

THE ATTORNEY GENERAL FOR } MANITOBA (PLAINTIFF)..... }	APPELLANT;	1903 *Nov. 30.
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THE ATTORNEY GENERAL FOR } CANADA (DEFENDANT)..... }	RESPONDENT.	*Feb. 16.

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA.

Crown lands—Settlement of Manitoba claims—48 & 49 V. c. 50 (D.)—49 V. c. 38 (Man.)—Construction of statute—Title to lands—Operation of grant—Transfer in præsentī—Condition precedent—Ascertainment and identification of swamp lands—Revenues and emblements—Constitutional law.

The first section of the "Act for the final Settlement of the Claims of the Province of Manitoba on the Dominion" (48 & 49 Vict. ch. 50) enacts that "all Crown Lands in Manitoba which may be shewn, to the satisfaction of the Dominion Government, to be swamp lands shall be transferred to the province and enure wholly to its benefit and uses."

Held, affirming the judgment appealed from (8 Ex. C. R. 337) Girouard and Killam JJ. dissenting, that the operation of the statutory conveyance in favour of the Province of Manitoba was suspended until such time or times as the lands in question were ascertained and identified as swamp lands and transferred as such by order of the Governor-General-in-Council, and that, in the meantime, the Government of Canada remained entitled to their administration and the revenues derived therefrom enured wholly to the benefit and use of the Dominion.

APPEAL from the judgment of the Exchequer Court of Canada (1) dismissing the plaintiff's action with costs.

The action was by statement of a claim made, on behalf of the Province of Manitoba, that on the proper

*PRESENT :—Sir Elzéar Taschereau C.J. and Girouard, Davies, Nesbitt and Killam JJ.

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construction of the "Act for the final Settlement of the Claims of the Province of Manitoba on the Dominion," (1) that province was entitled, as of right, to all the surface rights, hereditaments, timber, wood, hay and emblements upon and appertaining to all Crown lands in Manitoba which might, at any time, be shewn to the satisfaction of the Dominion Government to be swamp lands pursuant to the above mentioned statute and to various orders-in-council in relation to the selection and identification of the lands in question, and that the province was also entitled to certain moneys received by the Government of Canada through sales of the timber, wood, hay and emblements of the said lands, since the 20th day of July, 1885, (date of the assent to the statute.) with interest, subject only to the costs of administration and collection of revenues.

The contention on the part of the Government of Canada was that the statutory grant took effect only on the happening of the event of Crown lands in Manitoba being shewn, to the satisfaction of the Dominion Government, to be swamp lands and such lands, so ascertained, being identified and transferred to the province as such in the usual manner, by order-in-council, and that, until such transfer, the revenues from the lands in question enured wholly to the benefit and use of the Dominion of Canada.

In relation to the selection and transfer of the lands in question, an order by the Governor-General-in-Council was passed, on 19th June, 1896, as follows :

"On a Memorandum dated 14th May, 1886, from the Minister of the Interior, representing that it is expedient to settle the method to be adopted of making a selection of the swamp lands to be granted to the Government of the Province of Manitoba, under the Act passed in that behalf at the session of Parliament

held in 1885 (48 & 49 Vict. ch. 50, sec. 1). The Minister observes that section 3 of chapter 84 of the "United States Statutes at Large," part 1, Public Laws 1845-1851, contains a provision having reference to the selection of swamp lands to be granted to certain states of the Union, which reads as follows: 'All legal subdivisions, the greater part of which are subject to overflow and thereby rendered unfit for cultivation, shall be included in the list, but when the greater part of a sub-division is not of that character, the whole of it shall be excluded therefrom; (the legal sub-division in the United States' system of survey, as in the Canadian, consists of forty acres.) That the definition seems a fairly good one and would apply to the case now under consideration, and he, the Minister, recommends that it be adopted as applicable to the lands to be selected for the purpose of being granted to the Province of Manitoba, under the provisions of the Act 48 & 49 Vict. ch. 50, sec. 1, hereinbefore referred to.

"The Minister further observes that the United States' statute provides that the selection shall be subject to the approval of the Secretary of the Treasury; and the lands to be selected shall be such as are not held or claimed by individuals; that the selection shall be made by surveyors appointed for that purpose by the United States; that the expense of the selection shall be defrayed by the states interested; and that the lists and surveys, where surveys are necessary, shall also be made at the expense of the states interested.

"The Minister recommends that the selection necessary to make the grant to the Province of Manitoba shall be made by two surveyors, appointed for that purpose by the Minister of the Interior; that the two surveyors so appointed shall be paid, and the other expenses incident to the selection defrayed, by the Province of Manitoba; that the lands to be selected

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shall be swamp lands according to the definition hereinbefore recommended for adoption, and shall consist of unoccupied and unclaimed lands at the disposal of the Government of Canada; that the selection shall not commence to be made before the 20th of May in any one year and that whatever portion of such work is not completed by the 1st of October in the said year shall remain in abeyance until after the 20th of May in another year, and so on until the selection has been completed.

“That the surveyors, appointed as hereinbefore provided, shall report from time to time to the Minister of the Interior, until the whole grant to which the Government of Manitoba is entitled under the said Act 48 & 49 Vict., ch. 50, sec. 1, has been made up, and they shall furnish lists of the lands selected by them, and the said lists shall be subject to the approval of the Governor-in-Council upon reports made from time to time by the Minister of the Interior; and the signification in writing to the Lieutenant-Governor of Manitoba of the approval of such lists by His Excellency shall operate to vest the title in the lands described in the said lists in Her Majesty for the purposes of the Province of Manitoba.

“The committee concur in the foregoing report of the Minister of the Interior and the recommendations therein made, and they advise that the requisite authority be granted to carry the same into effect.”

On the 16 April, 1888, the Minister of the Interior reported that the surveyors appointed for the purposes mentioned in the foregoing order-in-council had made a joint report on 16th Feb., 1888, submitting a revised and corrected list of certain lands selected by them as “swamp lands” for approval in accordance with the terms of the order-in-council, and the Governor-General-in-Council, thereupon, under the provisions of the

statute, 48 & 49 Vict., ch. 50, ordered that the lands mentioned in said list should be and become "vested in Her Majesty for the purposes of the Province of Manitoba." Subsequently other lands selected as "swamp lands" in like manner were transferred to the provincial government.

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The defendant for the purposes of the suit admitted that : (1) Certain Crown lands in Manitoba were, in pursuance of 48 & 49 Vict., ch. 50, sec. 1, shewn to the satisfaction of the Dominion Government to be swamp lands and transferred to the province accordingly : (2) Between the 20th July, 1885, when the said Act received 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 : (3) The Government of the Dominion has retained such sums of money to the use of the Crown for the purposes of the Dominion of Canada.

By the judgment appealed from (1) the Exchequer Court of Canada decided in favour of the defendant and the present appeal is asserted on behalf of the Province of Manitoba.

Daly K.C. and *J. Travers Lewis* for the appellant. To fully appreciate the question reference should be made to the orders-in-council passed prior to 48 & 49 Vict. ch. 50, and to the debates which took place in the House of Commons. The appellant craves leave to refer to these orders-in-council and debates, as found in "Hansard," because this is merely a controversy between the Crown, as represented in one right by the Dominion, and in the other by the Province of Manitoba, and not between subject and subject. The

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question in controversy concerns land vested in the Crown. No subject of the Crown is a party to this action; and, for these reasons, counsel should be permitted to refer to these orders-in-council in the "Hansard" debates.

It clearly appears, from the reference to and quotations made from the statutes of the United States, in the orders-in-council of 19th June, 1886, that it was the express intention and desire of the Government of Canada to pursue the same "policy" towards Manitoba in reference to these swamp lands that the Government of the United States had pursued towards the Western States of the Union, that Canada was to adopt the "American system," in dealing with the swamp lands in Manitoba. There were good reasons for this. The United States statute was passed in 1850. Numerous controversies had arisen in connection with the selection and administration of swamp lands, and valuable precedents were thus available, to which the Government might have reference in dealing with the lands. The physical features were similar and the system of surveys in the states affected is identical with the Dominion Lands surveys in Manitoba.

In the Act of Congress, granting the swamp lands to Arkansas and other states, the words "that there be and is hereby granted" are used in the enacting clause. These and other words of similar purport were advisedly omitted from the first section of the Dominion Act, as it was not necessary to use operative words of grant. See *The Queen v. Farwell* (1); *Attorney-General for British Columbia v. The Attorney-General for Canada* (2).

The words "shall be transferred to the province and enure wholly to its benefit and uses," in the Act

(1) 14 Can. S. C. R. 392.

(2) 14 Can. S. C. R. 345 : 14 App. Cas. 295.

of 1885, have the same force and operative effect as the words, "that there be and is hereby granted," in the United States statutes, and, consequently, amounted to a grant *in præsenti*, of all "swamp lands" in the Province of Manitoba to the province, subject only to the Dominion Government being satisfied as to the character of lands. The lands passed to Manitoba on the day when the Act was assented to. The title became perfected when the lands were identified and vested by orders-in-council, the latter merely giving precision to the title. A statute amounting to a present grant does not require the formalities required in an ordinary grant of land to make it effective. *Rutherford v. Greene's Heirs* (1); *Lessieur et al v. Price* (2) at page 76 per Catron J.; *Railroad Co. v. Freemont County* (3); *Railroad Co. v. Smith* (4); *Schulenberg v. Harriman* (5); *Missouri K. & T. Railway Co. v. Kansas Pacific Railway Co.* (6).

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The title to the lands remaining in the province, and the lumber and hay cut upon the land, as well as any other emblements, belong to the province.

In *Langdeau v. Hanes* (7) Field J. held (p. 530) that a legislative confirmation of a claim to land was a recognition of the validity of the claim, and operated as effectually as a grant or quitclaim and that the title there questioned was perfect long before the issue of a patent. *French v. Fyan* (8) follows the same construction as to the grant *in præsenti*. In *Wright v. Roseberry* (9) Field J. held that the grant of swamp lands to the several states was one *in præsenti* passing title to the lands from the date of the Act and requiring only identification to render title perfect. In

(1) 2 Wheat. 196.

(2) 12 How. 59.

(3) 9 Wall. 89.

(4) 9 Wall. 95.

(5) 21 Wall. 44.

(6) 97 U. S. R. 491.

(7) 21 Wall. 521.

(8) 93 U. S. R. 169.

(9) 121 U. S. 488.

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San Francisco Sav. Union v. Irwin (1) Field, J. held it to be a grant *in presenti*, to each state then in the Union, of lands situated within its limits of the quality described, which could not be defeated, nor impaired, by the delay or refusal to have the list made and patent issued. See also *Southern Pacific Railroad Co. v. Orton* (2) at page 479; *Railroad Co. v. Baldwin* (3) at page 429; *Leavenworth L. & G. Railroad Co. v. United States* (4); *Denny v. Dodson* (5).

If this contention prevails, and the grant to Manitoba be held to have been a present grant, operating as an immediate transfer of the lands afterwards shewn to be swamp lands, then, from and after the 20th July, 1885, Manitoba became and was entitled to all income and profits derived from said lands, and, consequently, the Dominion Government should account to Manitoba therefor. The Act of 1885 does not contain any reservation of exception in favour of the Dominion. The grant is absolute and Manitoba should enjoy the same relationship to the Dominion as an ordinary purchaser; the rules between vendor and purchaser should apply. See Leake's Uses and Profits of Land, p. 29; Dart's Vendors and Purchasers (6 ed.) p. 611. The grantor cannot derogate from his own absolute grant, so as to claim rights over the thing granted. *Suffield v. Brown* (6), per Westbury L. J. at page 190; *Wheeldon v. Burrows* (7), at page 42; *Crossley & Sons v. Lightowler* (8); at page 486; *Russell v. Watts* (9), at page 572.

Manitoba contends that, from and after the 20th July, 1885, the Dominion was a trustee in the premises. There was an implied trust created by the Act and the

(1) 28 Fed. Rep., 708.

(5) 32 Fed. Rep. 899.

(2) 32 Fed. Rep. 457.

(6) 4 DeG. J. & S. 185.

(3) 13 U. S. R. 426.

(7) 12 Ch. D. 31.

(4) 92 U. S. R. 733.

(8) 2 Ch. App. 478.

(9) 25 Ch. D. 559.

ordinary equitable rules as between subject and subject should apply. *Perry on Trusts* (5 ed.) sec. 30. The Crown may be a trustee; *Canada Central Ry. Co. v. The Queen* (1); *Lewin on Trusts* (10 ed.) 68, 153; *Acland v. Gaisford* (2) at page 32; *Wilson v. Clapham* (3); *Ferguson v. Tadman* (4). If the settlor proposes to convert himself into a trustee, then the trust is perfectly created; and whenever a person, having a power of disposition over property, manifests any intention with reference to it in favour of another, the court, when there is a sufficient consideration, will execute that intention through the medium of a trust, however informal the language in which it happens to be expressed. *Holroyd v. Marshall* (5), per Westbury L. J. at page 209. The Dominion, being trustee for Manitoba, has no right to retain the profits of these lands. No trustee can derive a profit from the exercise of his office, or derive any personal advantage from the trust property. *Lewin on Trusts* (10 ed.) 296, 328; *Wightwick v. Lord* (6); *Heathcote v. Hulme* (7), at page 131. We cite also *Williams on Real Property* (19 ed.) 171; *Washburn, Real Property*, (ed. 1902) vol. ii. secs. 1441—2, 1150, 1501; *Aberdeen Town Council v. Aberdeen University* (8).

Turning once more to the statute, even the marginal note to the section in question reads: "Swamp lands to belong to the province;" *Sheffield Waterworks Co. v. Bennet* (9), at p. 421; *Venour v. Sellon* (10); and it is to be observed that by sec. 7 it is provided that "the grants of land . . . authorized by the foregoing sections shall be on the condition that they be accepted by the province . . . as a full settlement of all claims made by the said province . . ."

(1) 20 Gr. 273.

(2) 2 Mad. 28.

(3) 1 Jac. & W. 36.

(4) 1 Sim. 530.

(5) 10 H. L. Cas. 191.

(6) 6 H. L. Cas. 217.

(7) 1 Jac. & W. 122.

(8) 2 App. Cas. 544.

(9) L. R. 7 Ex. 409.

(10) 2 Ch. D. 522.

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The expression deliberately used is "the *grants* of land." The statute did not, therefore, merely provide for a *future* transfer of the swamp lands, but itself characterized the consideration for the settlement of all provincial claims as statutory grants *in præsenti*.

Newcombe K.C. for the respondent. The American cases cited by the appellant have no authority in this court; at best, they may be used only to support arguments. Besides, the Statute at Large, referred to, is, *quâ* the point now in issue, essentially different from the Canadian Act, as will appear from a comparison of the two enactments.

There is a long series of decisions in the United States courts upon their statute of which it will be sufficient to mention the leading cases of *Railroad Company v. Smith* (1); *French v. Fyan* (2); *Wright v. Roseberry* (3). In these cases it was held that the plain and indisputable grant made by the words in section 1, must be considered to govern the whole statute which was a grant *in præsenti* and this notwithstanding the very strong grounds for negating such a construction contained in the provisions of section 2. Were it not for the express grant in section 1, it would seem that none of the courts would have been disposed to favour such an interpretation for we find that, notwithstanding the distinct terms of grant in section 1, Mr. Justice Clifford of the Supreme Court in the case of *Railroad Company v. Smith* (1) dissented from the judgment of the court. There are also judgments in opposite sense in the United States. See *Thompson v. Prince* (4), where, though overruled in *Keller v. Brickey* (5), Mr. Justice Scott adhered to his opinion given in the former case.

(1) 9 Wall. 95.

(2) 93 U. S. R. 169.

(3) 121 U. S. R. 488.

(4) 67 Ill. 281.

(5) 78 Ill. 133.

In the Canadian Act there is absolutely no grant nor anything equivalent to a grant and nothing from which an intention to make one could be inferred. It has been suggested that 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 official debates of the House of Commons have been cited. There is nothing in the official debates to support this contention. It appears, on the contrary, from several passages, that the Dominion Government understood that the swamp lands would not be transferred to the province until they had been shewn to the satisfaction of the Dominion Government to be such. See debate on the bill reported in the official debates, 1885, vol. II, at page 2794.

The swamp lands which, until the passing of the statute, were undoubtedly vested in the Crown in right of the Dominion remained vested in the Crown after any transfer under the Act. The only change, therefore, is that, after transfer, they enure to the benefit of the province. There is in this Act nothing but a direction that, after the happening of a future event, viz., the lands having been shewn to be swamp lands, they shall be transferred to the provincial administration. If any lands which are swamp lands are never shewn, to the satisfaction of the Dominion Government, to be such, they will never be transferred.

As will be seen by section 2 of the United States statutes it is the duty of the Secretary of the Interior to take the initiative in the necessary proceedings for ascertaining the lands to be granted and for completion of the conveyance. By the Canadian statutes no such duty is imposed upon the Dominion Government. All that is provided is that the "lands which may be

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shewn to the satisfaction of the Dominion Government to be swamp lands shall be transferred."

The method actually adopted for determining which were swamp lands to be transferred is shewn by the order-in-council. It would seem that the Minister of the Interior somewhat gratuitously accepted the task of ascertaining what were swamp lands which would come under the operation of the statute. How, exactly, the transfer was carried out does not appear to be material. The Act has provided that the lands shall be transferred and the order-in-council is sufficient evidence that all requisite preliminaries have been carried out and the transfer duly completed.

The respondent refers to *Thompson v. Prince* (1); *Keller v. Brickey* (2); *Rutherford v. Greene's Heirs* (3); *The Queen v. Farwell* (4); *Railroad Company v. Smith* (5).

THE CHIEF JUSTICE.—I would dismiss this appeal.

The appellant contends that this statute should be read as if it enacted an actual and unconditional grant of the swamp lands in question in favour of Manitoba. Now, upon the very wording of the statute, that contention cannot prevail. The grant is conditional. It takes effect only if there are any swamp lands, and so, necessarily, only when it has been ascertained if there are any, and where they are. *Shall be transferred* when ascertained to be swamp lands cannot mean *are transferred in præsentî*.

The statute does not say "are transferred," simply because parliament did not intend to transfer the title *in præsentî*. The words are plain, and cannot receive the forced construction for which the appellant contends.

(1) 67 Ill. 281.

(2) 78 Ill. 133.

(3) 2 Wheat. 196.

(4) 14 Can. S. C. R. 392.

(5) 9 Wall. 95.

I agree in my brother Davies' reasoning and conclusions.

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GIROUARD J. (dissenting).—The first section of chapter 50 of 48 & 49 Vict. enacted on the 20th July, 1885, by the Parliament of Canada,

An Act for the final Settlement of the Claims of the Province of Manitoba on the Dominion,

provides that

all Crown lands in Manitoba which may be shewn to the satisfaction of the Dominion Government to be swamp lands, shall be transferred to the province and enure wholly to its benefit and uses.

It is re-enacted almost word for word in section four of chapter 47 of the Revised Statutes of Canada, 1886, with a slight variation which I believe is of no importance. The words "which may be shewn," etc., are replaced by the following: "which are shewn, etc."

Section two provides for "an allotment of land," etc., which

shall be selected by the Dominion Government and granted as an endowment to the University of Manitoba,

founded a few years previously.

By sections three and five, a certain annual pecuniary indemnity, "for the want of public lands" is increased to \$100,000 such increase to date from the 1st July, 1885.

Sections four and six authorize the advance of certain sums of money and the re-adjustment of the yearly or semi-yearly subsidies and allowances to be calculated also from the 1st July, 1885. Doubts having arisen as to the true construction of section six, an interpretation Act was passed during the following session of 1886, which affects only the money payments.

Clause seven provides that

the grants of land and payments authorized by the foregoing sections shall be made on the condition that they be accepted by the province

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(such acceptance being certified by an Act of the Legislature of Manitoba) as a full settlement of all claims made by the said province for the reimbursement of costs incurred in the government of the disputed territory, or the reference of the boundary question to the Judicial Committee of the Privy Council, and all other questions and claims discussed between the Dominion and the Provincial Government, up to the tenth day of January, one thousand eight hundred and eighty-five.

On the 26th May, 1886, by 49 Vict. ch. 38, sec. 1, the Legislature of Manitoba passed the following acceptance:

The Legislature of the Province of Manitoba accepts the grants and payments as authorized and construed by the above recited Acts as a full settlement of all claims by the said Province upon the Dominion, as therein set forth, up to the tenth day of January, one thousand eight hundred and eighty-five.

The Dominion statute does not provide for any means or method of selecting these swamp lands "to the satisfaction of the Dominion Government;" evidently this was considered to be a mere matter of administration and left to the action of the Dominion Government. It was eventually settled by an order-in-council of the 19th June, 1886. The order-in-council recites that it is expedient to make "a selection of the swamp lands to be granted" to Manitoba, provides for the appointment of two surveyors or commissioners by the Minister of the Interior, who are empowered to select the lands in the manner indicated in the American statutes relating to the grant of federal swamp lands (which is recited in the order-in-council), and to furnish from time to time lists of the lands so selected, the whole at the expense of Manitoba, and finally declares that

the signification in writing to the Lieutenant Governor of Manitoba of the approval of such lists by His Excellency shall operate to vest the title in the lands described in the said lists in Her Majesty for the purposes of the Province of Manitoba.

Of course anything in this or any order-in-council contrary to the statute is *ultra vires*.

The surveyors proceeded with their work (which is yet unfinished) and reported lists from time to time which were duly transmitted to Manitoba with the approbation of His Excellency. In these orders in Council the Canadian Government declares

that the lands mentioned in the said annexed list * * * be and the same are hereby vested in Her Majesty for the purposes of the Province of Manitoba.

The appellant contends that all Crown lands in Manitoba shown at any time to the satisfaction of the Dominion Government to be Crown swamp lands, became from the date of the passing of said Act the property of Manitoba, including all surface rights, timber, hay crops, baser metals and all other territorial revenues derived from the said lands on and after the 20th July, 1885, the date of the passing of the statute, after deducting costs and charges which the department of the Interior incurred in administering the said lands. By his action he demands that an account be taken and payment be ordered.

The question is whether section one of the Canadian statute constitutes a transfer *in præsenti* of the swamp lands or whether it is a grant stipulated to take effect only on and at the time of the happening of a future event, viz., the selection of the lands to the satisfaction of the Dominion Government as swamp lands.

The court below held that this transfer dates only from the orders-in-council. Mr. Justice Burbidge remarks:

The statute provides that all Crown lands in Manitoba which may be or (as enacted in the Revised Statutes) are shown to the satisfaction of the Dominion Government to be swamp lands shall be transferred to the province and enure wholly to its benefits and uses. But when shall such lands enure to the benefits and uses of the province? The answer, it seems to me, must be, when they have been shewn to the

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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.

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With due deference, it seems to me that this argument goes to the delivery and actual possession of the lands and not to the title or transfer, which is in the statute.

The appellant has referred us to several American decisions rendered in interpretation of a statute (U. S. Statutes at Large, vol. 9, 519, [1850], respecting swamp lands) similar in many respects to the one under consideration, but apparently very different as to clause one. The language of the American statute is "that there be and is hereby granted to the State of," etc., the swamp lands intended to be conveyed. The expression in the American statute "hereby," that is by means of this, leaves little room for doubt that a transfer *in præsenti* was contemplated by Congress, and for this reason I consider that the numerous American decisions defining the nature of the grant under that statute are of little value in the determination of the meaning of clause one of the Canadian Act.

Other American decisions, however, are quoted by the appellant which seem to me to be quite in point. They were rendered in interpretation of legislative land grants worded in the very language of our Canadian statute. The oldest and leading case is undoubtedly *Rutherford v. Greene's Heirs*, (1) decided in 1817 by the Supreme Court of the United States when that high tribunal was presided over by one of the greatest jurists of modern times, Chief Justice Marshall.

(1) 2 Wheat 196.

Almost every word of his elaborate judgment applies to the case before us, and I cannot do better than reproduce part of it in support of the view I take of the question. Referring to an Act passed in 1782 by the State of North Carolina "for the relief of the officers and soldiers of the continental line and for other purposes therein mentioned," the eminent judge says :—

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The 10th section enacts : "that 25,000 acres of land shall be allotted for, and given to, Major General Nathaniel Greene, his heirs and assigns. within the bounds of the lands reserved for the use of the army, to be laid off by the aforesaid commissioners, as a mark of the high sense this state entertains of the extraordinary services of that brave and gallant officer."

This is the foundation of the title of the appellees.

On the part of the appellant it is contended that these words give nothing. They are in the future, not in the present tense, and indicate an intention to give in future, but create no present obligation on the state, nor present interest in General Greene. The court thinks differently. The words are words of absolute donation, not indeed of any specific land, but of 25,000 acres in the territory set apart for the officers and soldiers.

"Be it enacted that 25,000 acres of land shall be allotted for and given to Major General Nathaniel Greene." Persons had been appointed in a previous section to make particular allotments for individuals, out of this large territory reserved, and the words of this section contain a positive mandate to them to set apart 25,000 acres for General Greene. As the act was to be performed in future, the words directing it are necessarily in the future tense.

"Twenty-five thousand acres of land shall be allotted for, and given to Major General Nathaniel Greene." Given when? The answer is unavoidable—when they shall be allotted. Given how? Not by any future act,—for it is not the practice of the legislatures to enact that a law shall be passed by some future legislature,—but given by force of this Act.

It is suggested that the answer to the question, "Given when?" indicates that a gift *in presenti* was not intended. Evidently here Chief Justice Marshall refers to the lands with metes and bounds. But the answer to the question : "Given how?" shews that

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the gift was created not by the operation of the allotment or survey but by force of the statute. This is made more clear from his following remarks:—

It has been said that to make this an operative gift, the words "are hereby" should have been inserted before the word "given" so as to read, "shall be allotted for, and are hereby given to," &c. Were it even true that these words would make the gift more explicit, which is not admitted, it surely cannot be necessary now to say that the validity of a legislative act depends, in no degree, on its containing the technical terms used in a conveyance. Nothing can be more apparent than the intention of the legislature to order their commissioners to make the allotment, and to give the land when allotted to General Greene.

The 11th section authorizes the commissioners to appoint surveyors, for the purpose of surveying the lands given by the preceding sections of the law. In pursuance of the directions of this act, the commissioners allotted 25,000 acres of land to General Greene, and caused the track to be surveyed. The survey was returned to the office of the legislature on the 11th of March in the year 1783. The allotment and survey marked out the land given by the Act of 1782, and separated it from the general mass liable to appropriation by others. The general gift of 25,000 acres lying in the territory reserved for the officers and soldiers of the line of North Carolina, and now become a particular gift of the 25,000 acres, contained in this survey ° * *

It is clearly and unanimously the opinion of this court that the Act of 1782 vested a title in General Greene to 25,000 acres of land, to be laid off within the bounds allotted to the officers and soldiers, and that the survey made in pursuance of that act, and returned in March, 1783, gave precision to that title and attached it to the land surveyed.

The soundness of this doctrine has never been questioned in any court of the American Union; on the contrary it has since been frequently reaffirmed by the United States Supreme Court, and more particularly in *Lessieur v. Price* (1); *Langdon v. Hanes* (2); *Schulenberg v. Harriman* (3); *Wright v. Roseberry* (4).

American decisions, although not binding, have always been of great weight with English and Canadian courts in the absence of any jurisprudence

(1) 12 How. 59 at p. 76.

(3) 21 Wall. 44 at p. 60.

(2) 21 Wall. 521.

(4) 121 U. S. R. 488.

of their own, as in this particular instance. See *Niagara District Fruit Growers Stock Co. v. Walker* (1); *Scaramanga & Co. v. Stamp* (2); *Itler v. Howe* (3); *Skilling v. Royal Ins. Co.* (4), part 2; *In re Missouri Steamship Co.* (5); *Wells v. Gas Float Whitton No. 2* (6).

The reasons advanced by Chief Justice Marshall commend themselves to my mind; they are convincing, and I have no hesitation in coming to the conclusion that the grant to the Province of Manitoba dates from the statute and not from the respective orders-in-Council.

Although we have no jurisprudence directly in point, yet it cannot be said that we are entirely without authority. In two well considered cases decided by this court a few years ago, I find dicta, propositions and principles which seem to agree with the American decisions. I refer to *The Queen v. Farwell* (7) and especially *The Attorney General of British Columbia v. The Attorney General of Canada* (8), as the latter went to the Judicial Committee of the Privy Council. As in this instance public lands had been granted by statute by one government to another in Canada for consideration; 1st, by the order-in-Council or Articles of Union (Art. 11) of British Columbia, agreed to in 1871 and having the force of an Imperial Statute; 2ndly, by an Act of the British Columbia Legislature, 43 Vict. ch. 11, passed in 1880; and 3rdly, by another Act of the same legislature, 47 Vict. ch. 14, section 2, passed in December, 1883, in substitution of 43 Vict. ch. 11. All three enactments purport to aid in the construction of a railway through the province, since built and known as the Canadian

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(1) 26 Can. S. C. R. 629.

(2) 5 C. P. D. 295.

(3) 23 Ont. App. R. 256 at p. 275.

(4) 6 Ont. L. R. 401 at p. 405.

(5) 42 Ch. D. 321.

(6) [1897] A. C. 337.

(7) 14 Can. S. C. R. 392.

(8) 14 App. Cas. 295.

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Pacific, and for that purpose grant to Canada in trust a large tract of public lands in British Columbia

along the line of the railway before mentioned wherever it may be finally located, to a width of twenty miles on each side of the line, as provided in the order in Council, section 11, admitting the Province of British Columbia into Confederation. (47 Vict. ch. 14. sec. 2.)

These public lands had never been surveyed, and even in 1883, when the last provincial statute was enacted in settlement of long pending difficulties and disputes between the two governments, the line of railway had been only partly located. The wording of the grant is not the same in all the enactments, although I am not prepared to admit that the meaning is different in any of them. Section 11 of the Articles of Union declares "that the Government of British Columbia agreed to convey to the Dominion Government, etc."; the Act 43 Vict. ch. 11 uses the expression "the lands being granted to the Dominion Government, etc."; and section 2 of 47 Vict. ch. 14, enacts that "there shall be and there is hereby granted to the Dominion Government," etc.

The Judicial Committee and this court, Henry J. dissenting, did not doubt that the grant was absolute and operated immediately. Judges were divided, not as to the date of the grant, but only as to whether it included precious metals. The Judicial Committee seems to hold that a transfer of the lands, including territorial revenues, was made by force of the 11th Article of Union rather than by the subsequent provisions of the provincial statutes, the difference in language not being noticed by their Lordships, probably as of no importance in the determination of the point before them. They quote only the Article of Union as the origin or creation of the grant. A few extracts from the reports of the elaborate opinions delivered in all the courts will show that they are at least high authorities in the determination of the point before us.

Mr. Justice Fournier who alone in the Supreme Court was of opinion that the grant did not include the precious metals, said :

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Dans le traité, sec. 11, l'obligation est "to convey to Dominion Government, &c., &c., a similar extent of public lands," dans l'acte 43 Vict. ch. 11, "lands being granted to the Dominion for the purpose, &c., &c.", dans la 47 Vict. ch. 14 (Colombie), sec. 2. "there shall be, and there is hereby granted to the Dominion Government, in trust, &c., &c., to be appropriated as the Dominion Government may deem advisable, the *public lands* along the line of the railway, &c., &c." Dans la sec. 7 de ce dernier acte les expressions sont : "There is hereby granted to the Dominion Government, three and a half million acres of land, &c., &c." On voit que dans toutes les expressions employées pour faire l'octroi, il n'en est pas une seule qui comporte l'idée qu'il y ait autre chose que la terre qui soit octroyée. Toutes les expressions sont claires, précises, n'accordant qu'une seule chose, la terre, et ne laissent aucune place au doute. (page 368.)

And in *The Queen v. Farwell* (1), the eminent judge added :—

In the case of *Attorney General of British Columbia v. Attorney General of Canada*, p. 345, which was decided by this court yesterday, I had occasion to express my opinion upon the question of the ownership of the precious metals in these railway lands, but as regards the construction to be put upon the statute granting provincial lands in aid of the construction of the Canadian Pacific Railway, I think the expressions used are quite sufficient to convey the lands to the Dominion, and therefore Farwell's title from the Government of British Columbia is void ; but I come to this conclusion with the reserve I made in the other case, that the conveyance does not cover the gold and silver mines. * * * (Page 428.)

Chief Justice Ritchie :—

It was a statutory transfer or relinquishment by the Province of British Columbia of the right of that province in or to such public lands to the Dominion of Canada, to be managed, controlled and dealt with by the Dominion Government in as full and ample manner as the Provincial Government could have done had no such Act been passed * * * (Page 358).

Mr Justice Taschereau concurred with Mr. Justice Gwynne.

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Mr. Justice Gwynne:—

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This language of the 11th article of the treaty with reference to the transfer from British Columbia to the Dominion of Canada of this tract of land never could be literally complied with, that is to say that by no species of conveyance could the land be conveyed to the Dominion Government as grantees thereof. That Government, from the nature of the constitution of the Dominion, could not take lands by grant or otherwise, nor could it have the power of appropriation of the tract in question, otherwise than under the direction and control of the Parliament of Canada. When, therefore, as part of the terms upon which British Columbia was received into the Dominion, it was agreed that a tract of the public lands of the Province of British Columbia should be conveyed in such manner as to be subjected to being appropriated as the Dominion Government may deem advisable, what was intended plainly was, as it appears to me, that the beneficial interest which the province had in the particular tract of land as part of the public domain of the province should be divested, and that the tract, although still remaining within the Province of British Columbia, should be placed under the control of the Dominion Parliament as part of the public property of the Dominion. * * * (Pages 375, 376.)

And in *The Queen v. Farwell* (1), the learned judge remarked:—

I concur with the majority of this court that the appeal should be allowed for the reasons sufficiently stated in the case of *Attorney General of British Columbia v. Attorney General of Canada* p. 345; the title of Canada is referable to the treaty alone, and the Acts of Parliament which were passed to carry out the provisions of the treaty. (Page 428.)

Mr. Justice Henry in *The Attorney General for British Columbia v. The Attorney General for Canada* (2) based his judgment upon his previous opinion in *The Queen v. Farwell* (1), decided in the Exchequer Court in 1886, in which he declared the grant to Canada void for, among other reasons, 1st. "That the land is not described or defined; 2nd. That the statute did not operate as an immediate transfer." But the learned judge is alone in taking this view of the case, at pages 403 and following.

(1) 14 Can. S. C. R. 392.

(2) 14 Can. S. C. R. 345.

We have the advantage of the opinion of Mr. Justice, afterwards Chief Justice Strong, in the case of *The Queen v. Farwell* (1), where the Supreme Court held that the grant to Canada in aid of the construction of the Canadian Pacific Railway was absolute and operated immediately, and declared void a subsequent patent of a parcel of these lands by the province to one Farwell. This case was not appealed to the Privy Council and I presume is binding upon us, especially as it does not conflict with the decision of the Privy Council in *The Attorney General of British Columbia v. The Attorney General of Canada* (2), the point as to precious metals not being involved.

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Mr. Justice Strong said :

I am of opinion that the objection that the statute required a grant or some subsequent instrument to carry it into execution wholly fails. It was clearly self executing and operated immediately and conclusively so soon as the event on which it was limited to take effect happened, that is as soon as the "line of railway was finally located." Whether upon that event occurring, it operated by relation from the date of its enactment so as to avoid intermediate grants by the Province of British Columbia is an inquiry which the facts of the present case do not require us to enter upon, for the respondent acquired no title to this land until after the line of railway was finally located. * * (Page 425.)

The result is that when the letters patent under the great seal of British Columbia issued on the 16th of January, 1885, assuming to grant this land to the respondent, the province had no title to the land and consequently nothing to grant, an absolute title thereto having previously vested in the Dominion under the statute 47 Vict. ch. 14, upon the final location and ascertainment of the line of railway. (Page 427.)

If I understand the learned judge correctly, the final location of the line of railway was a suspensive condition merely of the executed and complete title or possession of the particular lands granted, and not of the general grant or title which "was clearly self-

(1) 14 Can. S. C. R. 392.

(2) 14 App. Cas. 295.

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executing and operated immediately.” Of course we have not to deal in the present case with the rights of third parties. The effect of the grant has to be considered between the immediate parties to it and in that case the fulfilment of the suspensive condition had a retroactive effect from the day of the grant. *Conditio existans retrotrahitur ad tempus contractus*. Such is the rule of the Roman law and of the English law also; so the learned judge tells us on another occasion; *Leblanc v. Robitaille* (1).

The Lords of the Judicial Committee did not express different views upon the nature of the grant, nor its perfection. They admit its validity and the immediate transfer of the lands and their territorial revenues, but declare that it did not include precious metals, which were distinct, they held, from lands and from part of the prerogative rights of the Crown.

Lord Watson, speaking for the court, first quoted in full article 11 of the order-in-council of 1871, and continued:

Whether the precious metals are or are not to be held as included in the grant to the Dominion Government, must depend upon the meaning to be attributed to the words “public lands” in the 11th Article of Union. The Act 47 Vict. c. 14, s. 2, which was passed in fulfilment of the obligation imposed upon the province by that article and the agreement of 1883, defines the area of the lands, but it throws no additional light upon the nature and extent of the interest which was intended to pass to the Dominion. The obligation is to “convey” the lands, and the Act purports to “grant” them, neither expression being strictly appropriate, though sufficiently intelligible for all practical purposes. The title to the public lands of British Columbia has all along been, and still is, vested in the Crown, but the right to administer and to dispose of these lands to settlers, together with all royal and territorial revenues arising therefrom, had been transferred to the province before its admission into the Federal Union.

Leaving the precious metals out of view for the present, it seems clear that the only “conveyance” contemplated was a transfer to the Dominion of the provincial right to manage and settle the lands, and

(1) 31 Can. S. C. R. 582 at p. 587.

to appropriate their revenues. * * * It therefore appears to their Lordships that a conveyance by the province of "public lands" which is, in substance, an assignment of its right to approximate the territorial revenues arising from such lands, does not imply any transfer of its interest in revenues arising from the prerogative rights of the Crown. The 11th article does not appear to them to constitute a separate and independent compact. It is part of a general statutory arrangement, of which the leading enactment is, that, on its admission to the Federal Union, British Columbia shall retain all the rights and interests assigned to it by the provisions of the British North America Act, 1867, which govern the distribution of provincial property and revenues between the Province and the Dominion; the 11th article being nothing more than an exception from these provisions. The article in question does not profess to deal with *jura regia*; it merely embodies the terms of a commercial transaction, by which the one government undertook to make a railway, and the other to give a subsidy, by assigning part of its territorial revenues.

The exception created by the 11th Article of Union, from the rights specially assigned to the province by sect. 109, is of "lands" merely. The expression "lands" in that article admittedly carries with it the baser metals, that is to say "mines" and "minerals" in the sense of sect. 109. Mines and minerals in that sense, are incidents of land, and, as such, have been invariably granted, in accordance with the uniform course of provincial legislation, to settlers who purchased lands in British Columbia. But *jura regalia* are not accessories of land; and their Lordships are of opinion that the rights to which the Dominion Government became entitled under the 11th article did not to any extent derogate from the provincial right to "royalties" connected with mines and minerals under sect. 109 of the British North America Act.

I find the same principles laid down in another decision of the Privy Council. I refer to *The Government of Newfoundland v. Newfoundland Railway Co.* (1) decided in 1888. By contract confirmed by an Act of the legislature of the colony, the government covenanted and agreed to pay certain money subsidies in aid of the location, construction and operation, for a certain number of years, of 340 miles of a railway from St. John's to Hall's Bay and also

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to grant in fee simple to the Syndicate Company 5,000 acres of land for each one mile of railway completed throughout the entire length of 340 miles. The said fee simple grant of 5,000 acres of land per mile to be made to the said Syndicate Company upon completion of each section of five miles of railway, or fraction thereof, at the terminus at Hall's Bay.

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The statute or contract then contains provisions for ascertaining the lands to be granted which were to be selected within a certain time by the railway company in alternate sections or blocks.

Lord Hobhouse said :

As regards the grants of land, they (their Lordships) feel little difficulty. It does not appear quite clearly what has been done with respect to these lands, but the argument has proceeded on the footing that in some cases grants have been completed ; in some the company has selected blocks (as by the contract it has a right to do) but no grants have been made ; and in the rest there has been no selection of blocks.

In their Lordships' views, the contract is not so framed as to make the grants of land dependent in any way on the completion of the whole line, or upon anything but the completion of each five-mile section. As each of these sections was completed, the right to twenty-five thousand acres of land became perfect. The company has time allowed to select its blocks, but may if it pleases make the selection at once. There may, or rather must, be delays in selection, and in the formalities of conveyance. But their Lordships think that it would not be in accordance either with the objects for which grants of this kind are intended, viz : the immediate attraction of settlers, or with the frame of the contract, if they were to hold that the perfect right which the company has gained on completion of each section is lessened by such delays (1).

The decree of the Supreme Court of Newfoundland that the Government should make the grants of the said lands was confirmed, although in some cases, as stated by Lord Hobhouse, no selection of blocks of land had been made.

The question in issue in *The Attorney General of British Columbia v. The Attorney General of Canada* (2)

(1) 13 App. Cas. at pp. 206-207. (2) 14 Can. S. C. R. 345.

does not present itself in the present case, and therefore it cannot be said that the case is in point. *The Queen v. Farwell* (1) is perhaps more so. Lord Watson and nearly all the Judges of the Court based their judgment upon the Articles of Union of British Columbia and not upon the statute of that Province. Whether *The Queen v. Farwell* (1) is in point or not, it cannot be denied that a great deal has been said by all the eminent judges which throws light upon the nature and effect of a statutory transfer or grant of public lands by one government to another like that of the swamp lands.

The language of the Canadian statute of 1885 now under consideration seems to me to be stronger than that of any other statute quoted above. The word "transferred" used in section one of the Dominion Act leaves less room for doubt than the words "agree to convey" in the Articles of Union of British Columbia, "agree to grant" in the Newfoundland statute, or "allotted" and "given" in the North Carolina Act, at least in the mind of the Canadian Parliament. That is made more clear when we compare it with sect. 2 which provides for an endowment to the University of Manitoba. The lands given must be selected first and granted after, probably by a patent, although a donation *in praesenti* may be contemplated, a point we are not called upon to decide. It cannot be denied that the language of sections 1 and 2 of the Canadian statute is different and much stronger in section one. The swamp lands are granted first and selected after and delivered without the necessity of a patent.

American statutes respecting swamp or other public lands require the issue of a patent, but in such a case it is held to operate merely as record evidence of a complete title, adding nothing to the legislative grant

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beyond identification or delimitation. The Canadian statute, it is admitted, does not require a patent, which is looked upon as impracticable under our system of government, all public lands being held by one and the same sovereign, the King of England, although for different purposes, whereas the United States and the different states of the Union form distinct sovereignties. Transfers of lands from the Dominion to a Province are invariably made by force of the statute without a patent. In conformity with this practice, the Dominion Act of 1885 enacts that the swamplands in Manitoba shall be *transferred*, and by this I presume that Parliament did not mean only the mere power to transfer or even the naked transfer *or grant*, which is the expression used in section 7—the words “transfer” and “grant” being moreover synonymous—but the fee simple, right, title, estate, property, ownership and possession legally resulting upon a grant of land to the grantee, altogether distinct from the complete title and the actual possession of the particular lots of land resulting from the surveys, selection and delivery made under the statute.

These grants of public lands amounting to sales, as they were made for consideration, cannot be considered in the light of sales of things moveable sold by number or measure, which according to numerous decisions are not perfect till the counting or measuring is done. They are sales in the lump and not by number or measure; they have for object a specific kind of lands, namely, Crown swamp lands, which can easily be ascertained and selected. This selection is a mere incident in the transaction, which could be carried out even against the will of the Dominion Government. It is so far from being a condition precedent that if by any possibility the Dominion Government did refuse to select the lands, that selection could

be enforced by a decree of the Exchequer Court. It has nothing to do with the title, but merely with the delivery and actual possession of the lands. If before delivery the lands should disappear through an earthquake or any other Act of God, the loss would fall, not upon the Dominion, but upon Manitoba, who would have no claim for an indemnity; likewise, accretion would benefit Manitoba alone. This is the true test of ownership.

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The Dominion Act, different in this respect from all American statutes, does not provide for the appointment of surveyors to select the lands. It merely enacts that the Dominion Government must be satisfied that the lands are swamp lands. That Government is not authorized to "vest" these lands in Manitoba, as was done by the order in Council of the 16th April, 1888; this took place by the operation of the statute. However, as these words affect only the actual possession and do no harm, no reasonable objection can be made against their use. But the Dominion Government cannot declare that they "vest the title in the lands" as was done in the order in Council of the 19th of June, 1886. This is contrary to the statute as I read it.

This order in Council shows that the Dominion Government has practically adopted the American method of selecting the lands, well aware that it was settled by a long standing jurisprudence and that it would be a safe guide for all concerned. They might, however, have adopted any other mode, the statute requiring in general terms only the expression of their satisfaction in the premises.

And if section one means only a grant *in futuro*, why the words at the end of it "and enure wholly to its benefits and uses?" If these words take effect only from the date of the orders in Council, they are useless

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and without meaning, for no one will dispute, and it is admitted by the respondent, that without them the Province of Manitoba would be entitled to all the territorial revenues of the swamp lands from the date of the orders in Council. They were not inserted to make that point clearer, for it is not disputable; they were used to emphasize that the grant preceding immediately was *in præsenti* and not *in futuro*.

It appears to me that section 7 indicates that the selection of the lands has nothing to do with the existence of the grant or title. It says that

the grants of land and payments authorized by the foregoing section shall be made on the condition that they be accepted by the province (such acceptance being certified by an Act of the Legislature of Manitoba) as a full settlement of all claims made by the said province, etc.

That is the only expressed condition attached to the very existence of the grant which undoubtedly had the effect of suspending it till the condition had been accomplished. Under well settled rules of law it would be inoperative if the event does not happen; but if it does, the fulfilment of the condition makes the grant perfect from its date, for as Lord Bacon observes

the assent of the grantee is presumed to an act which is for his benefit until he dissents.

Bacon's Abridg. vol 4, p. 537, Vo. *Grants*.

The selection of the lands to the satisfaction of the Dominion is not mentioned in section 1 as a condition suspensive of the title of the swamp lands; it is not available to the Dominion to defeat the grant; but even if it was, its fulfilment would have a retroactive effect from the date of the statute.

The respondent² in his statement of defence alleges that "any right, title or interest whatever" of the province

did not accrue until such lands had been shown to the satisfaction of the Dominion Government to be swamp lands.

This is adding to the language of the statute, and I am not prepared to do so. It is contended that this language is implied from the expressions in section 1 which may be shown to the satisfaction of the Dominion Government to be swamp lands.

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These words do not imply a suspensive condition as to the particular swamp lands with metes and bounds; they establish a mere covenant on the part of the Dominion authorities that they will select the lands; they do not support the contention advanced by the respondent; they do not create the right, title or interest of the province which is in the statute, and according to the rule of law that the proprietor is entitled to the territorial revenues of his property, these must reckon from the date of title, that is, of the statute. Such is the principle followed in all the American cases cited at the Bar, where it is shown that the grant is *in praesenti*, and I believe they are in accordance with the English common law. See Am. & Eng. Enc. of Law, (2 ed) vol. 14, p. 1113; vol. 26, pp. 326, 344, and notes.

I find in the Revised Statutes of Canada, 1886, ch. 47, unmistakable evidence that Parliament intended to grant *in praesenti*. Clause 4 of chapter 47 re-enacts this first section and immediately before we read in clause 3:

All ungranted or waste lands in the province shall be vested in Her Majesty, and administered by the Governor in Council for the purposes of Canada.

No one can doubt that this provision, although in the future tense, has a present operation. I cannot see any reason why the same Parliament, when using the same language in section 4 of the same statute, did not mean the same thing, especially as this inter-

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pretation is the only one which meets the circumstances of the case.

I do not look upon the Canadian statute of 1885 as an ordinary piece of legislation, passed in the interest only of the Dominion at large. It is more a compromise of claims made by a Province against the Dominion, or perhaps more correctly an offer of settlement of claims proposed by the latter which the province has accepted. After this acceptance the statute is in the nature of an agreement or contract for consideration between the Dominion and Manitoba which, I take it for granted, could not very well be repealed or altered except with the consent of the province.

Moreover, the view I take of the meaning of that statute is the only one consistent with the circumstances of the case and any other construction would, it seems to me, partly defeat the object of the Act. The province has no public land like Ontario and Quebec and the other old provinces, and in compensation for this it is allowed a yearly indemnity which by that very statute is increased from \$45,000 to \$100,000. A large amount of land in the province, granted to the Canadian Pacific Railway Company and the Hudson Bay Company, was exempt from school and municipal taxes. Thereafter swamp lands shall belong to the province. The yearly and half yearly money subsidies and allowances based upon population are also increased. A fresh advance to the province of \$150,000 was authorized to meet the cost of constructing a lunatic asylum and other exceptional services. Manitoba had incurred a large expenditure in the government of a vast disputed territory since known as New Ontario, which she lost by a judgment of the Judicial Committee of the Privy Council, thereby being deprived of extensive revenues derived from the

population settled in that territory. It is evident from the reading of the statute that she was entitled to some indemnity from the Dominion. All its provisions show that the increases in money were to commence at once, even before the Act was passed, namely, from the 1st July, 1885. If the interpretation given by the respondent is to prevail, one grant only, and a most important one, is to be beneficial *in futuro*, viz., the grant of swamp lands. The immediate revenue from this source was however needed to reclaim these very lands. The province had to provide for the costs of survey and selections, a course not generally pursued except when dealing with one's own lands. Great expense for draining and irrigation would be incurred, and if the province is to receive only the bare land, denuded of timber and other territorial revenues, it may be doubtful if the grant would be of any benefit. This could not have been intended by the Parliament of Canada. Substantial and immediate satisfaction was evidently demanded and accorded. Claims made against the Dominion had to be satisfied presently. To decide that these swamp lands would be available in five, ten, fifteen, twenty years, or even later, is to defeat the object of Parliament. It is especially in such a case that we must enforce the rule of law embodied in our Interpretation Act, viz.; that every Act of Parliament must receive such fair, large and liberal construction and interpretation as will best insure the attainment of the object of the Act and of every provision or enactment thereof, according to its true intent, meaning and spirit.

Finally, the respondent has not contended in his *factum*, and I do not understand that he seriously advanced any contrary proposition at the Bar, that if the grant be *in præsenti* the appellant is not entitled to an account of the revenues and profits from the 20th

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July, 1885, till Manitoba was put in actual possession under the orders-in-council. Whether considered as a trustee in law or in fact, the Dominion Government having received revenues and profits which did not belong to it, must account for them to the Province of Manitoba.

For these reasons I am of opinion that the appeal should be allowed and the action of the appellant maintained with costs.

DAVIES J. — The question to be decided in this appeal is as to the proper construction of the Dominion statute 48 & 49 Vict. ch. 50, entitled "An Act for the final Settlement of the Claims made by the Province of Manitoba on the Dominion."

The first section of that statute reads as follows :

All Crown lands in Manitoba which may be shewn to the satisfaction of the Dominion Government to be swamp lands, shall be transferred to the Province and enure wholly to its benefits and uses.

The section is substantially re-enacted in ch. 47 of the Revised Statutes of Canada. The dispute is as to the meaning of the section, whether it is to be construed as operating *in præsentî* so as immediately to confer the right on Manitoba to the swamp lands therein referred to or as doing so only as and when these lands were shewn to the satisfaction of the Dominion Government to be swamp lands. I agree with the learned judge of the Exchequer Court that the shewing of the lands to be swamp lands to the satisfaction of the Dominion Government is a condition precedent to their use and benefit enuring to Manitoba. There are no words of present transfer used in this section as was the case in *Farwell v. The Queen* (1), and as are to be found in many of the United States cases referred to during the argument. On the contrary the language

(1) 14 Can. S. C. R. 392.

used, I think, refers to the happening of some future necessary action to identify the lands and makes their transfer conditional upon that action taking place. It was impossible to locate, identify or describe in a statute the swamp lands of Manitoba or to separate them from the other lands of the Dominion Government. It was impossible even to approximate their acreage. They could only be identified and located after a careful survey by competent surveyors, shewing them to be "swamp" as distinguished from other lands; and it seems to me that by the very terms of the section it was only those lands shewn to be "swamp" to the satisfaction of the Dominion Government, which were to pass to Manitoba. They could not pass until the facts to enable the Dominion Government to reach a conclusion as to the character of the lands had first been obtained and submitted to the Government. What was to pass? All Crown lands shewn to the satisfaction, etc., to be swamp lands. When were they to pass? Surely only and as they were so shown. They clearly could not pass on the enactment of the Dominion statute, for apart from questions of identity in respect of the lands and satisfaction of the Government as to their quality, the seventh section expressly provided that the grants of land and payments of money authorized were made and authorized on the condition that they should be accepted by the province as a full settlement of its claims, etc. Nothing is said about the lands passing when Manitoba accepted which was not till the following year. We were referred to many United States cases on similar statutes granting lands from the United States to individual states of the Union. But they do not help, at all, in the construction of this statute, because the language used in them is quite different and could leave little, if any, doubt

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that the grants were to be *in presenti*. The language of the 9th United States Statutes at Large (1850) page 519, is "that there be and is hereby granted." Similar language was used in the British Columbia statute, 47 Vict. ch. 14, which came before this court for construction in the case of *The Queen v. Farwell* (1), and as Mr. Justice Strong there said :

It (the statute) was clearly self-executing and operated immediately and conclusively *so soon as the event on which it was limited to take effect happened*, that is as soon as the line of railway was finally located.

We were pressed with the decision of Chief Justice Marshall in the United States case of *Rutherford v. Greene's Heirs* (2). I have read the decision most carefully, but confess that as read by me it is a strong authority for the respondent in this case. The only part of the judgment applicable to the case at Bar is that which puts a construction upon the statute as to the time when the gift of the lands attached. The distinguished jurist answering a contention that the words in the statute gave nothing to General Greene, expressed his opinion that they were words of absolute donation, not indeed of any specific land, but of 25,000 acres in the territory set apart for the officers and soldiers. The words of the section there in controversy were

that 25,000 acres of land shall be allotted for and given to Major General Greene, his heirs and assigns, within the bounds of lands reserved for the use of the army to be laid off by the aforesaid commissioners as a mark of the high sense, etc.

After pointing out that in a previous section persons had been appointed to make particular allotments for individuals and quoting the above words of the section granting to General Greene, the Chief Justice asks :

Given when? The answer is unavoidable, when they shall be allotted. Given how? Not by any future act, for it is not the prac-

(1) 14 Can. S. C. R. 392.

(2) 2 Wheat. 196.

tice of legislation to enact that a law shall be passed by some future legislature, but given by force of this Act.

As a fact the Dominion Government seems to have gratuitously assumed the duty of surveying and selecting the swamp lands. No complaint is made either of the terms on which the surveys and selections were made, nor is it alleged that there has been undue delay. It was quite open to Manitoba to have had the surveys made if the province had so determined and to have placed the necessary evidence before the Dominion Government to have satisfied it of the existence and location of swamp lands to which it was entitled under the statute. But nothing of the kind was done. The method and manner of location was left entirely to the Dominion without protest or complaint.

I think the appeal should be dismissed with costs.

NESBITT J. concurred in the judgment dismissing the appeal with costs.

KILLAM J (dissenting).—I am of opinion that this appeal should be allowed.

The learned judge of the Exchequer Court proceeded upon the view that the transfer referred to by the statute was to take place only upon its being shown to the satisfaction of the Dominion Government that the lands were "swamp lands," that in the meantime the lands were to be administered by the officers of the Crown for the Dominion, and that this involved the right of the Dominion to the beneficial enjoyment of the lands in the interval.

I quite agree that a formal conveyance of the lands was not necessary. The lands were vested in the Crown and were to remain so vested. And the province was to have no right to occupy or deal with the

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lands in the interval. Whether the proposed transfer was to be by force of the statute or was to require a formal act seems to me unimportant. At any rate, for its completion, some indication of the Dominion Government being satisfied that the lands were swamp lands would be contemplated.

But it does not appear to me to be a necessary consequence that the absolute right to the beneficial enjoyment was to remain in the Dominion until the Government became so satisfied. In my opinion the statute 48 & 49 Vict. ch. 50, sec. 1, necessarily imposed a limitation upon the right of the Dominion to administer and beneficially enjoy the lands.

By the statute constituting the Province of Manitoba, 33 V. ch. 3, sec. 30 (D.) 1870,

all ungranted or waste lands in the province shall be * * * vested in the Crown and administered by the Government of Canada for the purposes of the Dominion, subject, &c.

But such administration must, of course, be treated as subject to the control of Parliament, which could dictate the purposes. In this case it did dictate that certain lands were to be applied to a particular purpose. By various other enactments the Parliament of Canada has fettered the executive in the administration of Dominion lands. Certain sections have been allotted to the Hudson Bay Company; others have been set aside for school purposes for the benefit of the Province of Manitoba or the North-West Territories; others have been allotted or agreed to be granted to railway companies; other dispositions have been provided for. The authorities administering the lands must do so subject to these enactments and to the rights arising under them.

It seems to me that, by virtue of the Dominion Act, 48 & 49 Vict. ch. 50, and the acceptance of its terms by the provincial Act, 49 Vict. ch. 38, there arose a legis-

lative contract between the Dominion and the province, under which, in consideration of the release of certain claims of the province, the Dominion was to make certain grants to the province and to do other things of value to the province and its inhabitants. The Dominion Act, then, should be interpreted by analogy to the principles applied to contracts for the sale of land. It was as if a party agreed to sell all portions of an estate which should be ascertained to be woodland, or pasture land, or of some other character. The fact that the Dominion Government, and not an independent party, was to be the judge of the character could not affect the matter.

The logical conclusion from the reasoning of the learned judge of the Exchequer Court would be that the officers of the Crown for the Dominion could continue to dispose of all swamp lands in Manitoba, as before the Act of 1885, and appropriate the proceeds without liability to account therefor. Such a construction would go far to render nugatory the agreed grant of the swamp lands to Manitoba. It does not appear to me that it is any answer to this reasoning to say that the lands were not likely to be sold to any considerable extent or that the province could trust to the sense of right and justice of the Dominion authorities. It must be assumed that the Dominion intended to bind itself to something, that some distinct right was intended to be given to the province. Otherwise the Dominion would do no injustice by disposing of the lands as it saw fit.

In my opinion the Act was intended to operate with reference to all lands which were Crown lands at the time of the enactment and which should thereafter be shewn to the satisfaction of the Dominion Government to be swamp lands.

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It is true that the right to occupy and control and administer the lands was to accrue at a future date. But the agreement and the statutory direction for the transfer would not be fulfilled by transfer of the lands stripped of timber or otherwise rendered of much less intrinsic value.

In the case of an agreement between two private individuals for the sale and purchase of land, executed on the part of the purchaser, the vendor would be enjoined against the destruction of timber or other waste or made to account therefor, and he would be made to account for rents and profits or to allow an occupation rent for lands beneficially occupied.

The words "shewn to the satisfaction of the Dominion Government to be swamp lands" should, in my opinion, be treated as descriptive only of the lands to be transferred. They are not words of condition, except in so far as the ascertainment of the lands imposed a condition upon the completion. But once ascertained, applying the principles applicable to contracts of sale, the right to the benefits and uses should be deemed to have accrued not later than the execution of the consideration on the part of the province.

The provincial statute accepting the grants and payments in settlement of the claims was not enacted for about a year after the Dominion statute; but the claims were old ones existing prior to the Dominion Act. I think that the acceptance should be treated as relating back, so that the consideration should be deemed to have been executed at the passing of the Act of 1885.

It must have been in the contemplation of Parliament that the work of ascertaining the character of the lands would occupy years. No provision was made for the payment of interest or other compensation for the inevitable delay.

About the time of the enactment of the provincial Act an order was made by the Governor-General-in-Council laying down certain rules to guide in settling the character of the lands, and providing for the selection of the swamp lands by two surveyors appointed by the Minister of the Interior, but paid by and conducting their work at the expense of the Province. This was merely a provision for the practical working out of the statute, which must necessarily take a long time, and is, I understand, not yet completed.

The provision is that the lands are to be "transferred to the province and enure *wholly* to its benefits and uses." Taking the prior words as defining the lands to be transferred and of which the uses and benefits are to enure to the province, I think that the proper construction is to treat it as speaking from the time of its enactment and as providing that the uses and benefits were to enure from that time to the province. This construction appears strengthened by the use of the word "wholly" and by the analogy of contracts of sale. It has the advantage, also, of giving some effect to the words "enure wholly to its benefits and uses," which would be absolutely useless with reference to the period following the completed and formal transfer.

Appeal dismissed with costs.

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Solicitor for the respondent: *E. L. Newcombe.*

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