latter had passed an Act agreeing thereto, and that section 31 did not apply, in view of section 32. No such Act was passed by the province, and no fiat was obtained for the purpose of taking proceedings against the province.

Held: That the agreement or consent of the Attorney-General of the province could not bind the Crown in the right of the province; that section 32 of the Exchequer Court Act did not apply; and that, on the facts, the court had no jurisdiction to hear and determine the controversy between the two governments.

That, however, the court clearly had jurisdiction in the subject matter with respect to the other defendants, both under section 31 of the Exchequer Court Act and section 2 of 9-10 Ed. VII, ch. 18.

2. That, as the Province of Saskatchewan was not at the date of its establishment, owner of the lands, mines, minerals and royalties nor had any vested rights in any duties or revenues in respect to the lands from which the province was carved, differing in this respect from the original provinces of Confederation, sections 102 and 109 of the B.N.A. Act did not apply to it, notwithstanding section 3 of the Saskatchewan Act. That in any event, said sections did not purport to transfer any "property" or rights to the provinces.

3. That the word "royalties" in section 109 of the B.N.A. Act did not embrace all kinds of royalties, but was limited in its meaning by the text to such as are connected with lands, mines and minerals; such as, *inter alia*, the right to *bona vacantia* and of escheat arising by reason of a failure of heirs, which "royalties" by section 21 of the Saskatchewan Act are reserved to the Dominion "for purposes of Canada."

That said section 21 did not purport to transfer to or vest any property in either the Dominion or the Province, but was merely declaratory of the Dominion's ownership, and was enacted with a view of removing doubt, and for greater certainty.

INFORMATION exhibited by the Attorney-General of Canada to have it declared that a certain estate for which no heirs were found belong to the Dominion Crown.

February 5th, 1921.

The case now heard before the Honourable Mr. Justice Audette, at Regina.

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F. W. Turnbull, K.C., for plaintiff.

E. S. Williams for Western Trust Company.

S. R. Curtin for Henrietta Shulze.

A. Hayworth for the Attorney-General of Saskatchewan.

The facts are stated in the reasons for judgment.

AUDETTE, J. now (4th April, 1921), delivered judgment.

This is an information, exhibited by the Attorney-General of Canada, whereby it is sought to recover the whole estate of a person dying in the province of Saskatchewan, without any heirs. The case, furthermore, presents an interest of a high political nature, in that it involves the attribution of such estate, in the nature of *bona vacantia*, either to the Crown in the right of the Dominion or to the Crown in the right of the Province of Saskatchewan.

On the 13th November, 1916, one Augustus Heyer, being then domiciled in the said province, died intestate and unmarried, leaving no heirs or other persons lawfully entitled to his estate, and in the course of the following month letters of administration of his estate were granted by the Surrogate Court of the Judicial District of Regina, to the defendant the Western Trust Company. The latter has realized assets amounting to $8,123.71, less $364.50 paid on account of creditors' claims.

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The estate, as alleged in the information, wholly consisted at the time of his death of personal property. However, counsel at bar on behalf of the Dominion, stated that the estate consisted principally of a piece of land which had been sold under an agreement of sale, with a mortgage on the land. The sale, by equitable conversion, made the property personal property and subject to a mortgage in favour of a land company, which will have to be paid.

Counsel at bar, on behalf of the Dominion and the Province, rest their respective claim to these *bona vacantia*, both under the B.N.A. Act, 1867, and The Saskatchewan Act" (4-5 Ed. VII, ch: 42).

By sec. 3 of the Saskatchewan Act, it is provided: "3. The provisions of the British North America Acts, 1867 to 1886, shall apply to the Province of Saskatchewan 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 Saskatchewan 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 it is contended by the Province, that this section had the effect of introducing, in the said Act, the provisions of sections 102 and 109 of the B.N.A. Act, which provide for the distribution of the revenues between the Dominion and the four provinces therein mentioned. In other words, sec. 102 creates and establishes the source of the consolidated revenue fund of the Dominion; *excepting* therefrom what is specially reserved by section 109 of the said Act, namely: 1st, such portions thereof as are by that Act

(B.N.A. Act) reserved to the respective legislatures of the Provinces; 2nd, or are raised by them in accordance with the special powers conferred on them by the Act.

These two sections read, as follows, viz.: "102. All duties and revenues over which the respective Legislatures of Canada, Nova Scotia, and New Brunswick before and at the Union had and have power of appropriation, except such portions thereof as are by this Act reserved to the respective Legislatures of the Provinces, or are raised by them in accordance with the special powers conferred on them by this Act, shall form one consolidated revenue fund, to be appropriated for the public service of Canada in the manner and subject to the charges in this Act provided." "109. 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 first question that suggests itself on the consideration of these two sections, is whether or not the position of the Province of Saskatchewan is identical to that of the four provinces which originally formed part of Confederation.

Raising this question is almost solving it.

Sec. 109 in proceeding to fix the revenues of the four provinces, prefaces by stating that "All lands, mines, minerals and royalties belonging to the several Provinces . . . at the Union . . . shall belong to the said Provinces.

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Now it is of common and elementary knowledge in Canada, that previous to the passing of the Saskatchewan Act, in 1905, that the territory out of which that Province was carved, belonged to the Dominion of Canada.

It is unnecessary to labour establishing such a question which has become a well known page of our Canadian history; but, if it is desired by any one to so acquaint himself with the details of such facts, reference may be had,—to save a long nomenclature of such facts,—to the elaborate judgment of Sir Walter Cassels, in the case of *the King* v. *the Trust and Guarantee* Co., (1) where the sequence of such events is stated in detail.

From this statement it follows that the public lands or territory taken from the lands or territory belonging to the Dominion, to form the Province of Saskatchewan in 1905, all belonged to the Dominion,—no public lands were given or passed to the province at the time of its creation and that, moreover, these public lands still at the present time remain the property of the Dominion. The very "lands and minerals and royalties incident thereto" referred to in sec. 109 of the B.N.A. Act, are by sec. 21 of the Saskatchewan Act specifically reserved to the Dominion. In 1905, at the time of the formation of the Province of Saskatchewan, this very word "royalties" in sec. 109 of the B.N.A. Act, having been already commented upon,—in enacting this section 21 the matter was made clearer in adding after the word "royalties," the other qualifying words "incident thereto,"—and these last words constitute a further argument in favour of the canon of construction of *ejusdem generis* in reading the word royalties, in sec. 109 of the B.N.A. Act.

(1) (1916) 15 Ex. C.R. 403, at pp. 407, et seq. (On appeal to Supreme Court, 54 S.C.R. 107.)

This section 21 of the Saskatchewan Act, relied upon by the Province, appears to be an enactment that owes its existence only to the consideration of "making matters clear and removing any doubt, and for greater certainty;" because it has no other effect than affirming that these "properties" belonged to the Dominion before 1905, and will continue to belong to it, notwithstanding there was not in the Saskatchewan Act any enactment declaratory of its ownership to the contrary. The section is declaratory of the Dominion's ownership in these lands, mines, minerals and royalties.

Therefore, if the Province can gain any benefit from this section 109 of the B.N.A. Act, it would have to establish that, *at the Union*, at the time the province was created, "Lands, mines, minerals and royalties," belonged to the province. These premises being obviously established in the negative, it follows necessarily that these "lands, mines, minerals and royalties" come within the ambit of sec. 102 of the B.N.A. Act, and belong to the Dominion,—and that the revenues accruing under the "royalties" mentioned in sec. 109, with respect to that Province, either as escheat, or *bona vacantia*, belong to the Dominion under the provisions of sec. 102.

Lord Watson, in delivering judgment of the Board in the St. Catherine Milling Co. case (1) referring to section 109, said: "Its legal effect is to exclude from the 'duties and revenues' appropriated to the Dominion all ordinary *territorial* revenues of the Crown arising within the Province."

(1) (1889) 14 A.C. 46, at 58.

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The Province of Saskatchewan stands in quite a different position from that of the four original provinces at the Union, in respect of "lands, mines, minerals and royalties" (Sec. 109) as these belonged to the four provinces before they entered into the federal pact.

Now, the word "royalties" mentioned in sec. 109,—used as it is, must be given the meaning controlled by the text. It cannot be contended that the word "royalties" therein mentioned can or should be given its full extended and literal meaning so as to embrace all kinds of royalties. It means the royalties governed by the context, applying the common rule of construction of *ejusdem generis*. It is too obvious that all royalties, such as all droits of Admiralty and droits of the Crown, royalties accruing to the Crown from unclaimed wrecks, deodands (now abolished), waifs, (Bona waviata), bona confiscata, etc., cannot form part of the royalties mentioned in section 109. All of this leads to the irresistible conclusion that the meaning of the word "royalties" was intended to be controlled and restricted by the context of cognate matters (1).

At pages 119, 123 and 124 of Forsyth's Cases and Opinions on Constitutional Law, a similar interpretation is placed upon the word "royalties" associated with the word "land" and like descriptive words.

(1) *Cooney* v. *Covell*, 21 N.Z., L.R., 106; Maxwell on Statutes, 5th ed. 538, 539; *Ailesbury* v. *Pattison*, 1 Doug., 28. *Mercer case* (1882) 8 A.C. at p. 778; *the King* v. *Rithet*, 17 Ex. C.R. 109; *the Trusts and Guarantee Company* v. *the King*, 54 S.C.R. 107; 15 Ex. C.R. 403.

In the consideration of sec. 109 of the B.N.A. Act, both in the *Mercer case* (1) and the *St. Catherine's Milling and Lumber Co., case* (2), the Earl of Selborne and Lord Watson in the Judicial Committee of the Privy Council, speak of these royalties as *"royal territorial rights,"* and as *"territorial revenue,"*—leading to the obvious conclusion that these rights and revenues are exclusively in connection with "lands, mines and minerals" and no others.

Section 109 of the B.N.A. Act, would not, up to the present day, seem to be at all applicable to the Province of Saskatchewan, because that Province was not possessed of the ownership of the "lands, mines and minerals and royalties" either as a province, or as a portion of the North West Territories before 1905.

The Parliament of Canada in 1910, passed *The Escheats Act,* (9-10 Ed. VII, ch. 18) whereby it is provided, by sec. 2: "Where His Majesty the King, in his right of Canada, is entitled to any land or other real or personal property by reason of the person last seised or entitled thereto having died intestate and without lawful heirs the Attorney-General of Canada may cause possession thereof to be taken in the name of His Majesty, or if possession is witheld may exhibit an information in the Exchequer Court for the recovery thereof."

This Act entitled the Crown, in the right of Canada, to *bona vacantia,*—and *a fortiori* in a province where the lands already belonged to the Dominion—and the Act further provides for the disposition of the proceeds of such escheat or *jura regalia.*

The third section of that Act provides for the distribution of the assets of such an estate, in the manner therein set forth and by the Government of the Dominion of Canada.

(1) 8 A.C. 767, at p. 778. (2) 14 A.C., 46.

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Having come to the conclusion that the right to the *bona vacantia* in question, never passed to the Province, but belong to the Crown in the right of the Dominion of Canada, I am led to the consideration of the position assumed by the defendants respectively.

THE PROVINCE.

When the question of the conflicting claims by the two governments to these *bona vacantia* arose, the Deputy Attorney-General of the Province, wrote to the plaintiff's solicitor and counsel, the following letter:

Regina, August 20th, 1919.

"Sirs:

Re Estate of Augustave Heyer, deceased.

I have the honour to acknowledge receipt of your letter of the 12th instant, and note that the Dominion Government is not willing that this estate should be turned over to the Province of Saskatchewan. I also observe your suggestion that the Attorney-General of Canada should file an information in the Exchequer Court, making the administrators of the estate and the Attorney-General of Saskatchewan parties to the information.

This course appears to be desirable in the circumstances, and I may say that it is quite satisfactory to me to have proceedings begun by the Dominion Government in the Exchequer Court as is suggested.

I have the honour to be,

Sirs,

Your obedient servant,

T. A. Colclough,

Deputy Attorney General

Messrs. Turnbull & Kinsman,

Barristers,

Regina, Sask."

Acting upon this letter, the Information was exhibited making the Attorney-General of the Province a party thereto, and the Attorney-General of the Province, by his solicitors, filed a plea to the Information, whereby he claims on behalf of the Province, the *bona vacantia* in question. However, after consenting to be so made defendant in the case, and having filed and served a defence to the action without raising therein any objection to the jurisdiction of the court, the Attorney-General of the Province, by counsel at bar, did not hesitate to argue that the court had no jurisdiction in the matter as between the two governments; that such jurisdiction could only exist, under section 32 of the Exchequer Court Act, after the Legislature of the Province of Saskatchewan had passed an Act agreeing to such jurisdiction in cases of controversies.

The Province is not, it is true, legally bound by the letter of the Deputy Attorney-General, under the decision of *DeGalindez* v. *the King* (1)—and the large jurisprudence establishing the Crown is not bound by the laches of its officers. However, the question becomes more serious when the Attorney-General, by his statement in defence, attorns to the jurisdiction and afterwards at trial, by a reflex argument, goes back on his first attitude and blows hot and cold. *Qui approbat non reprobat.* It is not within my province to pass upon the ethics of such attitude. The Crown in the right of the Dominion by courtesy advised the Province of its intention of instituting the present action; but there was no necessity to do so,—an action against the party who has the control of the assets of the deceased's estate would have been quite sufficient.

(1) Q.R. 15 K.B. 320.

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However, I have come to the conclusion to give effect to this plea of jurisdiction in respect to suing the Provincial Crown, without obtaining, as a condition precedent the issue of a *fiat*. While the Exchequer Court of Canada may not have jurisdiction to hear, under the provisions of sec. 32 of the Exchequer Court Act, the controversy between the two Governments, it has clearly jurisdiction with respect to the other two defendants to hear and determine the claim made by the Information, both under sections 31 of the Exchequer Court Act and under sec. 2 of the Escheats Act (9-10 Ed. VII, ch. 18).

The action as against the Attorney-General of the Province of Saskatchewan will stand dismissed. On the question of costs, while, under the present circumstances after attorning to the jurisdiction, there would be no justification for a condemnation for costs up to and including the trial; however, taking into consideration that the issues are between two Governments and that the question is a new one, there will be no costs to either party.

The defendant, the Western Trust Company, by their statement in defence, admit the statements in paragraphs 1, 2, 3, 4 and 7 of the information, and claim no interest in the deceased's estate, except for their costs of administration and payments made by them out of the estate on creditors' claims, but submit their right to the court to abide by its judgment.

The defendant Henrietta Shulze having, at trial, abandoned any claim under the allegation of common law wife, now rests her claim solely for wages. And I might add that when one accepts and has the benefit of the services of another and there is no reason why

these services should be given gratuituously, ordinarily no other conclusion can be reached than that there was a tacit agreement between the parties that the services should be paid for.

It would seem that at the deceased's death, his estate became vested in the Sovereign, as represented by the Dominion of Canada and that the Sovereign could not be divested of the same, only by matter of record.

1st. There will be judgment adjudging and determining that the Crown, in the right of the Dominion of Canada, do recover the *bona vacantia* in question, the proceeds of the said deceased's estate.

2nd. The action as against the defendant the Attorney-General of the Province of Saskatchewan is dismissed without costs.

3rd. The Western Trust Company is condemned and ordered to pay over and deliver to the plaintiff, the whole of the said estate and the proceeds thereof; to account for its administration, and is at liberty to file a claim with the plaintiff to be dealt with in pursuance of *The Escheats Act.*

4th. The defendant Henrietta Shulze will be at liberty to file her claim with the plaintiff, proving and establishing the same, and to be thereafter dealt with in accordance with the provisions of the Escheats Act.

Judgment accordingly.

Turnbull & Kinsman, solicitor for plaintiff.

Carruthers & Williams, solicitors for Western Trust Co.

S. R. Curtin, for Mrs. Shulze.