BETWEEN:

1910
Dec. 29.

THE KING, ON THE INFORMATION OF THE ATTORNEY-GENERAL FOR THE DOMINION OF CANADA ..... } PLAINTIFF;

AND

JOHN K. POWELL ..... DEFENDANT.

Dominion lands—Patent—Omission of reservation of railway rights—Improvidence—Cancellation—Certificate of title—Rectification of Register—Jurisdiction.

On the 13th November, 1906, the defendant applied for a homestead entry for certain Dominion lands in the Province of Alberta. On the 21st March, 1907, his application was filed, and a homestead receipt given him with the following notice or declaration stamped thereon: "Subject to the right of way and other purposes for Grand Trunk Pacific Railway Company, cited in clause 46 of agreement." In July, 1907, the defendant acquired the adjoining lands, and then applied to purchase the lands in question, abandoning his homestead application. On the 19th September, 1907, a patent for said lands was issued to the defendant, but through error and improvidence the Department of the Interior, in issuing the patent, neglected to reserve thereout a portion of the lands required by the Grand Trunk Pacific Railway Company for its right of way, although it was shewn that prior to the receipt by the Department of the defendant's application for the purchase of the said lands, the railway company (on the 21st December, 1906) had made an application for a free grant of so much of the said lands as might be required for their right of way, and the Crown agreed to grant such right of way pursuant to the provisions of clause 46 of the agreement set out in the schedule to "An Act respecting the construction of The National Transcontinental Railway" (3 Edw. VII c. 71). On the 23rd October, 1907, a certificate of title to the said lands was issued to the defendant by the provincial government, and at the time of action brought he was the registered owner of the lands under *The Lands Titles Act*, cap. 24 of the Statutes of Alberta, 1906.

Held, that at the time of the application of the Grand Trunk Pacific Railway Company for the lands in question, and the recognition of such application by the Dominion Government, the defendant had no right whatever in the lands except as subject to the right of the Grand Trunk Pacific Railway Company; and that the omission of a reservation of the said right was a matter of error and improvidence which avoided the said patent under section 94 of 7 and 8 Edw. VII, c. 20. *Williams* v. *Box* (44 S.C.R. I); *The Attorney-General* v. *Conto is* (25 Gr.

353); *Fonseca* v. *The Attorney-General of Canada* (17 S.C.R. 612 referred to

2. That the Exchequer Court had jurisdiction to decree the patent void under sec. 94 of 7 and 8 Edw. VII, c. 20 (Dom.) Subsec. (*r*) of sec. 2, chap. 24, of the Statutes of Alberta, 1906, considered. *The Queen* v. *Farwell* (3 Ex. C.R. 271 and 22 S.C.R. 553) relied on.

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Argument of Counsel.

THIS was an information by the Attorney-General for the Dominion of Canada seeking the cancellation of a patent for certain Dominion lands.

The facts are stated in the reasons for judgment.

December 16th, 1910.

The case was now heard at Ottawa.

F. H. Chrysler, K.C., for the plaintiff, contended that the facts set up a sufficient case for a declaration that the patent in question should be declared void by reason of error and improvidence. The court has undoubted jurisdiction to so declare under section 205 of *The Dominion Lands Act* (1).

The patent should have contained a reservation of the rights of the railway company, because those rights had become vested prior to any application on behalf of Powell to purchase the lands. The patent must be set aside, the certificate of title delivered up, and the register of title rectified. There is no question about the propriety of this court exercising the jurisdiction to grant a remedy in this case. *Attorney-General* v. *Contois* (2).

W. L. Scott, for the defendent, argued that there was a complete contract on behalf of the Dominion Government to issue a patent to the defendant before any rights of the Grand Trunk Pacific Railway Company had obtained. Whatever relation of a contractual nature subsisted between the Dominion Government and the railway company was entirely *res inter alios acta* so far as the defendant Powell was concerned.

(1) R. S. C., 1906, Cap. 55. (2) 27 Gr. 346.

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(*Leake on Contracts* (1); *Tamplin* v. *James* (2); *Hunter* v. *Carrick* (3); *Cyclopedia Laws of England* (4). Then again there was no notice to the defendent of any rights of the railway company. In the absence of notice the property passed to him clear of any equities, if anything of that nature enures to the benefit of the railway company. (*Boulton* v. *Jeffrey* (5); *Bank of Australia* v. *The Attorney-General* (6); *Attorney-General* v. *Fraser* (7); *Attorney.General* v. *Goldsbrough* (8).

This is not a case where the court even if it had jurisdiction can excerise the same to set aside a patent, because the defendant is an entirely innocent purchaser.

If the land is taken from the defendant, compensation should be generous and commensurate with the loss he would thereby sustain. The land is worth about $250, an acre, while the defendant only paid $3 an acre.

It is submitted on behalf of the defendant that this court has no jurisdiction in the matter in question to grant the relief sought. The moment the land is patented it passes out of the Crown in the right of the Dominion, and becomes provincial land. Thereafter the Dominion can exercise no rights over it either contractual or remedial. If *The Exchequer Court Act* can be said to provide jurisdiction by section 31 in such a case as this, then it is submitted that such provision is *ultra vires* of the Dominion Parliament. After the land takes upon itself the character of provincial land, under *The British North America Act*, section 92, it is only competent for the provincial

(1) 4th ed. pp. 206, 207.
(2) L. R. 15 Ch. D. 215, 217, 218.
(3) 28 Gr. 489; 10 A. R. 449; 11 S. C. R. 300
(4) Vol. 9, pp. 274, 275.
(5) 1 U. C. E. & A. 111.
(6) 37 S. C. R. 577.
(7) 15 N. S. W. Rep. 256.
(8) 15 Vic. Rep. 658,

legislature to deal with it as falling within the classification of "property and civil rights". *Pockett* v. *Poole* (1); *Kennedy* v. *The City of Toronto* (2).

But even if there is jurisdiction in the court it should not be exercised because it would be fruitless as there is no machinery for carrying the judgment of the court into execution. If the court cannot grant complete relief, and such relief can be fully granted by a provincial court, this court in such a case would stay its hand. Under the provisions of the Alberta statute (1906, cap. 24 Sec. 2) the certificate of title is evidence that the defendant is owner of the land. Even if the patent were set aside this certificate would still belong to the defendant, and would be a cloud on the title. But if proceedings were taken in the provincial court it would have jurisdiction over the local Lands Titles office, and could give a complete remedy in the way of removing any cloud on the title. Under section 44 of the Alberta statute the certificate of title is a complete defence to anyone attacking the title. (*Attorney-General* v. *Goldsbrough* (3); *Hamilton* v. *Iredale* (4); *Jonas* v. *Jones* (5); *Steere* v. *The Minister of Lands* (6).

It is submitted that the Crown cannot get rid of the certificate of title; it would stand as a bar to the action both in the provincial and federal courts under section 44 of the Alberta statute. (See also sections 44, 50, 57, 76, 79, 82, 114, 115, 116, 128, and 130, and also *Williams* v. *Box* (7).

Mr. Chrysler, K.C. replied citing *Fonseca* v. *Attorney General* (8); *Farwell* v. *The Queen* (9); *Jellett* v.

(1) 11 Man. Rep. 508.
(2) 12 O. R. 211.
(3) 15 Vict. R. 658.
(4) 3 N. S. W. State Reports, 1903, pp. 535, 548.
(5) 2 N. Z. L. Rep. 2 S. C. 15.
(6) [1904] 6 W. A. L. R. pp. 178.
(7) 41 S. C. R. p. 1.
(8) 17 S. C. R. 612.
(9) 22 S. C. R. 553.

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Wilkie (1); and *Syndicat Lyonnais Du Klondyke* v. *McGrade* (2).

Reasons for Judgment.

CASSELS, J. now (December 29th, 1910) delivered judgment.

This is an information exhibited by His Majesty the King on the information of the Attorney-General for the Dominion of Canada, asking for a declaration that a certain patent bearing date the 19th September, 1907, granting to the defendant certain lands described as part of the north-east quarter of Section twelve, in Township Fifty-three, Range Five, West of the Fifth Meridian, in the province of Alberta, in the Dominion of Canada, and being composed of all that portion of the north-east quarter of Section twelve of the said Township, which is not covered by any of the waters of Wabamum Lake, as shown upon a map or plan of survey of the said Township, approved and confirmed at Ottawa on the 4th day of July, 1906, by Edouard Deville, Surveyor General of Dominion Lands, and of record in the Department of the Interior, containing by admeasurement Forty-six and Fifty-hundredths acres, more or less, was issued and granted improvidently and in error, and should be declared to be null and void and delivered up to be cancelled.

The following are the allegations in the information in support of the contention of the plaintiff:—

"2. That the said patent was issued to the Defendant in pursuance of an application made by the Defendant to the Department of the Interior to purchase the said lands.

"3. That prior to the receipt by the Department of the Interior of the application of the Defendant for the purchase of the said lands, and while the said lands were

(1) 26 S. C. R. 282. (2) 36 S. C. R. 251.

vested in His Majesty in right of the Dominion of Canada, the Grand Trunk Pacific Railway Company made an application for a free grant of so much of the said lands as might be required for the right of way of the said Company, and His Majesty agreed to grant such right of way to the said Company, pursuant to the provisions of Clause 46 of the Agreement set forth in the schedule forming part of Chapter 71 of the Statutes passed in the year 1903, intituled 'An Act respecting the construction of a National Transcontinental Railway.'

"4. That at the time the Defendant made application to purchase the said lands, the Defendant was well aware that the said Grand Trunk Pacific Railway Company had received a grant of so much of the said lands as might be required for its right of way.

"5. That through improvidence and in error, the Department of the Interior, in issuing the patent for the said lands the said Defendant, neglected to reserve thereout and therefrom the portion of the said lands required by the said Grand Trunk Pacific Railway Company for its right of way, and improvidently and in error issued the patent for the said lands to the Defendant."

The defendant denies the allegations of fact stated in the information, and in addition sets up that on the 23rd October, 1907, a certificate of title to the said lands was issued to him, and he is now the registered owner of the lands under and by virtue of *The Land Titles Act*, cap. 24 of the Statutes of Alberta of the year 1906, and he pleads this statute as a bar to any relief.

Clause 46 of the agreement ratified by cap. 71, 3 Edw. VII. (1903) provides that "the Government shall pro-
"cure to be granted to the company in so far as the same
"are vested in His Majesty in right of the Dominion of

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"Canada such lands as may be required for the right of "way of the Western Division', &c. 'The right of the "said company to obtain such lands without compen- "sation shall cease when the said division is constructed "and equipped as required by clause 29 hereof."

On the 21st December, 1906, an application was made for right of way over a portion of the lands in question, as appears by Exhibit 'A' of the ylaintiff:—

"The Grand Trunk Pacific Railway,
Land Department.
G. U. RYLEY, Commissioner.

MONTREAL, Que., Dec. 21, 1906.

The Secretary,
Department of the Interior,
Ottawa, Ont.

Sir,—I beg to apply, on behalf of the Grand Trunk Pacific Railway Company, for a right-of-way or for the other purposes mentioned in Clause 46 of the Agreement, embodied in the *National Transcontinental Act*, on Sections 12, 13, 14, 15, 16, 17, 18, 7, Township 53, Range 5, West 5th Meridian, and to ask you to advise me, at an early date, whether or not your Department is in a position to grant the application.

Yours truly,
(Sgd.) G. U. RYLEY,
Land Commissioner."

On the 14th January, 1907 a letter was written as follows (Plaintiff's Exhibit 'B'):—

"Department of the Interior, Canada,
OTTAWA, January 14, 1907.

Sir,—Replying to your letter of the 21st ultimo, respecting right of way in Township 53, Range 5, West Fifth Meridian, I am directed to say that the sections referred to stand as follows:—

N. ½ 7 patented C.P.R.
S. ½ 7 selected C.P.R.
All 12 Agent asked to report if clear.
All 13 patented C.P.R.
NE. ¼ 14 unpatented homestead Fred. R. Smith.
NW. ¼ 14 unpatented homestead Alb. N. Smith.
S. ½ 14 selected C.N.R.
All 15 patented C.P.R.
NE. ¼ 16 unpatented homestead A. Michaud.
NW. ¼ 16 unpatented homestead G. A. Leduc.
S. ½ 16 Agent asked to report if clear.
All 17 patented C.P.R.
NE. ¼ 18 unpatented homestead John Ek.
NW. ¼ 18 unpatented homestead Robert Smith.
SE. ¼ 18 unpatented homestead Sylvester Mahoney.
SW. ¼ 18 unpatented homestead Mastai Bertrand.

Your obedient servant,

(Sgd.) P. G. KEYES,

Secretary.

G. U. Ryley, Esq.,
Commissioner,
Grand Trunk Pacific Railway Company,
Montreal, P.Q."

Section 12 referred to includes the land in question.

On the same date (14th January, 1907) a letter was written by the Secretary of the Department of the Interior in Ottawa to the Agent of Dominion Lands, Edmonton, as follows (Plaintiff's Exhibit "D"):—

"Department of the Interior, Canada.

OTTAWA, January 14th 1907.

Sir,—I am directed to instruct you that if they are available, or should in the future become available, you are to reserve right of way for the Grand Trunk Pacific Railway in the following quarter sections:—

N.W. ¼	28–52–1 W. 5th M.
W. ½	30

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N.E. ¼	36
N.E. ¼ and S.W. ¼	25–52–2 W. 5th M.
All	26
All	30
S.E. ¼	33
W. ½ & S.E. ½	34
N.W. ¼	35
E. ½	36
S. ½	2–53–4 W. 5th M.
S. ½	7
All	8
All	10
E. ½ and N.W. ¼	12
S. ½	7–53–5 W. 5th M
All	12
All	14
All	16
All	18
All	12–53–6 W. 5th M.
All	13
All	14
All	15
All	16–53–6 W. 5th M.
All	17
All	19
All	20
All	24–53–7 W. 5th M.
All	25
All	26
All	27
All	28
All	30
All	25–53–8 W. 5th M.
All	26
All	27

All	28	
All	30	
All	25–53–9 W. 5th M.	
All	26	
All	27	
All	28	
All	30	

Please report if any of the above quarter sections are clear for this purpose now.

Your obedient servant,

(Sgd.) P. G. KEYES,
Secretary.

The Agent of Dominion Lands,
Edmonton,
Alberta."

On the 4th February, 1907, the agent at Edmonton wrote to the Secretary of the Department at Ottawa as follows:—

"*Re* H.O. letter of the 14th ult., I beg to say that the right of way of the Grand Trunk Pacific Railway has been reserved from the following land:—

Among other lands the N.E. ¼ 12."

On the 21st February, 1907 a letter was written as follows (Plaintiff's Exhibit 'C'):—

" Department of the Interior, Canada,

OTTAWA, February 21st, 1907,

Sir,—Referring to the Departmental letter of the 14th ultimo, respecting right of way in Township 53, Range 5, West fifth meridian, I am directed to say that right of way is being reserved for the Grand Trunk Pacific Railway Company in the N. ½ of Sec. 12 of the said township. The S. ½ of section 12 and

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the S. ½ of section 16, of the said township, are within Lake Wabamum.

Your obedient servant,

(Sgd.) LYNWOOD PEREIRA,
Assistant Secretary.

G. U. RYLEY, Esq.,
Land Commissioner,
Grand Trunk Pacific Railway Company,
Montreal, P.Q."

In the book kept in the Department at Ottawa a note had been made showing a reservation through the lands in question in favour of the Grand Trunk Pacific Railway Company. The exact date of its insertion is not clear, but it was there at the time of the application for a homestead right on the part of the defendant.

The defendant's position in relation to these lands is as follows:

On the 1st May, 1906 the following application had been made (Defendant's Exhibit No. 4):—

" Mr. GREENWAY. 1186940

P.O. Box 364, Edmonton, Alberta,
1 May,1906.

Hon. Frank Oliver,
Minister of the Interior.
Ottawa, Ont.

Dear Sir,—I would like to purchase a small piece of land having a frontage on Wabamum Lake. Will you therefore file my application for the piece in Township 53, Range 5, West of the 5th Meridian, lying between section 13 and the lake, and marked thus X on the attached diagram, and let me know the price per acre and terms of payment for same, and oblige.

JOHN K. POWELL.

50 acres, more or less.
The acreage is not marked on the Township map.
N. ½ 12–53–5–W. 5th."

On the 31st May, 1906 an answer was sent as follows:—(Exhibit 6 of Defendant):—

"Department of the Interior. File 1186940.

OTTAWA, 31st May, 1906.

Copy for the A.D.L. Edmonton.
Sent R.D.

Sir,—In reply to your letter of the 1st instant, addressed to the Minister, applying to purchase the fractional north ½ of Section 12, north of Wabamum Lake, in Township 53, Range 5, West 5th Meridian containing 59·9 acres, I am directed to say that if you own the adjoining quarter of section 13 and furnish the Department with satisfactory evidence to that effect, you will be permitted to purchase the land applied for at the current rate of $3. per acre, but otherwise the Department could not entertain your application.

A copy of this letter is being sent to the Agent of Dominion Lands, Edmonton, for his information.

Your obedient servant,

(Sgd.) P. G. KEYES,
Secretary.

JOHN K. POWELL, Esq.,
P.O. Box 364,
Edmonton, Alta."

On the 11th of June, 1906 the defendant wrote as follows (Defendant's Exhibit No. 7):—

"1215490.
Box 364 W.

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EDMONTON, Alberta, 11 June, 1906.
1186940 C.J.S., 25–6.

The Hon. Minister of the Interior,
Ottawa, Ont.

Dear Sir,—Noting your favour 1186940 of 30 ulto., I beg leave to say that for some reason lands west of range 2 (or 1) west of the 5th meridian, since passing from the Canadian Pacific Ry. to the Western Land Co. have been withdrawn from sale. The Section 13, Township 53, Range 5, referred to is included in the above. I would have no use for a quarter section out there anyway. All that I want is a small piece of lake front for a summer home,—something large enough for a vegetable garden and pasture for three or four cows and ponies would do—half of the 59·9 acres would answer. I would therefore be glad if you would permit me to select either "A" or "B" as shown on accompanying sketch. Hoping you may do so

I am,
Yours very respectfully
JOHN K. POWELL.

Reference, Merchants Bank, Edmonton.

Patent Branch, July 12, 1906. Received."

On the 25th October and the 9th November, 1906 the following letters were sent to the defendant:—

Defendant's Exhibit 8:—

"1186940.

Department of the Interior, Canada,
OTTAWA, October 25, 1906.

Dear Sir,—In accordance with the promise I made to you yesterday I submitted to the Minister your application to purchase either the whole or a part of the fractional north half of Section 12, Township 53, Range 5, west of the 5th Meridian, that is, the portion of that

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section which is dry land and which lies north of Wabamum Lake. He carefully considered the matter and decided the application could not be granted. You will be more formally advised by a letter from the Secretary of the Department in the course of a few days.

Yours faithfully,

(Sgd.) T. G. ROTHWELL,
Acting Deputy Minister.

JOHN K. POWELL, Esq.,
Edmonton, Alta."

Defendant's Exhibit No. 9:—

"File No. 1186940.

Department of the Interior,
OTTAWA, Nov. 9, 1906.

Sir,—Adverting to the Acting Deputy Minister's letter to you of the 25th ultimo, having reference to your application to purchase either the whole or apart, of the fractional N. ½ of Section 12, Township 53, Range 5, West Fifth Meridian, north of Wabamum Lake, I am directed to inform you that your contentions in this regard received the personal attention of the Minister of the Interior, but that he is unable to meet your wishes in the matter. I am to add that other applications for portions of the fractional parcel have also been refused.

Your obedient servant,

LYNWOODE PEREIRA,
Assistant Secretary.

John K. POWELL, Esq.,
Edmonton, Alberta."

This ended the application of the defendant to purchase the lands in question.

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Apparently, on the 13th November, 1906 the defendant made an application for a homestead entry, and the following correspondence passed:—

Defendant's Exhibit No. 16:—

"File No. 124805.

Department of Interior,
Dominion Lands and Crown Timber Office.

EDMONTON, Nov. 20, 1906.

Sir,—On the 13th inst. Mr. J. K. Powell called at this office to make homestead entry for the N.E. of 12-53-5 W. 5th. Mr. Powell was advised that the land could not be disposed of until instructions were received from Ottawa. Please refer to H.O. letter of the 22nd June last, file 1186940, and advise if homestead entry may be granted for this land.

Your obedient servant,

(Sgd.) A. E. HARRIS,
A. D. S.

The Secretary,
The Department of Interior,
Ottawa."

Defendant's Exhibit No. 17:—

"File No. 1186940.

Department of the Interior,
OTTAWA, February 22, 1907.

Sir,—Adverting to your letter of the 20th November last, File No. 124805, in which you state that Mr. J. K. Powell has made application for homestead entry for the N.E. quarter of Section 12, Township 53, Range 5, West Fifth Meridian, I am directed to inform you that if the owner of the S.E. quarter of Section 13, in the same Township, has not applied for the parcel in question, and if Mr. Powell is eligible to make a homestead entry his application may be granted, but it should be

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noted that it will be necessary for him to fulfill all the requirements of the homestead law.

In this connection I am to state that Messrs. Johnson & Gunner, of Edmonton, made application some little time ago to purchase the land covered by Mr. Powell's application, and stated that they had purchased the said S.E. quarter of Section 13. They, however, failed to establish their ownership, and intimated that evidence of purchase from the Land Company was not obtainable, as the company had reserved their land for their own purposes.

I am to add that there is no other application for the said S.E. quarter of Section 13 before the Department, and that it would seem that the Land Company has withdrawn the parcel from the market.

Your obedient servant,

P. G. KEYES,
Secretary.

The Agent of Dominion Lands,
Edmonton, Alberta."

Defendant's Exhibit No. 14:—

"The Secretary,
Department of the Interior,
Ottawa, Ont.

Dear Sir,—I would be glad to know if my application to homestead the N.E. ¼ Section 12, Township 53, Range 5, West of the 5th Meridian will be granted.

I made the application in the Land Office here on Nov. 13 last, and I understand the matter was referred to you by the Land Agent about Nov. 20.

Yours respectfully,

(Sgd.) JOHN K. POWELL.

P.O. Box 364, Edmonton, Alberta.
February 27, 1907."

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Defendant's Exhibit No. 15:—

"OTTAWA, March 26, 1907.

Copy for A.D.L. Edmonton, Ref. 124805.

Sir,—Replying to your letter of the 27th ultimo respecting your application to homestead the N.E. ¼ Section 12, Township 53, Range 5, West Fifth Meridian I am directed to say that on the 22nd ultimo the Agent of Dominion Lands at Edmonton was advised that if the owner of the S.E. ¼ of Section 13, in the above Township, had not applied for the N.E. ¼ Section 12, and if you were eligible to make homestead entry, your application might be granted, on the understanding, of course, that you would have to fulfil the homestead conditions.

Your obedient servant,

(Sgd.) P. G. KEYS,

Secretary.

John K. Powell, Esq.,
P.O. Box 364, Edmonton, Alberta."

On the 21st March, 1907 the application for a homestead entry was filed and apparently allowed, but it was expressly allowed "subject to right of way and other "purposes for Grand Trunk Pacific Railway cited in "clause 46 of agreement."

The defendant expressly admits in his evidence that on the homestead receipt handed him this notice in reference to the Grand Trunk Pacific Railway was stamped.

Subsequently, and towards the end of July, 1907, the defendant acquired the adjoining lands, and then applied to purchase the lands in question abandoning his homestead application, and subsequently the patent in question was issued.

According to my view of the case at the time of the application of the Grand Trunk Pacific Railway Co. and the recognition thereof by the Government, the

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defendant had no right whatever in the lands in question—at all events except subject to the right of the Grand Trunk Pacific Railway.

The issue of the patent without reserving the right of way for the Grand Trunk Pacific Railway was a mistake, and its issue was in error and through inadvertence.

Cap. 55, R.S.C. 1906, s. 205, is as follows:—

"205. Whenever patents, leases or other instruments respecting lands have issued through fraud, or in error or improvidence, any court having competent jurisdiction in cases respecting real property in the province where such lands are situate, may, upon action, bill or plaint respecting such lands, and upon hearing the parties interested, or upon default of the said parties after such notice of proceeding as the said court orders, decree or adjudge such patent, lease or other instrument to be void; and upon the registry of such decree or adjudication in the office of the Registrar-General of Canada, such patent, lease or other instrument shall be void. R.S. c. 54, s. 57."

Section 94 of 7–8 Edw. VII, cap. 20, "An Act to consolidate and amend the Acts respecting the Public Lands of the Dominion," which was assented to 20th July, 1908, is as follows:—

"94. Whenever letters-patent, leases or other instruments respecting lands have issued through fraud, or improvidence, or in error, any court having competent jurisdiction in cases respecting real property in the province where the lands are situate may, upon action, bill or plaint respecting the lands, and upon hearing the parties interested, or upon default of the said parties after such notice of proceeding as the said court orders, decree or adjudge the letters patent, lease or other instrument to be void; and upon the

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filing of the decree or adjudication in the Department of the Interior at Ottawa, the letters patent, lease or other instrument shall be void; and if the letters patent, lease or other instrument have been registered in the registry office or the land titles office for the diss trict in which tne land described in the letters patent, lease or other instrument is situate, and if such letters patent, lease or other instrument have been adjudged void at the suit of the Minister he shall cause a copy of the decree or adjudication, certified to be a copy as provided by section 96 of this Act, to be recorded forthwith in the said registry office or land titles office."

There is no difference between the two statutes except the latter part of section 94. In my opinion the latter Act governs. No vested rights are interfered with.

I have read the reasons for judgment in *Williams* v. *Box*, decided by the Supreme Court of Canada (1) and they confirm my view. In any event it is not of any material consequence. See *Attorney-General* v. *Contois* (2), where the late Chancellor Spragge sets out his views on the meaning of the statute.

Fonseca v. *Attorney-General of Canada* (3), per Gwynne, J., at pp. 649, 650; and per Patterson, J., at p. 655.

Under the facts in this case I am of the opinion that the grant in question was issued in error and improvidently.

Mr. Scott argued that there is no jurisdiction in the Exchequer Court, and that resort should be had to the courts of Alberta.

It may not be necessary to determine the question, but my view is that sub-section (*r*) of section 2 of

(1) 44 S. C. R. 1.

(2) 25 Gr. at p. 353.

(3) 17 S. C. R. 612.

the statutes of Alberta, 1906, 6 Edw. VII, chap. 24, defining the expression "Court" as meaning "any court authorized to adjudicate in the Province in civil matters in which the title to real estate is in question" would include the Exchequer Court in this form of action, and so with the expression "Judge."

I am relieved from further consideration of this question by the decision in *The Queen* v. *Farwell* (1).

The New South Wales case, *Bank of Australasia* v. *Attorney-General of New South Wales* (2), does not seem to me to have any application. A reference to this case at pages 260 and 262 shows that the Court pointed out that it was not a proceeding by *scire facias* by which a grant could be called in, set aside or corrected.

In *Assets Co. Ltd.* v. *Mere Roihi* (3), it is expressly pointed out that the power of the Crown to set aside its own grant has not been considered.

In the case before me, the question is not complicated by any grant from the defendant. If the plaintiff desires the same form of judgment as in the *Farwell* case it can issue, and the defendant be ordered to reconvey. If any amendment of the information is desired it can be made.

1. The patent should be set aside and the requisite directions given for the rectification of the register.

2. If any difficulty arises as to the form of judgment it can be spoken to in chambers.

The defendant must pay the costs. He had full notice of the claim of the Crown prior to action, and notice of the railway company's right was also given on the homestead receipts.

(1) 3 Ex. C. R. 271; 22 S. C. R. 553.
(2) L. R. [1894] 15 A. C. N. S. W p. 256.
(3) (1905) A. C. at p. 203.

1910

THE KING v. POWELL.

Reasons for Judgment.

The Crown will of course repay the purchase money. The costs can be set off *pro tanto* against this amount.

Judgment accordingly.

Solicitors for plaintiff: *Chrysler, Bethune & Larmonth.*

Solicitors for defendants: *Dawson, Hyndman & Hyndman.*