

BETWEEN

THE ATTORNEY-GENERAL OF } PLAINTIFF;
MANITOBA..... }1903
June 29.

AND

HIS MAJESTY'S ATTORNEY- } DEFENDANT.
GENERAL FOR CANADA..... }*Swamp lands — Revenues — Title — 48-49 Vict., c. 50 — Canada and
Manitoba*

By the first section of 48-49 Vict. c. 50, intituled "*An Act for the final settlement of the claims made by the Province of Manitoba on the Dominion,*" it is provided that all Crown lands in Manitoba which may be shown to the satisfaction of the Dominion Government to be 'swamp lands' should be transferred to the province and enure wholly to its benefit and uses. (See also R.S.C., c. 47, s. 4). This enactment became law on the 20th July, 1885. It was admitted that certain Crown lands in Manitoba have, under the said provisions, been shown to the satisfaction of the Dominion Government to be 'swamp lands,' and transferred to the province accordingly. It was further admitted that between the date when the statute above mentioned became law and the various dates when such transfers were made to the province, the Dominion Government received certain sums of money produced by the sale of timber, hay and other emblements off the lands so transferred, and that the Dominion Government had retained such sums of money to the use of the Crown for the purposes of the Dominion of Canada. Upon a claim by the province for an account and payment of these moneys as having enured to its benefit and use,—

Held, that, until the lands were so transferred, the Dominion Government were entitled to administer the lands in question and to apply the revenues thereof for the purposes of the Dominion of Canada.

2. When Crown lands are transferred by the Dominion Government to a Provincial Government, or by the latter to the former, there is no transfer of title. That remains all the time in the Crown.

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What is transferred is the right to administer such lands and the right to appropriate the revenues therefrom ; and the latter right will in general follow and co-exist with the former.

THIS was an action, by way of Statement of Claim, by the Province of Manitoba, to recover certain moneys from the Dominion of Canada alleged to be due to the Province under the Act 48-49 Vict., c. 50.

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

April 24th, 1903.

The case was heard at Ottawa.

*T. M. Daly, K.C.*, for the plaintiff, contended that the effect of the Act 48 & 49 Vict., c. 50, was to transfer, upon the day it received the royal assent, not only the title but also all the rents, issues and profits in the swamp lands within the Province of Manitoba to the Government of that Province. It is clearly a grant *in presenti*, the passing of the title does not depend upon the recognition of the character of the lands by the Governor in Council. It was the intention of the Dominion Government to follow the course of the United States Congress in assigning swamp lands in the State of Arkansas, and other States, to the Government of such States, and the Dominion statute of 1885 is a close copy of the American statute of September 28th, 1850, (9 St. 519.) (He cited the *Official Debates of the House of Commons* (1). That being so, the court should adopt the construction put upon the American statute by the courts in the United States. He cited *Wright v Roseberry* (2); *Rutherford v. Greene* (3); *Lessieur v. Prince* (4); *Railroad Company v. Smith* (5); *Railroad Company v. Fremont* (6); *Shulen-*

(1) Vol. 3 (1885) p. 2420 ; Vol. (3) 2 Wheat. 196.

4, p. 2775.

(4) 12 How. 59.

(2) 121 U. S. at p. 495.

(5) 9 Wall. 95.

(6) 9 Wall. 89.

*burg v. Harriman* (1); *Missouri & Kansas Rd. Co. v. Kansas Pacific Rd. Co.* (2); *French v. Fyan* (3); *San Francisco Sav. Union v. Irwin* (4); *Railroad Company v. Baldwin* (5).

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Under the English authorities, and on general principles, a fair reading of the Dominion enactment will show that it was the intention of the Dominion to pass the title by the Act itself. (He cited *Dart on Vendors* (6); *Crossley v. Lightowler* (7); *Schofield v. Cahuac* (8); *Wheeldon v. Burrows* (9); *Canada Central Railroad v. The Queen* (10)).

Clearly the Crown in right of the Dominion is a trustee for the provincial government in this case *Lewin on Trusts* (11); *Ackland v. Gaisford* (12); *Clark & Humphrey on Sales of Land* (13); *Encyclopedia of Laws of England* (14); *Rafferty v. Schofield* (15); *Wilson v. Clapham* (16); *Ferguson v. Cadman* (17); *Holroyd v. Marshall* (18).

*Dr. Travers Lewis*, following for the plaintiff, contended that the Dominion statute both in its text and marginal notes contemplated a transfer of the title to the swamp lands contemporaneously with its passage. He cited *R. v. Milverton* (19); *Venour v. Sellon* (20); *Sheffield v. Bennet* (21); *Attorney-General v. Great Eastern Ry. Co.* (22); *The Interpretation Act* (23); *The Queen v. Farwell* (24); *Attorney-General of British Columbia v. Attorney-General of Canada* (25).

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| (1) 21 Wull. 44.            | (14) Vol. 12, p. 429.                              |
| (2) 97 U. S. 491.           | (15) [1897] 1 Ch. 937.                             |
| (3) 93 U. S. 169.           | (16) 1 J. & W. 38.                                 |
| (4) 28 Fed. Rep. 708.       | (17) 1 Sim. 530.                                   |
| (5) 103 U. S. 426.          | (18) 10 H. L. C. 191.                              |
| (6) Pp. 232, 235.           | (19) 5 A. & E. 854.                                |
| (7) L. R. 2 Ch. 478.        | (20) L. R. 2 Ch. D. 522.                           |
| (8) 4 DeG. & Sm. 533.       | (21) L. R. 7 Exch. 409.                            |
| (9) 12 Ch. D. 42.           | (22) L. R. 11 Ch. D. 460.                          |
| (10) 20 Gr. 273.            | (23) R. S. C. c. 1 sec. 7, ss. (3),<br>and sec. 4. |
| (11) 10th Ed. pp. 153, 223. | (24) 14 S. C. R. 393.                              |
| (12) 2 Madd. 28.            | (25) 14 A. C. 301.                                 |
| (13) P. 256.                |                                                    |

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*E. L. Newcombe, K.C.* for the defendant, contended that the marginal or side notes of an enactment could not be held to control the body of the statute. There is no parity between the Act of Congress of 1850 and the Dominion statute in question. Moreover the federal courts which have interpreted the American Act do not say that the particular States interested could recover profits for the period elapsing between the passing of the legislation by Congress and the actual grant. They merely say that the words used are apt to pass the title *in presenti*. (He cites *Thompson v. Prince* (1); *Keller v. Brickey* (2); *Rutherford v. Greene* (3); *The Queen v. Farwell* (4); *Railroad Company v. Smith* (5)).

*T. M. Daly, K.C.*, in reply, cited *Langdeau v. Hanes* (6).

THE JUDGE OF THE EXCHEQUER COURT now (June 29th, 1903,) delivered judgment

By the first section of the Act of Parliament 48-49 Victoria, chapter 50, intituled "*An Act for the final settlement of the claims made by the Province of Manitoba on the Dominion,*" it was provided that all Crown lands in Manitoba which may be shown to the satisfaction of the Dominion Government to be swamp lands should be transferred to the province and enure wholly to its benefit and uses. This provision is re-enacted in section four, chapter 47 of *The Revised Statutes of Canada*. By an admission filed in this case, it appears that certain Crown lands in Manitoba have, in pursuance of the provisions cited, been shown to the satisfaction of the Dominion Government to be swamp lands and transferred to the Province accordingly; that between the 20th of July, 1885, when the

(1) 67 Ills. 281.

(2) 78 Ills. 133.

(3) 121 U. S. 495.

(4) 14 S. C. R. 393.

(5) 9 Wall. 95.

(6) 21 Wall. 521.

Act 48-49 Victoria, chapter 50, received the royal assent, and the various dates when the above mentioned transfers were made to the Province, the Dominion Government received certain sums of money produced by the sale of timber, hay and other emblements off some of the said lands so transferred as aforesaid; and that the Government of Canada has retained such sums of money to the use of the Crown for the purposes of the Dominion of Canada.

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For the Province of Manitoba it is contended that these sums of money enured to its benefit and use; and an account and payment thereof are demanded.

Now when the statute mentions a transfer of Crown lands from the Dominion to the Province the meaning is not that there is any transfer of the title to such lands. That remains all the time in the Crown. What is transferred is the right to administer such lands and the right to appropriate the revenues therefrom; and the latter right will in general follow and co-exist with the former. No doubt it might be provided by statute or agreement that one Government should administer certain Crown lands for the benefit and use of some other Government, but in the absence of any such statute or agreement the Government that has the right to administer Crown lands has a right also to take and appropriate the revenues arising therefrom.

The right of the Government of Canada to administer the lands in question here until they were from time to time transferred to the Province of Manitoba is not contested, and it seems to me that until the lands were so transferred the Government of Canada had a right also to the revenues accruing therefrom. The statute provides that all Crown lands in Manitoba which may be, or (as enacted in *The Revised Statutes of Canada*) are shown to the satisfaction of the Dominion

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Government to be, swamp lands shall be transferred to the Province and enure wholly to its benefit and uses. But when shall such lands enure to the benefit and uses of the Province? The answer, it seems to me, must be, when they have been shewn to the satisfaction of the Dominion Government to be swamp lands and have been transferred; and until they are so transferred the Government of Canada have, I think, not only the right to administer such lands, which, as has been said, is not disputed, but also the right to take the revenues arising therefrom to the use of the Dominion.

It was contended that a different construction, and one more favourable to the Province, should be given to the provision in question; because the courts of the United States had put a different construction on an Act of Congress dealing with a similar subject, the policy of which the Parliament and Government of Canada were supposed to have followed. I am not, however, able to adopt that contention. The two Acts are not identical in terms, and it would not, it seems to me, be safe to go afield to find reasons for giving a meaning to the Act of Parliament cited different from that to be drawn from the terms used therein.

There will be judgment for the defendant.

Judgment accordingly.

Solicitors for plaintiff: *Lewis & Smellie.*

Solicitor for defendant: *E. L. Newcombe.*
