1895
June 3.

THE QUEEN ON THE INFORMATION OF THE ATTORNEY-GENERAL FOR THE DOMINION OF CANADA } PLAINTIFF;

AND

CHARLES T. D. BECHER..... DEFENDANT.

Dominion lands—R. S. C. c. 54 s. 57—Homestead entry issued through error and improvidence—Cancellation.

Where a homestead entry receipt for Dominion lands has been issued through error and improvidence the holder thereof is not entitled to have a patent for such lands issued to him, and the court may order his entry receipt to be delivered up to be cancelled as, outstanding, it might constitute a cloud upon the title.

INFORMATION for the recovery of the possession of a certain portion of Dominion lands in the North-West Territories.

By his information exhibited in this matter Her Majesty's Attorney-General for the Dominion of Canada alleged, in substance, as follows :—

1. That the tract of land and premises situate in the fifty-second township, in the twenty-fourth range, west of the Fourth Principal Meridian, in the North-west Territories, and being composed of the north-east quarter of section twenty in said township and range, was part of the public domain known as "Dominion lands."

2. That on the 2nd day of October, 1890, the said tract of land was withdrawn from ordinary sale and settlement by the Minister of the Interior, and notice thereof duly sent to the Secretary of the Dominion Lands Board at Winnipeg, with instructions to that officer to advise the agent of Dominion lands at Edmonton, within whose district the said lands were situated, of such withdrawal.

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3. That on the 9th of October, the secretary of the said board at Winnipeg notified the said agent at Edmonton, by letter, of the fact of such withdrawal; such letter being received by the agent at Edmonton on the 20th October, 1890.

5. That while it was the duty of such agent to enter the withdrawal of the said lands from ordinary sale and settlement in the books of his office, owing to illness at the time, he failed to do so.

6. That on account of the continued illness of the said agent at Edmonton, an acting agent was appointed in his place.

7. That on or about the 15th day of December, 1890, the defendant applied for a homestead entry under the provisions of *The Dominion Lands Act*; and the said acting agent at Edmonton on receiving such application searched in the books of his office and finding no entry or instructions recorded against the said parcel of lands, and in ignorance of the said withdrawal, issued to the defendant on the 15th day of December, 1890, a homestead entry receipt therefor.

8. That upon learning the fact of such withdrawal, the said acting agent at Edmonton, on or about the 23rd day of January, 1891, notified the defendant that the entry had been granted in error and must be cancelled.

9. That the defendant was in possession of the said tract of land, and had refused to surrender his said entry receipt.

The Attorney-General then claimed that as the said homestead entry receipt had been issued through error and improvidence, the defendant should be ordered by the court to deliver up possession of the said tract of land to the Crown, and that the court should also order the said entry receipt to be delivered up to be cancelled.

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By his statement in defence, the said defendant alleged that the said lands were open to homestead entry at the time of his making entry under his entry receipt, and that the said entry was valid and binding on the Crown. He further alleged that if any error was made in the issue of such entry, it was through the negligence and laches of the Department of the Minister of the Interior; and claimed that he should be paid all his outlays, expenses and damages in connection with making his homestead entry for the said lands, in erecting buildings and making improvements thereon, and that he should also be compensated for the loss of profit which he would uffer by being deprived of such lands, before being ordered to deliver up the possession of such lands and to deliver up the said homestead entry receipt to be cancelled.

The evidence, which was entirely documentary, substantiated the allegations of fact in the information.

The case was heard at Winnipeg on the 1st day of October, 1894.

Culver, Q.C. for the plaintiff:

So much of the matters of fact alleged in the information as the defendant has not specifically denied, he must be taken to have admitted. [Cites Rules 36 and 39 Exchequer Court Practice; *Thorp* v. *Holdsworth* (1); *Harris* v. *Gamble* (2); *Byrd* v. *Nunn* (3); *Wilson's Jud. Acts* (4); *Roscoe on Evidence* (5).]

Under the provisions of R.S.C., c. 54, (*The Dominion Lands Act*), the entry receipt is void by reason of the fact that before its issue the lands in question had been withdrawn from ordinary settlement and sale. [He cites *The American and English Encyclopædia of Law* (6)].

(1) 3 Ch. Div. 637.
(2) 7 Ch. Div. 877.
(3) 7 Ch. Div. 284.
(4) 7th ed. p. 209.
(5) 16 ed. p. 77.
(6) 23 vol. p. 52.

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By *The Dominion Lands Act* (R. S. C. c. 54, sec. 5), the Minister of the Interior is charged with the administration and management of the Dominion lands. By sec. 2 of R.S.C. c. 22, provision is made for the appointment of his deputy. By clause 40 of section 7 of *The Interpretation Act* the deputy of any Minister of the Crown is clothed with the same power to perform any official act as the Minister himself has. The withdrawal of the lands from ordinary sale and settlement could be made by the Deputy Minister as well as by the Minister of the Interior.

As to the laches or negligence of the agent at Edmonton, the Crown is clearly not chargeable with the results of this. It is incontrovertible doctrine that the Crown in Canada cannot be charged for the torts of its servants except by statutory provision therefor. There is no statute rendering the Crown liable in this case.

Again, if this land were in any way opened for ordinary sale and settlement, there was a former applicant for homestead entry who was refused, and he should have the benefit of the change in the status of the lands, if there be any change. [He cites *Attorney-General* v. *Garbutt* (1); *Stevens* v. *Cook* (2); *Manser* v. *Back* (3); *Willmott* v. *Barber* (4); *McKenzie* v. *Hesketh* (5).]

The entry receipt having been issued through error and improvidence it must be delivered up to be cancelled. [*Fonseca* v. *The Attorney-General* (6).]

Aikins, Q.C. followed, citing sections 29, 30, 32 and 35 of *The Dominion Lands Act* (R.S.C. c. 54).

Howell, Q.C. for the defendant:

The object of the Dominion Government in getting control of this domain was not to make money by

(1) 5 Gr. 181.
(2) 10 Gr. 410.
(3) 6 Hare 443.
(4) 15 Ch. Div. 96.
(5) 7 Ch. Div. 680.
(6) 17 Can. S. C. R. 612.

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speculation, but to develop the country by encouraging settlement. [He cites sections 22, 23, 26, 29, 30 and 32 of *The Dominion Lands Act*.]

I submit that as section 90 of *The Dominion Lands Act* vests the general power of carrying out the provisions of such Act in the Governor-General in Council, and especially invests that body with the power of reserving from general sale and settlement such Dominion lands as are required to aid in the construction of railways in the Territories; that the land in question here could not be withdrawn from sale and settlement without an order in council for that purpose. The letter of the Deputy Minister to the secretary of the board at Winnipeg was but an inchoate act, and the withdrawal referred to therein should have been completed and consummated by an order in council.

Section 29 applies only to sales of lands and not to homestead entry. Under section 30, it is true, the Minister may withdraw from homestead entry any tract of land, but must lay them out into town or village lots. That was not his object in withdrawing the lands here in question. [He cites *The Canadian Coat and Colonization Company* v. *The Queen* (1).]

As to the jurisdiction of the court to entertain this action, it depends upon section 57 of *The Dominion Lands Act* and section 17 (*d*) of *The Exchequer Court Act*, 1887. Now this entry has not been revoked or cancelled by the Minister, and, under section 97 of *The Dominion Lands Act*, I maintain that until this revocation or cancellation takes place, the court has no jurisdiction under the enactments mentioned to entertain this suit. If fraud had been established on the part of the defendant in obtaining entry, then I grant that under the old Equity procedure the court would

(1) 3 Ex. C. R. 157.

have jurisdiction to avoid the entry; but the facts do not raise any presumption of fraud, and there is none.

Again, assuming that the case fell within the provisions of section 57 of *The Dominion Lands Act*, I maintain that there was no "error" here within the meaning of that section. There was no error to which defendant was a party. [He cites *Attorney-General* v. *Contois* (1); *Attorney-General* v. *Fonseca* (2)]. Then there is no case made for "improvidence." If the lands were withdrawn, they were not open to homestead entry, I must admit that. But I submit, that they were not properly withdrawn; the proceedings were void as affecting the character of the lands; and there can, therefore, be no "improvidence" in the issuing of the entry.

Now, while I admit that the circumstances surrounding the issuing of the entry receipt in this case would amount to error within the doctrine of the Ontario cases, I contend that the Exchequer Court is not bound to follow them. The Supreme Court of Canada did not in the case of *Holland* v. *Ross* (3).

I submit upon all the facts of this case, that there was a good contract between the Crown and the defendant for homestead entry. The acting agent at Edmonton was acting within the scope of his duty in selling the land for homestead entry, and it was a proper subject of contract. The lands having been disposed of in this way, the Minister cannot put them back into another class. The plaintiff, therefore, must fail, and judgment go for defendant.

Perdue followed, citing sections 29 (4) of *The Dominion Lands Act* and *Middleton* v. *Power* (4).

Aikins Q.C. replied: 1st. There was a valid and proper withdrawal of the lands. 2nd. If any one was

(1) 25 Grant 354.
(2) 17 Can. S.C.R. 649.
(3) 19 Can. S. C. R. 566.
(4) 19 L. R. (Ir.) 1.

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entitled to a homestead entry it was clearly the first applicant, who was refused, and not the defendant. 3rd. A homestead entry is not a contract in the sense that a patent is. It confers no absolute rights, and may or may not be followed up by a grant in fee of the lands at the option of the Crown.

THE JUDGE OF THE EXCHEQUER COURT now (June 3rd, 1895,) delivered judgment.

Upon the facts of this case, I have come to the conclusion that the homestead entry receipt was issued to the defendant in mistake and through error and improvidence, and that the Crown is in no way bound to issue to him a patent to the lands in question under such entry,—more especially, but not as being material to the issue, as the defendant had early notice of the mistake. That being so it follows as a matter of course that the Crown is entitled to the possession of the lands; and I also think that the Crown is entitled to have the homestead entry receipt delivered up to be cancelled as, outstanding, it might constitute a cloud upon the title.

There will be judgment that the plaintiff is entitled to the relief claimed in the information. The plaintiff is also entitled to Her costs.

Judgment accordingly.

Solicitors for the plaintiff: *Aikins, Culver & McCleneghan.*

Solicitors for the defendant: *Perdue & Robinson.*