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IN THE MATTER OF "THE TRUSTEE ACT," BEING CHAPTER 220 OF THE REVISED STATUTES OF ALBERTA AND AMENDMENTS THERETO.

AND

IN THE MATTER OF THE ESTATES OF JOHN WUDWUD, DECEASED, ZADAI MALESKO, DECEASED, AND DAVID STEVENSON, DECEASED.

THE ATTORNEY GENERAL OF CANADA (INTERVENANT) ..... } APPELLANT;

AND

THE ATTORNEY GENERAL OF ALBERTA (INTERVENANT) ..... } RESPONDENT.

ON APPEAL FROM THE APPELLATE DIVISION OF THE SUPREME COURT OF ALBERTA

Constitutional Law—Escheats—Bona vacantia—Rights as between Dominion and province of Alberta—The Alberta Act (D., 1905, c. 3) ss. 3, 21—The B.N.A. Act, ss. 109, 102, 126, 92—The Ultimate Heir Act, Alta., 1921, c. 11.

Lands in the province of Alberta, granted by the Crown since 1st September, 1905, when *The Alberta Act* came into force, which have escheated for want of heirs or next of kin, escheat to the Crown in the right of the Dominion. *Trusts and Guarantee Co.* v. *The King* (54 Can. S.C.R. 107) followed.

Lands in Alberta granted by the Crown prior to 1st September, 1905, which have escheated subsequent to that date, also escheat to the Crown in the right of the Dominion. By s. 21 of *The Alberta Act* "All Crown lands, mines and minerals and royalties incident thereto" are retained by the Dominion. The phrase "Crown lands, mines and minerals" does not necessarily import lands, etc., held by the Crown in sole proprietorship; it should be read as including all interests of the Crown in lands, etc.; reading it thus, "lands, mines and minerals" may be regarded as the antecedent of the phrase "incident thereto"; accordingly the Dominion retains all interests of the Crown in lands within the province, together with all royalties incident to such lands; any royalty affecting lands, such as the right to escheat, might properly be described as a royalty "incident to" lands. The above construction is supported, when the section is compared with s. 109 of *The B.N.A. Act,* and read in light of the judgments in *Atty. Gen. of Ontario* v. *Mercer* (8 App. Cas. 767) and *Atty. Gen. of British Columbia* v. *Atty. Gen. of Canada* (14 App. Cas. 295 at pp. 304, 305).

Personal property situated in Alberta of persons domiciled in Alberta and dying intestate since 1st September, 1905, without next of kin, go to the Crown as *bona vacantia* in the right of the province. The

*PRESENT:—Anglin C.J.C. and Idington, Duff, Mignault, Newcombe and Rinfret JJ. Idington J. did not take part in the judgment.

effect of s. 3 of *The Alberta Act* was to give the newly created province "power of appropriation" (s. 102 of *The B.N.A. Act;* and see s. 126, and *Liquidators of the Maritime Bank of Canada* v. *Receiver General of New Brunswick* ([1892] A.C. 437 at p. 144) over revenues belonging to the same classes as those over which the original provinces had such power before Confederation, and which, under *The B.N.A. Act,* they still possess; subject, of course, to the enactments of *The Alberta Act.*

The Ultimate Heir Act, Alta., 1921, c. 11, in so far as it purports to affect real property, is *ultra vires;* it is legislation disposing of assets designated as belonging to the Dominion by the statute which brought the province into existence and defines its powers and rights, rather than truly an exercise of the provincial legislative authority in relation to the law of inheritance.

Judgment of the Appellate Division of the Supreme Court of Alberta (22 Alta. L.R. 186) reversed in part.

APPEAL by the Attorney General of Canada from the judgment of the Appellate Division of the Supreme Court of Alberta (1) in so far as it upheld the contentions of the province of Alberta on certain questions in dispute, under a special case submitted to that court. The case came before it as a consolidation of three separate applications by the administrators, made by way of originating notices, for advice and directions in respect of questions arising in the administration of certain estates of deceased persons, which applications, as to the claims advanced by the respective intervenants, were referred to the Appellate Division.

The estates in question were those of John Wudwud, deceased, Zadai Malesco, deceased, and David Stevenson, deceased. In each case the deceased died in Alberta, domiciled in Alberta, intestate, and without heirs or next of kin (other than as provided in *The Ultimate Heir Act* hereinafter referred to, in the case of Malesco who was the only one who died after that Act came into force) and leaving both real and personal property.

Wudwud died on June 24, 1918. The patent to the realty was granted (to the deceased's predecessor in title) by the Department of the Interior at Ottawa on August 15, 1910.

Malesko died on April 24, 1921. The patent to the realty was granted by the Department of the Interior at Ottawa on December 28, 1920.

(1) 22 Alta. L.R. 186; [1926] 1 W.W.R. 337; [1926] 1 D.L.R. 924.

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Stevenson died on November 8, 1919. The real estate was patented prior to the creation of the province of Alberta. The patent to the deceased's predecessor in title was issued in 1884, and the transfer to deceased was dated and registered in 1904.

The questions dealt with by the Appellate Division and its holdings thereon were as follows:

(1) Do lands situated in Alberta granted by the Crown since September 1, 1905, when *The Alberta Act*, 4 and 5 Edw. VII, c. 3, came into force, which have escheated for want of heirs or next of kin, escheat to the Crown in the right of the Dominion of Canada or in the right of the province of Alberta?

The Appellate Division answered this question in favour of the Dominion of Canada, following *Trusts and Guarantee Co.* v. *The King* (1).

(2) Do escheated lands in the province of Alberta granted by the Crown prior to September 1, 1905, which have not become Crown lands by escheat or otherwise prior to that date, escheat to the Crown in the right of the Dominion of Canada or of the province of Alberta?

The Appellate Division answered this question in favour of the province.

(3) Does personal property situated in Alberta of persons domiciled in Alberta and dying intestate since September 1, 1905, without next of kin, go to the Crown as *bona vacantia* in the right of the Dominion of Canada or of the province of Alberta?

The Appellate Division answered this question in favour of the province.

(4) Is c. 11, 1921 (Alberta) entitled *An Act to Provide for an Ultimate Heir of Lands and Next of Kin of Intestate Persons* (now R.S.A., 1922, c. 144, *The Ultimate Heir Act*) *intra vires* in whole or in part? (By the said Act a person dying intestate and without heirs or next of kin, is deemed to have made a will in favour of the University of Alberta, and the university is made the ultimate heir and next of kin of any such person).

The Appellate Division answered this question in favour of the province, holding the statute to be *intra vires*.

(1) (1916) 54 Can. S.C.R. 107.

N. D. MacLean K.C. and *E. Miall* for the appellant: Alberta, which never owned lands, mines and minerals, or royalties such as escheats and *bona vacantia*, is not in the same position as Ontario and British Columbia, which had owned them previous to becoming part of the Dominion. The words "All lands, mines, minerals, and royalties," as used in s. 109 of *The B.N.A. Act*, are limited and controlled by the words "belonging to the several provinces" in the same section. See *The King* v. *Atty. Gen. of British Columbia* (1). If, as submitted, s. 109 is not applicable to the province of Alberta, its case fails, as nowhere in *The Alberta Act* is there any grant to the province of royalties such as escheat and *bona vacantia*.

Should this court hold that said words in s. 109 are not limited as aforesaid, it is submitted that said s. 109 is subject to s. 21 of *The Alberta Act*. S. 21 is not a reservation from a grant of certain lands, etc., but is a declaration. The words in s. 21 are "All Crown lands, mines and minerals and royalties incident thereto." Clear distinction must be drawn between the meaning of Crown lands and, for instance, unpatented lands or ungranted lands, as used in the Manitoba Act. The true meaning of Crown lands is the estate of the Crown in lands. This includes its allodial estate in lands granted or ungranted.

Crown prerogatives of the Dominion could not be transferred to the province by implication, particularly in view of s. 16 of *The Interpretation Act* (R.S.C., 1906, c. 1.). Such could only be done by express words. See Maxwell on Statutes, 5th Ed., p. 220; *Théberge* v. *Landry* (2); *Cushing* v. *Dupuy* (3); *Atty. Gen. of British Columbia* v. *Atty. Gen. of Canada* (4); *Atty. Gen. of Canada* v. *Atty. Gen. of Ontario* (5).

The Ultimate Heir Act, Alta., 1921, c. 11, is colourable legislation and *ultra vires*. If escheat and *bona vacantia* fall to the Dominion, this Act is a direct appropriation of Dominion rights. Admitting the province's right to deal with succession, and property and civil rights, there is a

(1) [1924] A.C. 213 at p. 219.
(2) (1876) 2 App. Cas. 102, at p. 106.
(3) (1880) 5 App. Cas. 409, at p. 419.
(4) (1889) 14 App. Cas. 295, at p. 303.
(5) [1898] A.C. 700, at p. 709.

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difference between an incidental infringement of Dominion rights, as was the action of Saskatchewan in allowing illegitimates to inherit—*Atty. Gen. of Canada* v. *Stone* (1) —and the entire appropriation of Dominion rights as here attempted. *The Ultimate Heir Act* is entirely new, remedied no existing wrong, and is contrary to what has always been our law. It was enacted from the province's desire to secure the revenues which it tried to get by its Act of 1915 (c. 5), which, so far as that Act purported to deal with escheat of land, was held in *Trusts and Guarantee Co.* v. *The King* (2) to be *ultra vires*. The contention that the University of Alberta is a corporate entity, entirely distinct from the province, while true in letter, is not true in fact, as the bulk of the money required for the university's support is provided by the province (R.S.A., 1922, c. 56, s. 80). Receipt of revenues by the university under *The Ultimate Heir Act* would relieve the province *pro tanto*. The "true nature and character of the Act," its "pith and substance" shows it to be in reality an attempt to appropriate the Dominion prerogatives of escheat and *bona vacantia* under the guise of legislation as to inheritance, and therefore *ultra vires*. *Atty. Gen. for Ontario* v. *Reciprocal Insurers* (3) and cases cited therein.

W. S. Gray and *J. J. Frawley* for the respondent: The relation between the Crown and the province is the same as that which subsists between the Crown and the Dominion in respect of such of the public property and revenues as are vested in them respectively. *Liquidators of the Maritime Bank of Canada* v. *Receiver General of New Brunswick* (4).

It is finally settled that escheats and *bona vacantia* are "royalties" within the meaning of s. 109 of *The B.N.A. Act*, and go to the Crown in the right of the province in so far as the four original provinces are concerned, and in so far as British Columbia, subsequently admitted, is concerned. *Atty. Gen. of Ontario* v. *Mercer* (5); *The King* v. *Atty. Gen. of British Columbia* (6). Ss. 102 and 109 of

(1) [1924] S.C.R. 682.
(2) (1916) 54 Can. S.C.R. 107.
(3) [1924] A.C. 328.
(4) [1892] A.C. 437, particularly at pp. 441, 443.
(5) (1883) 8 App. Cas. 767.
(6) [1924] A.C. 213.

The B.N.A. Act apply to Alberta, under s. 3 of *The Alberta Act* (except in so far as varied), and, therefore, on authority of above cases, escheats and *bona vacantia* go to the province of Alberta, except as *The Alberta Act* changes that disposition. It may be contended that s. 109 cannot apply to Alberta because it did not own lands, etc., at the Union, as it only came into existence then as a province. But said s. 3 makes it clear that s. 109 applies just as if the province had a previous existence. There might be no lands, mines or minerals to which it could apply, but the royalties or *jura regalia* and the right to them came into existence contemporaneously with the creation of the province, and its right arises immediately just as if it had a previous existence. By s. 109 lands, etc., and royalties were declared to belong to the several provinces in which the same "are situate or arise." "Royalties," including in that term the right to escheats and *bona vacantia,* were rights arising in the future; the right to them arose from time to time after the province was established, and the provision as to them in s. 109 applied. See *The King* v. *Atty. Gen. of British Columbia* (1), and the same case in the Supreme Court of Canada (2).

Reading ss. 3 and 21 of *The Alberta Act* together, it is obvious that ss. 102 and 109 of *The B.N.A. Act* apply to Alberta, except as modified by said s. 21. S. 21 defines what royalties are reserved to the Dominion, the rest going to the province by virtue of said s. 109. From one point of view this is something in the nature of a grant and a reservation. S. 21 limits the reservation to royalties incident to Crown lands, mines and minerals. As to escheats, the reservation limits them to Crown lands, that is, land which at the time the Act came into force was still in the Crown, so that the right to escheats of land patented before that time is in the province. There is no reservation whatever as to *bona vacantia.*

Practically the same language is used in admitting Alberta and Saskatchewan as was used in admitting Manitoba, British Columbia and Prince Edward Island, as to making applicable the provisions of *The B.N.A. Act.* S. 109

(1) [1924] A.C. 213, particularly at p. 220.

(2) (1922) 63 Can. S.C.R. 622, particularly at pp. 635, 633.

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was applied in favour of British Columbia in *The King* v. *Atty. Gen. of British Columbia* (1), and it is beyond doubt that the intention in each case of new provinces entering or being established was that they were to be put on exactly the same footing as the original provinces, except in the minor respects enumerated in the different Acts and Orders in Council.

The contention that, as the Crown in the right of the Dominion had the title to the land before it was granted, it must go back to the Crown in the right of the Dominion in the event of escheat arising, overlooks two things: (1) That when Alberta was established, the distribution of property and powers between the Dominion and the provinces was made "as if * * * Alberta had been one of the provinces originally united," and to give full effect to these words, it must be conceded that Alberta commenced its existence (so far as possible) with all the property and powers which the original provinces had "excepting so far as varied," etc. This clearly covers the case of royalties such as escheats and *bona vacantia,* which are abstract rights arising after the creation of the province. (2) That the Crown is one and indivisible; the Crown in the right of the province is the Crown to the same extent as the Crown in the right of the Dominion, and an escheat to the Crown in the right of the province is an escheat to the Crown, or the lord from whom the land was held.

If royalties are not disposed of as above contended, they go to the Crown in the right of the province by reason of the exclusive jurisdiction as to "property and civil rights."

Even if nothing were said about royalties in *The B.N.A. Act* or *The Alberta Act,* the right to *bona vacantia* would belong to the province. The right does not arise like escheat, but simply because there are goods without an owner or any one who can claim through the deceased, and the Crown steps in and takes. In this connection, see *In Re Barnett's Trusts* (2), Halsbury's Laws of England, vol. 7, para. 442.

(1) [1924] A.C. 213.

(2) [1902] 1 Ch. 847, at p. 857.

As to lands unpatented when the province was formed it was decided in *Trusts and Guarantee Co.* v. *The King* (1) that the right of escheat is in the Dominion. (To preserve rights in event of further appeal it is submitted such decision was wrong). As to lands patented before the province was formed, escheats go to the province by virtue of ss. 3 and 21 of *The Alberta Act*. See last mentioned case at p. 124, and *Atty. Gen. of Canada* v. *Stone* (4) at p. 689.

The Ultimate Heir Act is *intra vires*. It provides an heir and prevents escheat arising. It comes within the province's jurisdiction over property and civil rights. See *Trusts and Guarantee Co.* v. *The King* (2); *Atty. Gen. for British Columbia* v. *The King* (3); *Atty. Gen. of Canada* v. *Stone* (4); and same case below (5); *Atty. Gen. for Quebec* v. *Atty. Gen. for Canada* (6). Escheat has been prevented from arising by legitimation Acts, and by Acts creating heirs for such illegitimate persons, by Acts enabling aliens to hold lands, by Acts abolishing forfeitures consequent on attainder, felony, etc., also by adoption Acts under which rights of inheritance and succession are conferred on legally adopted children. *The Ultimate Heir Act* is legislation of a similar kind and clearly within provincial powers.

The history of the law relating to escheats shows that from the beginning the right to escheat has been whittled away, the whole tendency being in favour of preventing escheats. See *Burgess* v. *Wheate* (7).

The judgment of the court was delivered by

DUFF J.—The answer to the first question is dictated by the judgment of this court in *The Trusts and Guarantee Co.* v. *The King* (1), and is to the effect that such lands escheat to the Dominion.

As to the second question, it is convenient first to limit ourselves to the case of lands granted by the Crown in

(1) (1916) 54 Can. S.C.R. 107.

(2) 54 Can. S.C.R. 107, at p. 110.

(3) (1922) 63 Can. S.C.R. 622. Idington J. at p. 631. On appeal [1924] A.C. 213.

(4) [1924] S.C.R. 682 at p. 688.

(5) [1920] 1 W.W.R. 563 at pp. 570-571, 576.

(6) (1883) 3 Cartwright's Cases 100, at pp. 104, 101.

(7) (1759) 1 Eden 177 at pp. 191, 201. (28 E.R. 652, at pp. 657, 661).

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right of the Dominion, the absolute title to which was vested in the Dominion at the time of the grant.

Did the right of escheat in respect of such lands, which, prior to the enactment of *The Alberta Act*, was a "royalty" belonging to the Crown in right of the Dominion, pass to the province by force of that statute? S. 21 of *The Alberta Act* is in these words:

> All Crown lands, mines and minerals and royalties incident thereto, and the interest of the Crown in the waters within the Province under The North-West Irrigation Act, 1898, shall continue to be vested in the Crown and administered by the Government of Canada for the purposes of Canada, subject to the provisions of any Act of the Parliament of Canada with respect to road allowances and roads or trails in force immediately before the coming into force of this Act, which shall apply to the said Province with the substitution therein of the said Province for the North-West Territories.

The observations of Lord Selborne in *Attorney General of Ontario* v. *Mercer* (1), are sufficient warrant for saying that it is at least doubtful whether such royalties can properly be described as interests in land and whether they would fall within the scope of the expression "Crown lands," standing alone.

According to the narrowest construction, "royalties incident thereto" may be treated as royalties incidental to the Crown title to lands, mines and minerals withheld by force of the section from the province. But there is a more liberal construction which must be considered: the phrase "Crown lands, mines and minerals" does not necessarily import "lands, mines and minerals" held by the Crown in full proprietorship. It may be read as including all interests of the Crown in lands, mines and minerals within the province. And reading it thus, "lands, mines and minerals" may be regarded as the antecedent of the phrase "incident thereto." According to this reading, the Dominion retains all interests of the Crown in lands, mines and minerals within the province, together with all royalties incident to such lands, mines and minerals. Any royalty affecting lands, mines and minerals (such, for example, as the right of escheat, according to which lands held in fee simple by a subject are liable to return to the Crown upon a failure of heirs) might not improperly be described as a

(1) (1883) 8 App. Cas. 767, at p. 777.

royalty "incident to" lands, mines and minerals, and this reading seems the more probable one.

The consequences of the narrow construction might, indeed, be startling. In view of the judgment of Lord Watson in *Attorney General of British Columbia* v. *Attorney General of Canada* (1) (the Precious Metals case), it is at least doubtful whether the "precious metals" are comprehended within the expression "lands, mines and minerals" in s. 21. For the right to them, the Dominion must rely upon the reservation of royalties. And this right, as Lord Watson points out, is in no way accessory to any title of the Crown to land, or to mines and minerals in the sense in which, according to the views expressed in the passage referred to above, those words are used in s. 109 of *The British North America Act* and, presumably, in s. 21 of *The Alberta Act*. The consequence, therefore, of reading the words "incident thereto," as comprising only royalties incidental or accessory to the the Crown's title in lands, mines and minerals, in the sense in which those words are here used, would be to exclude the precious metals or, rather, the *jus regale* touching the precious metals, from the reservation.

The effect of the section, by this construction, is to reserve the territorial revenues of the Crown to the Dominion, and when the language of this section is compared with that of s. 109 of *The British North America Act*, and read in light of the judgments in *Attorney General of Ontario* v. *Mercer* (2), and the *Precious Metals case* (3), there seem to be solid grounds for the view that such was the intent with which it was enacted. There is the highest and most weighty authority for construing this enactment in a broad and liberal spirit. *Attorney General of Ontario* v. *Mercer* (2), at pp. 778 and 779. The answer to the second question will therefore be that such lands escheat to the Dominion.

As touching the question of the right to *bona vacantia*, a different set of considerations must be examined. This right is not one of those reserved by s. 21, and, as respects

(1) (1889) 14 App. Cas. 295, at pp. 304 and 305.
(2) (1883) 8 App. Cas. 767.
(3) (1889) 14 App. Cas. 295.

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it, the answer to this question must turn upon the effect of s. 3, which is in these terms:

> The provisions of *The British North America Acts*, 1867 to 1886, shall apply to the province of Alberta in the same way and to the like extent as they apply to the provinces heretofore comprised in the Dominion, as if the said province of Alberta had been one of the provinces originally united, except in so far as varied by this Act and except such provisions as are in terms made, or by reasonable intendment may be held to be, specially applicable to or only to affect one or more and not the whole of the said provinces.

The Dominion advances the view that those provisions of *The British North America Act*, which deal with the allotment of the public property and revenues, have for their subject matter property and revenues which, at the time the Act took effect (or was to take effect), were or might be at the disposition of a colony having a legislature or government independent of the Dominion; and that subsequently they can have no application to (or even a meaning as applied to) provinces newly created under the authority of *The British North America Act, 1871*, such as Saskatchewan and Alberta.

There are, no doubt, many provisions of *The British North America Act* which, according to the strict letter, are not capable of application to the case of such a province. But, in so far as such provisions are in substance fairly applicable in a manner consonant with the general intendment of *The Alberta Act*, there seems to be no good reason for refusing to give effect to them accordingly.

The pertinent provisions of the Act are found in sections 102, 109 and 126. These provisions deal with property in the narrow sense, and with revenues derived from the exercise of *jura regalia*, over which the provinces, at the time of the union, possessed "power of appropriation." It is this power of appropriation which is reserved to the provinces. See s. 126, and *Liquidators of the Maritime Bank of Canada* v. *Receiver General of New Brunswick* (1).

If we consider the substance of the matter, there appears to be no very cogent reason against ascribing to these provisions, under the authority of s. 3 (in their application to Alberta), the only meaning according to which they are not insensible in relation to a newly created pro-

(1) [1892] A.C. 437, at p. 444.

vince, that is to say, as giving to such a province "power of appropriation" over revenues belonging to the same classes as those over which the original provinces had such power before Confederation, and which, by force of these provisions, they still possess; subject always, of course, to the enactments of *The Alberta Act* itself, and in particular to s. 21.

There is great force in the argument advanced by the province that sections 20 and 21 are most naturally read as presupposing the existence of some such general disposition in favour of the province; and the observations of Lord Selborne in *Attorney General of Ontario* v. *Mercer* (1) already alluded to, as to the spirit in which these enactments should be construed, cannot be insisted upon with too much emphasis.

There remains the question touching the validity of the Alberta statute. That the province of Alberta has plenary authority, under s. 92, to lay down the rules governing the devolution of both real and personal property at the death of the owner is, of course, past question. The real subject of controversy is whether or not the impeached statute is legislation in relation to rights of inheritance.

It must first be observed, as regards lands, that the second section of the statute, which is the section in question, comes into operation only when the events have happened under which, if the statute had not been passed, lands to which it relates would (assuming rights of escheat affecting lands acquired through The Hudson's Bay Company are not within s. 21) have vested in the province; or, by force of s. 21, would have vested in the Dominion. S. 2 of *The Ultimate Heir Act* declares that, in respect of such lands, the owner, dying intestate, shall be deemed to have made a valid will, devising them to the University of Alberta, and that the University of Alberta shall be deemed to be the heir and the next of kin of any person "so dying as aforesaid."

The direct effect and aim of this statute are, by means of a legal fiction, to dispose of, *inter alia,* real property which, by *The Alberta Act,* is reserved to the Dominion.

(1) (1883) 8 App. Cas. 767.

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S. 21, which must be read as a qualification of s. 109 of *The British North America Act* (see *Attorney General of British Columbia* v. *Attorney General of Canada* (1)), vests exclusively in the Dominion the power of appropriation over the property and rights to which it relates. The impugned enactment assumes to appropriate such property. Neither is it wholly without significance that the beneficiary of this legislative effort of the Alberta Legislature is to be an institution that, as regards finances, is mainly dependent upon that legislature for its support, and is very largely under the control of the Crown in right of the province.

This is legislation disposing of assets designated as belonging to the Dominion by the statute which brought the province into existence and defines its powers and rights; rather than truly an exercise of the provincial legislative authority in relation to the law of inheritance; and, being thus repugnant to the enactments of that statute, it is in law inoperative.

Appeal allowed with costs.

Solicitor for the appellant: *Neil D. MacLean.*

Solicitor for the respondent: *W. S. Gray.*

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BRUCE W. CLARKE AND LORNE H CLARKE (DEFENDANTS) ..... } APPELLANTS;

AND

RICHARD C. BABBITT (PLAINTIFF) ..... RESPONDENT.

ON APPEAL FROM THE APPELLATE DIVISION OF THE SUPREME COURT OF ONTARIO

Real property—Title by possession—The Limitations Act, Ont. (R.S.O., 1914, c. 75) s. 5—Nature of use and occupation—Nature and extent of enclosure—Evidence as to length of time—Trial judge's estimate of witnesses—Reversal of findings.

It was held that plaintiff had acquired title by possession to a strip of land covered by the paper title of defendants, adjoining land owners; that the planting and care of a hedge which, for a part of its length, encroached on defendants' land, the construction and main-

(1) (1889) 14 App. Cas. 295, at p. 304.

*PRESENT:—Anglin C.J.C. and Duff, Mignault, Newcombe and Rinfret JJ.