THE TRUSTS AND GUARANTEE COMPANY (DEFENDANTS) ..... } APPELLANTS;

AND

HIS MAJESTY THE KING (PLAINTIFF)..... } RESPONDENT.

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*May 5, 8.
*Oct. 24.

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA.

Devolution of estates—Intestacy—Failure of heirs—Escheat—Royalty—Bona vacantia—Dominion lands—Constitutional law—Surrender of Hudson Bay Company's lands—Construction of statute—"B. N. A. Act, 1867"—"Dominion Lands Act"—"Land Titles Act"—"Alberta Act"—(Alta.) 5 Geo. V., c. 5, Intestate estates.

In 1911, certain lands of the Dominion of Canada, situate in the Province of Alberta, were granted in fee to a person who died, in 1912, intestate and without heirs, being still seized in fee simple of the lands.

Held, Idington and Brodeur JJ. dissenting, that the right of escheat arising in consequence of the intestacy and failure of heirs was a royalty reserved to the Dominion of Canada by virtue of the 21st section of the "Alberta Act," 4 & 5 Edw. VII., ch. 3, and belonged to the Crown for the purposes of Canada. *Attorney-General of Ontario* v. *Mercer* (8 App. Cas. 767), followed.

Per Davies and Anglin JJ.—It was not competent for the Legislature of the Province of Alberta, by the statute of 1915, 5 Geo. V., ch. 5, relating to the property of intestates dying without next of kin, to affect the rights so reserved to the Dominion of Canada.

Per Idington and Brodeur JJ.—Upon the grant of the lands in question by the Dominion Government they ceased to be Crown lands of the Dominion and royalties reserved to the Dominion could not attach thereto. Further, the effect of section 3 of the Dominion statute, 51 Vict. ch. 20, amending the "Territories Real Property Act," R.S.C., 1886, ch. 51, and declaring that lands in the North-West Territories should go to the personal representatives of the deceased owner thereof in the same manner as personal estate, constituted an absolute renunciation of all such claims to royalties by the Crown in the right of the Dominion of Canada.

The appeal from the judgment of the Exchequer Court of Canada, (15 Ex. C.R. 403) was dismissed.

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*PRESENT:—Sir Charles Fitzpatrick, C.J. and Davies, Idington, Anglin and Brodeur, JJ.

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APPEAL from the judgment of the Exchequer Court of Canada(1), maintaining the prayer of the information filed by the Attorney-General for Canada and declaring that the lands in question, upon the death of the owner intestate and without next of kin, escheated to the Crown in the right of the Dominion of Canada.

The questions in issue on the present appeal are stated in the judgments now reported.

Frank Ford K.C. for the appellants.
W. D. Hogg K.C. for the respondent.

THE CHIEF JUSTICE.—The Attorney-General for Canada by information filed in the Exchequer Court, claimed a declaration that certain lands in the Province of Alberta of which one Yard Rafstadt, who died intestate and without heirs, was formerly the owner had escheated to His Majesty in right of the Dominion of Canada.

The claim is similar to that put forward in the Privy Council in the appeal of *Attorney-General of Ontario* v. *Mercer*(2), by the Dominion Government in the name of the respondent. In that case the lands of which the deceased who died intestate and without heirs had been the owner were situate in the Province of Ontario. By the judgment it was held that lands escheated to the Crown for want of heirs belonged to the province and not to the Dominion. The ground of the decision was that although section 102 of the "British North America Act, 1867," imposed upon the Dominion the charge of the general public revenue as then existing of the provinces yet, by section 109, the casual revenue arising from lands escheated to the Crown after the Union was reserved to the provinces—the

(1) 15 Ex. C.R. 403. (2) 8 App. Cas. 767

words "land, mines, minerals and royalties," therein including, according to their true construction, royalties in respect of lands, such as escheats.

What is now the Province of Alberta was formerly a part of the North-West Territories under the sole authority of the Dominion Government. Up to the time of the establishment of the province, by the statute 4 & 5 Edw. VII., ch. 3, there could be no doubt to whom the lands and their revenues belonged. Lest there should be any doubt as to the position of the public lands in the Province of Alberta the Act by which it was established provided by section 21 that all Crown lands, mines, minerals and royalties incident thereto should continue to be vested in the Crown and administered by the Government of Canada for the purposes of Canada. The words are practically the same as those in section 109 of the "British North America Act, 1867," from which they are doubtless taken whereby the like reservation was made in favour of the provinces.

I do not myself understand how, in face of the decision of the Judicial Committee, it can be contended that the same words which were held to reserve to the provinces the casual revenue arising from lands escheated to the Crown should now receive the opposite meaning and be held not to include royalties in respect of lands such as escheats.

I am not sure that it is very necessary to deal with the arguments put forward on behalf of the province. They seem to be largely those urged and expressly negatived in the *Mercer Case*(1). The present appellant in his factum claims that "the word 'royalties' has relation back only to mines and minerals." This was, perhaps, the main contention put forward by

(1) 8 App. Cas. 767.

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the Dominion in the *Mercer Case*(1), and their Lordships say, a p. 779:—

> The question is whether the word "royalties" ought to be restrained to rights connected with mines and minerals only, to the exclusion of royalties, such as escheats, in respect of lands. Their Lordships find nothing in the subject, or the context, or in any other part of the Act, to justify such a restriction of its sense.

It is useless to ask us to find now that the word in the same subject and context has the opposite meaning to that placed upon it by their Lordships.

Judgment for the respondent on this appeal does not involve any decision as to the right of the legislature of the province to change the laws of inheritance. Lands escheat to the Crown for defect of heirs and this has nothing to do with the question 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 thing. This is what has been done by the Alberta statute, chap. 5 of 1915. The statute in terms deals with property of a person dying

> intestate and without leaving any next of kin or other person entitled thereto.

It is because there is no one who can claim the property that the Crown takes it. There is no possibility of getting at this property through the deceased. The Crown does not claim it by succession at all, but because there is no succession.

In the *Mercer Case*(1), the Judicial Committee say:—

> Their Lordships are not now called upon to decide whether the word "royalties" in section 109 of the "British North America Act, 1867," extends to other royal rights besides those connected with "lands, mines and minerals."

It is not necessary in the present case either to decide this question. The right of the Crown to *bona*

(1) 8 App. Cas. 767.

vacantia is a different one from the right to an escheat. No question as to the former right really arises in this case and I do not express any opinion as to whether it belongs to the Crown in the right of the Dominion or of the province. The question will have to be decided if necessary in a proper case.

I would dismiss the appeal with costs.

DAVIES J.—Concurred with ANGLIN J.

IDINGTON J. (dissenting).—One Rafstadt the registered owner of a quarter section in Alberta who had obtained a certificate of title therefor, under the "Land Titles Act," died intestate without leaving heirs at law or next of kin.

The land had been granted to him on the 25th of July, 1911, by the Crown acting through the administration of the Department of the Interior of Canada.

The claim made that the said land escheated to and became vested in the respondent in right of the Dominion of Canada has been maintained by the Exchequer Court and the appellant, the administrator, having sold the land and administered the estate of deceased, has been ordered by said court to account to the respondent in right of the Dominion.

I respectfully submit that there seems to be thus presented a curious confusion of thought at the very threshold of this litigation.

If, as claimed by respondent and as held below, the Act, upon which the appellant acted as administrator is *ultra vires*, then nothing which that court can do, or we in reviewing its action and maintaining same view can do, will be of any avail.

The title to the land is, in such view, in respondent or liable to become so vested upon inquisition duly

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found. The Crown certainly cannot desire that innocent persons purchasing from or claiming through the purchaser from the appellant should suffer loss, as they inevitably must when, if ever, it is finally determined that the Act apparently constituting the appellant owner was *ultra vires* and all it had done thereunder null and void.

If I were driven to entertain the same view I should feel much embarrassed in maintaining such a judgment fraught with such obvious consequences unless and until proper concurrent legislation had been enacted adopting and validating the appellant's sale and remitting the trial of the right to the proceeds to the courts to determine.

However praiseworthy saving costs and going directly to the point may be as a rule, there are some cases where it cannot be done properly. And if the correct conclusion is as held below the proceedings herein should be stayed or the action dismissed.

The respondent can have no claim to money improperly received by appellant or any one else in Alberta unless under such circumstances that he can properly affirm the transaction and be no party to something detrimental to some of his subjects.

Passing that phase of this litigation and coming to the issue attempted to be raised and decided herein, let us ask ourselves what an escheat is and consider the definition thereof as given in Stroud's Judicial Dictionary, vol. 2, page 639, condensed from Coke upon Littleton, as follows:—

> Escheat is a word of art, and signifieth properly when, by accident, the lands fall to the lord of whom they are holden, in which case we say the fee is escheated.

Then let us bear in mind that the very basis of the argument in support of the view contended for by

respondent herein is the tenure by which the land is assumed to have been held and that it has to be presumed a grant had been made by the lord of an estate which for want of heirs has come to an end, and by reason thereof the land has fallen to the lord who had made the grant. Such is the theory rested upon.

The respondent, it is claimed, must be held in this case to be the lord so entitled.

To make no doubt of the theory and its resting upon tenure as the basis of this claim we have but to consider the illustrations furnished by cases where the estate is held upon a copyhold tenure when the title escheats to the lord of the manor. See in Watson's "Compendium of Equity," the chapter on "Escheat and Forefeiture," page 187, and cases cited there, especially *Walker* v. *Denne*(1) at page 187, where Lord Loughborough, then Lord Chancellor, expressly says the title would not escheat to the Crown but to the lord of the manor. See also the more recent cases of *Weaver* v. *Maule*(2); *Gallard* v. *Hawkins*(3), and especially at pages 306-7.

This last mentioned case brings forward another view, dealt with in Watson's work at pages 186-7, where it is explained that, until 47 & 48 Vict. ch. 71, equitable estates did not escheat to the Crown for they were not the subject of tenure and where there was a conveyance or devise in trust and there was no heir of the grantor or testator the trustee held for his own use absolutely.

The case of *Burgess* v. *Wheate*(4), contains elaborate learning on the subject, and the much more recent case of *Cox* v. *Parker*(5), presents the law in a very

(1) 2 Ves. 170.
(2) 2 Russ. & M., 97.
(3) 27 Ch. D. 298.
(4) 1 Eden 177.
(5) 22 Beav. 168.

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concise judgment of Sir John Romilly, Master of the Rolls.

These cases and many others make clear that the escheat of land is dependent on tenure and the title to the land only falls to the Crown in case by reason of the nature of the tenure thereof under the Crown such is the legal result when there is no one left to take the legal estate.

Let us now consider the nature of the tenure of the lands in question herein and see if and how it can ever produce such a result as contended for by respondent herein.

If ever legislation could sweep away such a right as escheat in relation to land so far as dependent on tenure surely the enactment of 51 Vict. ch. 20, sec. 3, did so.

It enacted as follows:—

3. Section five of the said Act is hereby repealed, and the following substituted therefor:

5. Land in the Territories shall go to the personal representatives of the deceased owner thereof in the same manner as personal estate now goes.

That was a comprehensive declaration of the Dominion Parliament relative to the doctrine of tenure upon which alone the escheat of land so far as dependent on tenure could rest. It was an absolute renunciation by the respondent, by assenting thereto, of any such possible claim.

It was repeated in section 3 of the "Land Titles Act" of 1894.

And in the same session in which the Province of Alberta was created, and as declaratory of the policy of parliament in that regard, it was enacted by the respondent's assent given same day as the "Alberta Act" was assented to as follows:—

1. Upon the establishment of a province in any portion of the North-West Territories and the enactment by the legislature of that

province of an Act relating to the registration of land titles, the Governor in Council may, by order, repeal the provisions of the "Land Titles Act, 1894," and of any of its amending Acts in so far as they apply to the said province, and by such order, or by any subsequent order or orders, may adjust all questions arising between the Government of Canada and the Government of the province by reason of the provisions of this section being carried into effect.

In pursuance thereof the Alberta Legislature at its first session enacted a "Land Titles Act" carrying out the purpose so designed and by the language thereof put beyond doubt, so far as it could, the possibility of any such thing as escheat dependent on tenure. It enacted as follows:—

74. Whenever the owner of any land for which a certificate has been granted dies, such land shall, subject to the provisions of this Act, vest in the personal representative of the deceased owner, who shall, before dealing with such land, make application in writing to the registrar to be registered as owner and shall produce to the registrar the probate of the will of the deceased owner, or letters of administration, or the order of the court authorizing him to administer the estate of the deceased owner, or a duly certified copy of the said probate, letters of administration or order, as the case may be; and thereupon the registrar shall enter a memorandum thereof upon the certificate of title; and for the purposes of this Act the probate of a will granted by the proper court of any province of the Dominion of Canada, or of the United Kingdom of Great Britain and Ireland, or an exemplification thereof, shall be sufficient.

2. If the certificate of title for the land has not been granted to the deceased owner the personal representatives before being entitled to be registered under this section shall bring the land under this Act in the ordinary way.

3. Upon such memorandum being made, the executor or administrator, as the case may be, shall be deemed to be the owner of the land; and the registrar shall note the fact of the registration by a memorandum under his hand on the probate of the will, letters of administration, order or other instrument as aforesaid.

4. The title of the executor or administrator to the land shall relate back and take effect as from the date of the death of the deceased owner.

Surely the respondent by acting upon this local legislation stipulated for in the enactment of Parliament above quoted must be taken to have assented thereto as if bargained for when in pursuance thereof

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he by order-in-council repealed the "Land Titles Act" of 1894.

The grant in question herein was made in pursuance of that policy and registered in conformity therewith.

Does it not seem repugnant to reason that such a claim as escheat by virtue of tenure could be permitted to spring from such grants and rest upon such a foundation? That legislation by Parliament and legislature adopted and carried into force by said order-in-council was, I submit, as absolute and final a renunciation by respondent in right of the Dominion as could be conceivable.

It is argued, however, that by reason of the Dominion having retained the control of the disposition of the Crown lands in Alberta, it must be taken to have intended to reserve to itself such incidental sources of revenue as might result from escheat.

The "Alberta Act," by section 21 thereof, enacted as follows:—

> 21. 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, and shall apply to the said province with the substitution therein of the said province for the North-West Territories.

When we are called upon to interpret and construe this enactment I think we can refer not only to the whole scope of the Act but also as *in pari materiâ* the enactments passed in same session bearing upon the policy of Parliament in its relation to the powers to be conferred upon the Alberta Legislature and especially that enactment already referred to which provided for that legislature carrying out the policy of Parliament

relative to the tenure of lands and their transmission in cases of intestates.

Having due regard not only to the "Alberta Act" itself but also these other enactments, it seems inconceivable that whatever Parliament intended, it could ever have sought to reserve to the respondent in right of the Dominion any such thing as escheat dependent upon tenure of the land.

There remains, however, the question of the right of the Crown to become possessed of *bona vacantia* quite independently of tenure. That sometimes is spoken of as a right to an escheat.

Of the existence of that right, call it what we may, there can, in light of the authorities such as *Taylor* v. *Haygarth*(1), and in *In re Bond*; *Panes* v. *Attorney-General*(2); *Dyke* v. *Walford*(3), and *In re Barnett's Trusts*(4), be no doubt. Each is illustrative of the varying condition under which the right may exist.

And if the respondent had sued appellant to recover the proceeds of the estate left after its due administration the question would arise whether such balance could be treated as *bona vacantia* falling to respondent in right of the Dominion or in right of the Province of Alberta.

Then we should have to consider the neat point in light of the following provision of the "Alberta Act," 5 Edw. VII., ch. 3, sec. 3, as follows:—

> 3. 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, and 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.

(1) 14 Sim. 8.
(2) (1901) 1 Ch. 15.
(3) 5 Moo. P. C. 434.
(4) (1902) 1 Ch. 847.

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Wherein do the provisions of the "British North America Acts" differ from those thus made applicable to the Province of Alberta?

It is said the provisions of the section 21, above quoted, make a difference.

True, the management of the Crown domain is reserved as a matter of public policy for the Dominion, but how can that touch anything turning upon the right of the respondent to recover *bona vacantia* on behalf of the Dominion?

There is nothing in the language of section 21 reaching so far as to require such a meaning to be given it.

There may arise cases similar to that which enabled the Court dealing with personal property in the hands of executors, in question in the case of *Taylor* v. *Haygarth*(1), cited above. Can it be said in such a case that *bona vacantia* derived from or being mere personal property is to be held recoverable by the respondent on behalf of the Dominion, instead of by him on behalf of the province?

Surely the reservation of the revenue from the sales and leasing of lands, mines and minerals is rather a shadowy foundation for such a claim. Yet there is nothing else in this "Alberta Act" distinguishing the status and powers of the new province from others in that regard which can be relied upon.

The right of the other provinces to escheat had been long determined in their favour by the case of the *Attorney-General for Ontario* v. *Mercer*(2), when the "Alberta Act" was passed and if there had been any such purpose as making a distinction in that regard against the new province it would have found expres-

(1) 14 Sim. 8.

(2) 8 App. Cas. 767.

sion in the Act in some more explicit way than by such indirect language as used in section 21.

And when the claim to *bona vacantia* is made how can it rest upon the single line

> All Crown lands, mines, minerals and royalties incidental thereto

for that is what the matter comes to?

There is nothing therein which in the remotest sense can extend to mere *bona vacantia* consisting of or derivable from personal property.

And with the claim thereto surely must fall also the claim to proceeds of real estate which had been declared at that time to become distributable as personal property.

And let us again observe the language of the first line of section 21 which defines nothing of that sort. Only the word "royalties" therein can be taken to have any possible semblance of meaning applicable to what is involved in the claim.

And these royalties are not presented as *jura regalia* but as "royalties incident thereto," *i.e.* incident to the "Crown lands, mines and minerals."

In common parlance we all know how the term "royalties" is used relative to the timber dues and any share of the minerals extracted under and by virtue of leases of mines or mining lands. How can such a term be made to have such an extended meaning as claimed herein?

The moment the lands are granted by the Crown they cease to be "Crown lands" and how a royalty can attach thereto puzzles one.

Again we must never forget that the whole subject of property and civil rights is relegated to the jurisdiction of the legislature of the province which can change the whole law of descent and constitute whomsoever or whatsoever it sees fit the heir at law or next

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of kin entitled to take the estate of an intestate or indeed if it saw fit could revoke the power to make a will and distribute the estates of deceased in such a way as it might determine.

To say that a legislature possessed of such plenary powers cannot enact such a law as declared by the judgment appealed from to be *ultra vires* seems to me somewhat remarkable.

I think the appeal should be allowed with costs throughout and the judgment appealed from be reversed.

ANGLIN J.—In this proceeding the Government of Canada seeks to recover from the administrator of one Yard Rafstadt, who died in November, 1912, in the Province of Alberta, intestate and without heirs or next of kin, the proceeds left in his hands, after satisfying claims of creditors, of land granted to the intestate in 1911, by letters patent issued from the Department of the Interior of Canada, of which he died seized.

The substance of an arrangement between the parties is that, if, upon the death of Rafstadt, the Crown in right of the Dominion of Canada was entitled to the land owned by him, either as an escheat or as *bona vacantia*, the net proceeds of the sale of such land in the hands of the administrator shall for all purposes be deemed the property of the Crown in right of the Dominion—that they shall represent the land.

A doubt was suggested as to the jurisdiction of the Exchequer Court to entertain this action on the ground that the money in question is in fact neither land escheated nor property of the Crown in right of the Dominion. The relief claimed by the information,

however, is primarily a declaration that the land owned by Rafstadt upon his death

escheated to and became vested in His Majesty the King in right of the Dominion of Canada.

That relief may properly be claimed in the Exchequer Court under 9 & 10 Edw. VII., (D.), chap. 18, sec. 2. The judgment has taken this declaratory form and a clause has been added, based upon the consent of parties, for the recovery by the Crown of the net proceeds of the sale held by the administrator.

The material facts were established by admissions and are fully stated in the judgment of the learned judge of the Exchequer Court.

Counsel for the appellant urges several distinct grounds of appeal:—

(1) That the right of property in the lands surrendered by the Hudson Bay Company to Her late Majesty Queen Victoria, was never vested in the Crown in right of the Dominion of Canada;

(2) That the right of escheat, if not vested in His Majesty in right of the United Kingdom, is vested in the Crown in right of the Province of Alberta;

(3) That the reservation made by section 21 of the "Alberta Act" does not include the royalties of escheat or *bona vacantia;*

(4) That under the Dominion "Land Titles Act," 57 & 58 Vict., ch. 28 (1894), the holder of a certificate of title obtained not merely an estate in the land but the full allodial rights therein and that it was, therefore, not subject to escheat;

(5) That under section 3 of that Act providing that

land in the Territories shall go to the personal representatives in the same manner as personal estate now goes, and be dealt with and distributed as personal estate,

the real property of a deceased owner became for all

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purposes personalty, and, while a case of *bona vacantia* might arise in respect of it, a case of escheat could not.

(1) I doubt if the appellant, claiming through a grant from the Canadian Government, should be heard to raise the first point, if it were otherwise tenable. But that all the property rights both of the Crown and of the company in those parts of the former Hudson Bay Lands which were not reserved for the company were vested in the Crown in right of the Dominion of Canada, is, I think, fully established. The original grant to the Hudson Bay Company; the "Rupert's Land Act," 31 & 32 Vict. (Imp.) ch. 105; the surrender by the Hudson Bay Company to the Crown; the addresses of the Senate and House of Commons of Canada to Her Majesty; and the Imperial order-in-council passed pursuant to the "Rupert's Land Act" contain the history of the arrangement and the steps by which the territory that had formerly been held by the Hudson Bay Company (saving the reserved sections) became vested in the Crown and subject to the legislative control of the Parliament of Canada.

That Parliament exercised the power thus conferred upon it of legislating in regard to the Crown lands in the territory thus acquired. The first "Dominion Lands Act," passed in 1872 (35 Vict. ch. 23), after designating them in the preamble as "certain of the public lands of the Dominion" enacted that the

> lands in Manitoba and the North-West Territories * * * shall be styled and known as Dominion lands.

The Act further provided for the administration and alienation of these lands in a manner consistent only with the assertion of the existence in the Dominion of the fullest proprietary rights therein. These provisions are continued in the Revised Statutes of Canada, 1886, ch. 54, and the Revised Statutes of

Canada, 1906, ch. 55, and it is under the authority of that legislation that the patent or grant to Yard Rafstadt issued. Section 21 of the "Alberta Act," (4 & 5 Edw. VII., ch. 3) may also, if necessary, be invoked as legislation, within the power conferred on the Dominion Parliament by the "Rupert's Land Act," declaratory of the title and interest of the Crown in right of the Dominion in the public lands within the territorial limits of the Province of Alberta. On this branch of the case I concur in the conclusion reached by the learned judge of the Exchequer Court.

(2) and (3) The second and third points can be conveniently dealt with together. By the 21st section of the "Alberta Act," (4 & 5 Edw. VII., ch. 3), it is declared that

> All Crown lands, mines and minerals and royalties incident thereto * * * shall continue to be vested in the Crown and administered by the Government of Canada for the purposes of Canada.

In *Attorney-General of Ontario* v. *Mercer*(1), the Judicial Committee considered the provisions of section 109 of the "British North America Act" that

> All lands, mines, minerals and royalties belonging to the several provinces of Canada, Nova Scotia and New Brunswick at the Union * * * shall belong to the several Provinces of Ontario, Quebec, Nova Scotia and New Brunswick in which the same are situated or arise.

Their Lordships held that "royalties" in this context includes escheat. After discussing the meaning of the term "royalties" and the nature of the objects which it covers, they say, at page 779:—

> Their Lordships are not now called upon to decide whether the word "royalties" in section 109 of the "British North America Act" of 1867 extends to other royal rights besides those connected with "lands," "mines" and "minerals." The question is whether it ought to be restrained to rights connected with mines and minerals only, to the

(1) 8 App. Cas. 767.

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exclusion of royalties, such as escheats, in respect of lands. Their Lordships find nothing in the subject, or the context, or in any other part of the Act, to justify such a restriction of its sense.

The restriction of the reservation of royalties in the "Alberta Act" to those incident to Crown lands, mines and minerals, does not distinguish the case at bar from the *Mercer Case*(1), since their Lordships there proceeded on the assumption that only royalties "connected with lands, mines and minerals," are covered by section 109 of the "British North America Act" (p. 779); nor does the omission of the words "in which the same are situated or arise" from the section of the "Alberta Act" render the decision in the *Mercer Case*(1), inapplicable. The right of escheat is a royalty incident to "Crown lands," or lands belonging to the Crown, and that royalty or right in respect to such lands in Alberta is declared by the "Alberta Act" to continue to be vested in the Crown for the purposes of Canada. I am, therefore, of the opinion that escheats arising in the Province of Alberta at all events in respect of lands which belonged to the Crown at the date of the creation of that province were amongst the rights and sources of revenue excepted and reserved to the Dominion by section 21 of the "Alberta Act."

(4) The grant by the Crown to the Hudson Bay Company of the lands comprised in the territory granted to it was "in free and common soccage." All lands in that territory conveyed by the company to settlers or others prior to the surrender by the company to Her late Majesty Queen Victoria and the subsequent transfer to the Dominion were held by that tenure. By an Act of the Dominion Parliament passed in preparation for the assumption of control of Rupert's Land by Canada it was provided that

(1) 8 App. Cas. 767.

all the laws in force in Rupert's Land and in the North-Western Territory at the time of their admission into the Union shall, so far as they are consistent with the "British North America Act, 1867", with the terms and conditions of such admission approved of by the Queen under the 146th section thereof, and with this Act, remain in force until altered by the Parliament of Canada or by the Lieutenant-Governor under the authority of this Act, (32 & 33 Vict. chap. 3, sec. 5).

This legislation, which left in force English law as it stood in 1670, the date of the Hudson Bay Company's charter, subject possibly to some question as to the portions of the region which may have been first occupied by French settlers (Clement on the Constitution, (2nd ed.), p. 54, *n.* 4), was re-enacted after the actual admission of the territory into the Union (34 Vict. chap. 16). In 1886 the Dominion Parliament enacted that

> All the laws of England relating to civil and criminal matters, as the same existed on the 15th day of July, 1870, shall be in force in the Territories in so far as the same are applicable to the Territories (49 Vict., ch. 25, sec. 3).

Since the statute of Charles II., free and common soccage has been the ordinary tenure on which freehold lands are held in England and it is the tenure prescribed in all the early colonial charters or patents in America (Blackstone, Lewis's edition, vol. 1, page 78, *n.* 1). The habendum in the patent to Raffstadt, put in by consent, was "in fee simple," making it clear that his estate was a fee simple to be held in free and common socage, to which the royalty of escheat has always been incident (11 Hals., page 24).

In the second volume of his commentaries (Lewis's edition, at page 104-5), Blackstone wrote:—

> 1. Tenant in fee simple (or, as he is frequently styled, tenant in fee) is he that hath lands, tenements, or hereditaments, to hold to him and to his heirs forever; generally, absolutely and simply; without mentioning what heirs, but referring that to his own pleasure, or to the disposition of the law. The true meaning of the word fee (feodum) is the same with that of feud or fief, and in its original sense it is taken

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in contradiction to allodium which latter the writers on this subject define to be every man's own land, which he possesseth merely in his own right, without owing any rent or service to any superior. This is property in its highest degree; and the owner thereof hath *absolutum et directum dominium*, and therefore is said to be seised thereof absolutely in *dominico suo*, in his own demense. But feodum, or fee, is that which is held of some superior, on condition of rendering him service; in which superior the ultimate property of the land resides. And therefore Sir Henry Spelman defines a feud or fee to be the right which the vassal or tenant hath in lands, to use the same, and take the profits thereof to him and his heirs, rendering to the lord his due services; the mere allodial property of the soil always remaining in the lord. This allodial property no subject in England has; it being a received, and now undeniable principle in the law, that all the lands in England are holden mediately or immediately of the king. The king therefore only hath *absolutum et directum dominium:* but all subjects' lands are in the nature of feodum or fee; whether derived to them by descent from their ancestors, or purchased for a valuable consideration; for they cannot come to any man by either of those ways, unless accompanied with those feudal clogs which were laid upon the first feudatory when it was originally granted. A subject therefore hath only the usufruct, and not the absolute property of the soil; or, as Sir Edward Coke expresses it, he hath *dominium utile*, but not *dominium directum*. And hence it is, that, in the most solemn acts of law, we express the strongest and highest estate that any subject can have by these words:—"he is seised thereof *in his demesne, 'as of fee.'*" It is a man's demesne, *dominicum*, or property, since it belongs to him and his heirs forever: yet this dominicum, property or demesne, is strictly not absolute or allodial, but qualified or feudal: it is his demesne, as of fee: that is, it is not purely and simply his own, since it is held of a superior lord, in whom the ultimate property resides.

In any part of the King's dominions where the English legal system prevails it would require legislation very clear and explicit indeed to take from the Crown its allodial interest and vest it in the subject. There is no such legislation in regard to land in Alberta, and, so far as it might affect the reservation in favour of the Dominion made by section 21 of the "Alberta Act," provincial legislation intended to have that effect would be *ultra vires*.

The appellant invokes the provisions of the Dominion "Land Titles Act," 1894 (57 & 58 Vict., ch. 28), making special reference to sections 3, 4 and 10, as indicating

the purpose of the Dominion Parliament to have been that in the North-West Territories a grant of land from the Crown followed by registration under the "Land Titles Act" should vest in the grantee the absolute or allodial title and that land so granted and registered should for all purposes be converted into and be subject to the incidents of personal property. But the definition in the Dominion "Land Titles Act" of 1894 of the word "grant" as meaning "any grant from the Crown of land *whether in fee or for years*" the definition of the word "owner" as meaning "any person or body corporate entitled to *any freehold or other estate or interest in land*," the provision of section 56 that

> the land mentioned in any certificate of title granted under this Act shall by implication and without any special mention therein, unless the contrary is expressly declared, be subject to (*a*) any subsisting reservations or exceptions contained in the original grant from the Crown,

and the provision of section 57 that

> Every certificate of title granted under this Act shall * * * be conclusive evidence * * * that the person named therein is entitled to the land included in the same for the estate or interest therein specified, subject to the exceptions and reservations mentioned in the preceding section,

afford striking and, I think, conclusive, proof that it was not intended by this legislation to affect any such radical change as would be involved in vesting in the grantees of Crown lands in the North-West Territories (as they then were) not merely the fee simple of the lands granted—"the strongest and highest estate that any subject can have"—but also the allodial rights of the Crown. While section 4 dispenses with words of limitation in transfers and provides that, if used, they shall have the like force and meaning as if used in connection with personal property, this provision does

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not apply to Crown grants and the effect of a transfer is declared to be to pass "all such right and title *as the transferror has*"—not the allodial rights in the land. While section 10 speaks of an "absolute estate," it so denominates an estate in fee simple, which may not be reduced by words of limitation to a limited fee or fee-tail. Far from indicating an intention to confer an allodial interest on grantees of the Crown these sections evince an intention that the greatest estate of a subject—that in fee simple— shall be the nature of the holding.

This statute was repealed as to Alberta by order-in-council of the 22nd July, 1906, authorized by statute 4 & 5 Edw. VII., chap. 18.

(4) and (5) Section 3 of the Act so repealed—reproduced in the Alberta "Land Titles Act"—is as follows:—

> Land in the Territories (Alberta) shall go to the personal representative of the deceased owner thereof in the same manner as personal estate now goes, and be dealt with and distributed as personal estate.

As originally introduced, in 1886 (49 Vict. ch. 26, sec. 5), the prototype of this provision read

> All lands in the Territories which by the common law are regarded as real estate shall be held to be chattels real and shall go to the executor or administrator of any person or persons dying, seised or possessed thereof as other personal estate now passes to the personal representative.

But this section was repealed in 1888 (51 Vict. ch. 20, sec. 3), and the provision then substituted read

> Land in the Territories shall go to the personal representative of the deceased owner thereof in the same manner as personal estate now goes.

No substantial change was made by the Act of 1894 (57 & 58 Vict., ch. 28, sec. 3, above quoted). The omission from these later enactments of the words "shall be held to be chattels real" is

significant and shews that, at all events since 1888, whatever may have been the case under the Act of 1886, land is still land and it is only for purposes of descent and distribution that it is to be regarded as personalty. Otherwise it remains land and subject to all the incidents of land. On the death of an owner of land intestate and without heirs he leaves nothing to be dealt with as a subject of descent or distribution. On his death his estate in the land comes to an end and, *eo instanti*, the Crown, by virtue of the escheat, is seised of the land which had been his. There is nothing to pass to a personal representative.

The legislation relied upon is, no doubt, effective to convert into personalty, and to attach to it all the incidents of personalty, for purposes of succession and distribution, whatever estate or interest the deceased owner held in his real property. But it leaves untouched the allodial interest or "ultimate property" which remained resident in the Crown after the grant of the fee and by virtue of which, on the death of the owner intestate and without heirs, the fee having determined, the Crown was again seised of the land as it had been before the grant. Nothing passed to the personal representative of the owner. There was nothing upon which the provisions of section 3 could operate. The owner's interest simply ceased to exist. As put in *Attorney-General of Ontario* v. *Mercer*(1), at page 772,

> When there is no longer any tenant, the land returns by reason of tenure, to the lord by whom or by whose predecessors in title, the tenure was created * * * The tenant's estate (subject to any charges upon it which he may have created) has come to an end and the lord is in by his own right.

While it is no doubt competent to the legislature of the Province of Alberta, subject to the restrictions

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of section 21 of the "Alberta Act," to determine the tenure of land in that province and to amend the law of descent, it cannot deal with either of these matters so as to affect the rights by that section reserved to the Crown in right of the Dominion, including *inter alia* the right of escheat. In so far as it may purport to do so chapter 5 of the Alberta statutes of 1915 is *ultra vires*.

I would, for these reasons, dismiss this appeal with costs.

BRODEUR J (dissenting).—For the reasons given by Mr. Justice Idington, I am of opinion that this appeal should be allowed with costs throughout.

Appeal dismissed with costs.

Solicitors for the appellants: *Emery, Newell, Ford, Bolton & Mount.*

Solicitors for the respondent: *Hogg & Hogg.*