Privy Council Appeal No. 36 of 1934.

In the matter of a Reference concerning refunds of dues paid under the terms of Section 47 (F) of the Timber Regulations in Manitoba, British Columbia, Saskatchewan and Alberta.

The Attorney-General of Manitoba and others - - - *Appellants*

v.

The Attorney-General of Canada - - - - - *Respondent*

FROM

THE SUPREME COURT OF CANADA.

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 17TH JANUARY, 1935.

Present at the Hearing:
LORD BLANESBURGH.
LORD THANKERTON.
LORD WRIGHT.
LORD ALNESS.
SIR LANCELOT SANDERSON.
[*Delivered by* LORD WRIGHT.]

This is an appeal by special leave from a judgment of the Supreme Court of Canada given under a reference from the Governor-General-in-Council. The Order of Reference was in the following terms, which it is here convenient to set out in full:—

"The Committee of the Privy Council have had before them a report, dated 27th April, 1933, from the Acting Minister of Justice, with reference to the provisions of the regulations governing the granting of yearly licences and permits to cut timber on Government lands in Manitoba, Saskatchewan, Alberta, within twenty miles on either side of the Canadian Pacific Railway in the Province of British Columbia, and the tract of three and a-half million acres controlled by the Government of the Dominion in the Peace River District in the Province of British Columbia (hereinafter referred to as the Timber Regulations), established by Order in Council of 26th March, 1924, and subsequent amending Orders in Council, under the authority of section 57 of the Dominion Lands Act, chap. 113, R.S.C. 1927, and duly published in the *Canada Gazette* and validated in respect of non-compliance with the provisions of section 75 of the said Act by chap. 44 of the Statutes of Canada, 1928; and in particular to the provisions of

paragraphs (*e*) and (*f*) of section 47 of the said regulations, which read as follows :—

‘(*e*) Any holder of an entry for a homestead, a purchased homestead or a pre-emption, who, previous to the issue of letters patent, sells any of the timber on his homestead, purchased homestead or pre-emption, to owners of sawmills or to any others without having previously obtained permission to do so from the Minister, is guilty of a trespass and may be prosecuted therefor before a justice of the peace and, upon summary conviction, shall be liable to a penalty not exceeding one hundred dollars, and the timber so sold shall be subject to seizure and confiscation in the manner provided in the Dominion Lands Act.

‘(*f*) If the holder of an entry as above described desires to cut timber on the land held by him, for sale to either actual settlers for their own use or to other than actual settlers, he shall be required to secure a permit from the Crown timber agent in whose district the land is situated, and shall pay dues on the timber sold to other than actual settlers at the rate set out in section 42 of these regulations, but the amount so paid shall be refunded when he secures his patent.’

“ The Minister states that, prior to the coming into force of the several Agreements entered into between the Government of the Dominion of Canada and the Governments of the Provinces of Manitoba, British Columbia, Alberta and Saskatchewan, respectively, whereby provision was made for the transfer to the said Provinces, respectively, on the terms and conditions therein set forth, of the natural resources therein described (which said agreements were confirmed and given the force of law by the British North America Act, 1930, 20–21 Geo. V, chap. 26 (Imp.)), permits to cut timber were, pursuant to the terms of paragraph (*f*) of section 47 of the Timber Regulations, granted to entrants for homesteads, purchased homesteads, or pre-emptions on Dominion lands within the several Provinces aforementioned, and dues required to be paid as by the said regulation provided were paid by the permittees to the Dominion Government, subject to the term or condition that the dues so paid should be refunded to the permittee when he had secured a patent for the land for which he had made entry.

“ The Minister further states that many such permits were outstanding and in force at the time the several agreements with the Provinces aforementioned came into force ; that a large number of the holders of such permits subsequently became entitled to, and received, patents for the lands in respect of which they had made entry, from the Crown in the right of the Province within which such lands are respectively situate, and, thereupon, having thus become entitled to a refund of dues paid under the terms of paragraph (*f*) of section 47 of the Timber Regulations, made application for such refund of dues either to the Provincial Government concerned or to the Dominion Government ; that a question has arisen between the Dominion Government and the Government of each of the Provinces aforementioned whether the obligation to make the refund of dues in such cases is, under the terms of the several agreements aforementioned, an obligation of the Provincial Governments, respectively, or of the Dominion Government, and that it is expedient that appropriate action should be taken at once to obtain a judicial determination of this question to the end that settlers, who are now admittedly entitled to a refund of such dues from either the Province or the Dominion, may be afforded relief in that regard, by the responsible Government, at an early date.

"The Committee, on the recommendation of the Acting Minister of Justice, advise that Your Excellency in Council be pleased, under and in pursuance of the provisions of section 55 of the Supreme Court Act, R.S.C. 1927, chap. 35, to refer to the Supreme Court of Canada for hearing and consideration the following questions :—

(*a*) Under the terms of the several agreements aforementioned, is the obligation to refund dues, pursuant to the terms of paragraph (*f*) of section 47 of the Timber Regulations, in the cases aforementioned, an obligation of the Dominion or of the respective provinces ?

(*b*) If the obligation be that of the Dominion, is the Dominion entitled to be recouped by the provinces respectively, the amount of the dues so refunded ?"

The Supreme Court answered the questions as follows :—

"To the Interrogatory numbered One : The said obligation is an obligation of the respective provinces :

"To the Interrogatory numbered Two : In view of the answer to Interrogatory No. One, this question does not arise ; but, if our view had been that the provinces were not under a direct obligation to refund, we should have considered that the Dominion, on refunding such dues, would be entitled to recoupment from the province concerned."

The decision of the appeal depends on the construction of the terms of the several Agreements between the Dominion and the Provinces specified in the Order of Reference, but before their terms can be considered it is necessary to examine the provisions of the Dominion Lands Act and of the Timber Regulations in so far as they relate to the position of entrants for homesteads. These provisions were passed by the Dominion Legislature while the administration of Crown lands in the four Provinces was vested in the Dominion : in the case of the Provinces of Manitoba, Alberta and Saskatchewan, Canada had retained these lands when these Provinces were constituted in 1870 and 1905 : in the case of British Columbia the lands in question called the Railway Belt and the Peace River Blocks had been transferred by that Province to the Dominion for the purpose of constructing the railway. The four Agreements were for the transfer or re-transfer of the lands to the respective Provinces.

The provisions of the Dominion Lands Act, so far as they are material to this appeal, are those which dealt with what is called "Homestead Entry." By section 11 (1) British subjects or intending British subjects were empowered to make application for entry for a homestead ; if that application were accepted on payment of the prescribed fee, the receipt given by the local agent of the Government was to be a "certificate of entry," entitling the recipient to take, occupy, use and cultivate the land entered for, and to hold possession thereof to the exclusion of any other person, and to bring and maintain actions for trespass committed on the land. These rights, however, were subject to the proviso that occupancy, use and possession of land should be subject to the provisions of the Act or of any other Act affecting

it, or of any regulations made thereunder (section 11 (2)). By section 11 (6) it was provided that an entry for a homestead should be for the sole use and benefit of the entrant, failing which the Minister should have a discretion to cancel the entry. An entrant was bound to perfect his entry by taking up possession of the land and beginning residence thereon within six months from the date of the certificate, failing which the entry was liable to be cancelled; it might also be cancelled if the entrant in any year failed to fulfil the requirements of the Act. The area for which entry was granted was one not exceeding 160 acres. At the end of three years, the entrant might be granted letters patent for the land, which thereupon vested in the entrant in fee simple. Before, however, letters patent could be issued the entrant was required to have fulfilled certain conditions, and in particular to have erected a habitable house on the plot and to have cultivated such an area of land in each year as to satisfy the Minister.

It is unnecessary here to recapitulate the numerous provisions of the Act in detail on this matter. It is clear that the object of the homestead system was to encourage settlement and cultivation as arable land, though by section 27 in certain cases the land might be used for raising stock.

Except for section 15 (4), which enabled the Minister to cancel an entry for land within six months if the land were ascertained to be valuable on account of merchantable timber, that part of the Act which dealt with "Disposal of Lands," and included the provisions with reference to homestead entries, did not specify what were to be the entrant's rights in regard to timber. Another division of the Act, headed "Disposal of Timber," dealt with the disposal by the Government by public competition of the right to cut timber on berths not exceeding in area 25 square miles. By section 57 it was provided that the Governor-in-Council might make regulations for the issue of permits to cut timber (*inter alia*) (*a*) to actual settlers for use for building purposes on their farms or for fuel for themselves, (*b*) for sale as cordwood, and also to other classes of persons and for other objects. As appears from the Order of Reference quoted above, the Regulations which are here relevant are there treated as made under section 57, that view is accepted by the Supreme Court, though the Court is disposed in the alternative to hold that the Regulations in question are valid under section 74 (*k*), which empowered the Governor-in-Council "to make such orders as are deemed necessary to carry out the provisions of this Act, according to their true intent and to meet any case which arises and for which no provision is made in this Act." Their Lordships do not, however, consider the question whether or not the Regulations are valid, to be open for discussion in this case; they must, however, point out that they would feel great difficulty in holding that the relevant regulations could validly be made under section 57 (1) or (2), though they are inclined to think that they might be

justified under section 74 (*k*). But it is not here necessary for their Lordships or, indeed, competent for them, to express any decided opinion on the point. They however, are disposed to read section 57 (*a*) as referring to the cutting of timber by actual settlers, on Dominion land other than their own holdings, and they think it even clearer that section 57 (2) (*b*) relates to timber on outside land.

On this view, then, there is no reference in the Act to the powers (if any) of an entrant in regard to timber on his land until the part of the Act which is headed "Summary proceedings respecting forfeiture and trespass." Under that heading there is (*inter alia*), section 103, which is in these terms:—

> "103. Any holder of an entry for a homestead who previous to the issue of the letters patent, sells any of the timber on his homestead to owners of sawmills or to any others than settlers for their own exclusive use, without having previously obtained permission so to do from the Minister, is guilty of a trespass and may be prosecuted therefor before a justice of the peace, and, upon summary conviction, shall be liable to a penalty not exceeding one hundred dollars, and the timber so sold shall be subject to seizure and confiscation in the manner hereinbefore provided."

It is now convenient to turn to the Regulations, which in terms are described as governing the granting of yearly licences and permits to cut timber on Dominion lands. These are complicated Regulations, but only Regulations 47 (*e*) and (*f*) are relevant to this enquiry or affect homestead entrants. On comparing Regulation 47 (*e*) with section 103 of the Act, it appears that they do not textually agree, as the Supreme Court seem to have thought: 47 (*e*) does not, as section 103 does, qualify "any others" by adding the words "than settlers for their own exclusive use"; but that difference is not here material, since, as already explained, the validity of 47 (*e*) is not in question.

Before considering the effect of Regulations 47 (*e*) and (*f*), which have already been set out in full in the Order of Reference quoted above, it may be useful to consider what is the position of the entrant between the date of his entry and the time at which in virtue of the letters patent he becomes owner in fee of the plot. The transaction under which he acquires his right as entrant is not easy to bring under the precise description of contract. In one aspect the terms of the Dominion Lands Act and the Regulations may be regarded as constituting an invitation to qualified persons to tender, so that a qualified applicant by making an application and tendering the fee, makes an offer which the Government, by giving the receipt, accepts; thus there is the consensual element which justifies the application of the term "arrangement" even if the term "contract" is not strictly appropriate. The holder of the entry becomes bound, at least on acquiring possession, to fulfil the terms of the statute and in particular becomes subject under section 2 of the Act in regard to his use, occupancy and possession of the land to the

provisions of the Act or any other Act affecting it or of the Regulations made thereunder. The rights thus acquired by the holder seem to fall within the language of this Board in *Glenwood Lumber Company* v. *Phillips* [1904], A.C. 405 at p. 408 :—

> "If the effect of the instrument" [or here the transaction] "is to give the holder an exclusive right of occupation of the land, though subject to certain reservations or to a restriction of the purposes for which it may be used, it is in law a demise of the land itself."

But whether properly described as a demise or not, the holder does acquire an interest or estate in the land, subject to conditions. He acquires the use and occupation for purposes of cultivation and is bound to cultivate, unless the case falls within section 27. But until the letters patent are granted the freehold is in the Crown ; and standing timber is part of the freehold. Thus in *Bewick* v. *Whitfield*, 3 P.Wms. 267, Talbot L.C. said :—

> "The timber while standing is part of the inheritance ; but whenever it is severed either by the Act of God or by tempest or by a trespasser and by wrong, it belong to him who has the first estate of inheritance whether in fee or in tail who may bring trover for it."

Lord Talbot had in mind the case of a tenant for life, but the principle is applicable to tenants generally. In the Act timber is defined as meaning "trees standing, fallen or cut." Section 103 of the Act and Regulations 47 (*e*) and (*f*) show clearly that there are limits to the powers granted to entrants dealing with timber. It is clear that wrongfully to cut timber constitutes trespass, and hence that term is used to describe the wrongful act in section 103, and Regulation 47 (*e*), at least in regard to timber wrongfully cut, which remains the property of the Crown, as is expressly provided in the analogous cases under section 63. It is not specified in the Act or Regulations what use an entrant may properly make of timber on his lot, though it is agreed that he is impliedly entitled to cut it to clear the ground, or to use as fuel, or to build the house which under section 16 he is bound to build as a condition of being granted letters patent, or to provide fencing and so forth. But Regulation 47 (*e*) debars him from selling it, save under a permit, and regulation 47 (*f*) forbids him to cut timber on the land for sale without a permit, save as provided, and imposes on him an obligation to pay dues on timber sold in accordance with the terms set out in the regulations. These regulations accordingly constitute restrictions on the rights conferred by the certificate of entry ; by section 11 (2) the entrant has undertaken to be bound by these Restrictions, and they are accordingly terms of the transaction under which the entrant has become entitled to his interest in the plot against the Crown ; equally are the terms which bind the Crown, such as the obligation to refund sums paid, terms of that transaction.

But in addition, the right to cut for sale and sell such timber off the land on paying the prescribed dues under regulation 47 (*f*) is itself not merely a licence, but an interest in lands. The

distinction between a licence and a grant is clearly stated by Romer L.J. in *Warr* v. *London County Council* [1904], 1 K.B. 713, at p. 721, where citing *Thomas* v. *Sorrell*, Vaugh., 351, he distinguishes "a licence properly so called" from "a right in the nature of a profit *à pendre*, *i.e.* to take something out of the soil," which is matter of grant: the latter case he illustrates by the instance of a permission not merely to cut down a tree on a man's ground, but to carry (or have it carried) away.

In their Lordships' judgment, the dues were paid for the right to sell off the land, which was the property of the Crown, the trees which could not be lawfully either cut for sale or sold off the land without permission. Hence the dues were paid in respect of an interest in the land—that is, in respect of the trees which till cut were part of the freehold, and in respect of their sale off the land. All this without the permit would have been a wrongful act or trespass. The contingent obligation on the Crown to refund was an integral part of the transaction.

It has been necessary to define the position of the entrant in order to deal with the questions of construction, on which depends the answer to the questions referred. These questions of construction arise on four separate contracts made between the Dominion on the one hand and the four several Provinces on the other. These contracts were all of the same character; in each case the Dominion undertook to transfer (or in the case of British Columbia to re-transfer) the Crown lands to the Province respectively in question; each agreement contained a number of detailed provisions not here material, and also contained certain financial terms under which annual sums were to be paid by the Dominion to the Province. The provisions directly relevant to this appeal are substantially identical in the four agreements. Those contained in clauses 1 and 2 of the Manitoba agreement, may be taken as typical and are as follows:—

> "1. In order that the Province may be in the same position as the original Provinces of Confederation are in virtue of section 109 of the British North America Act, 1867, the interest of the Crown in all Crown lands, mines, minerals (precious and base) and royalties derived therefrom within the Province, and all sums due or payable for such lands, mines, minerals or royalties shall, from and after the coming into force of this agreement, and subject as therein otherwise provided, belong to the Province, subject to any trusts existing in respect thereof, and to any interest other than that of the Crown in the same, and the said lands, mines, minerals and royalties shall be administered by the Province for the purposes thereof, subject, until the Legislature of the Province otherwise provides, to the provisions of any Act of the Parliament of Canada relating to such administration; any payment received by Canada in respect of any such lands, mines, minerals or royalties before the coming into force of this agreement shall continue to belong to Canada whether paid in advance or otherwise, the intention that, except as herein otherwise specially provided, Canada shall not be liable to account to the Province for any payment made in respect of any of the said lands, mines, minerals or royalties before the coming into force of this agreement, and that the Province shall not be liable to account to Canada for any such payment made thereafter.

"2. The Province will carry out in accordance with the terms thereof every contract to purchase or lease any Crown lands, mines or minerals and every other arrangement whereby any person has become entitled to any interest therein as against the Crown, and further agrees not to affect or alter any term of any such contract to purchase, lease or other arrangement by legislation or otherwise, except either with the consent of all the parties thereto other than Canada or in so far as any legislation may apply generally to all similar agreements relating to lands, mines or minerals in the Province or to interests therein, irrespective of who may be the parties thereto."

The respondent contends that under these clauses the Dominion is entitled to retain the payment made to the Dominion under Regulation 47 (*f*), but that the Province is bound to refund any amounts which may become due under the same Regulation to an entrant when he secures his patent. These contentions involve two main propositions: (1) that dues paid to the Dominion under the regulations constitute payments within clause 1 in respect of lands within the Province falling within the agreement, and (2) that the holder of an entry acquires his position under an arrangement whereby he becomes entitled to an interest in Crown lands in the Province as against the Crown or further or alternatively that a permit and payment of dues under Regulation 47 (*f*) is in itself such an arrangement. From these propositions it follows, it is contended, that under clause 1 the Dominion is entitled to retain without being liable to account to the Province all such payments, made before the coming into force of the agreement, but that under clause 2 the Province is bound to refund the amounts so paid by an entrant to him when he secures his patent, as being necessary to carry out the terms of such an arrangement as clause 2 specifies.

The Supreme Court has accepted these contentions as well founded, and their Lordships agree with the Supreme Court.

The appellants have argued that the dues so paid were merely deposits which the Dominion received and held simply as stakeholders subject to an obligation to refund in specie; hence it was contended, they could never be correctly described as payments which ever belonged or could continue to belong to the Dominion, the obligation to refund attached it was said to the specific monies paid; it was "the amount so paid" that was to be refunded and accordingly the hand which received was the hand to refund. Their Lordships, agreeing with the Supreme Court, do not accept these arguments. The dues when paid were in no sense impressed with a trust; they were paid so that they should belong to, or become the property of, the Dominion; there simply attached to the Dominion on payment a contingent personal obligation to refund a corresponding amount if or when an entrant secured his patent. The express words of the clause "continue to belong" cannot, in their Lordships' judgment, fairly be construed as importing a continuance of anything beyond the mere fact of "belonging," and the express words that

the Dominion were not to be "liable to account" also import the intention that the payments so received were to be put out of any future account between the Dominion and the Province. In effect a sharp line was to be drawn at the date at which the agreement should come into force: any such payments before that date were to be deemed to be for account of the Dominion, and any payments subsequently were to be for account of the Province. This construction is also supported by the words "whether in advance or not."

Clause 1 having thus dealt with the position that there was to be no accounting on either side for payments received according as the several payments fell either before or after the coming into force of the agreements; clause 2 dealt with liability to carry out obligations in respect of Crown lands in the respective Province. The appellants have contended that neither the original entry nor the securing of rights under Regulation 47 (*f*) can be described as "any other arrangement, etc.," within clause 2; in any event they further contended that what was to be carried out by the Province was limited to obligations such as the granting of letters patent to entrants or the fulfilling of obligation in respect of actual lands, such as trusts or onerous covenants. Their Lordships do not agree with either contention. The words "every other arrangement, etc.," following on the words "every contract to purchase or lease any Crown lands" seem singularly apt to describe the complex transaction under which an entrant was admitted, and one of the terms under which he was admitted was that if he had to pay dues under Regulation 47 (*f*) he should be entitled to have them refunded. These were terms which had to be carried out by the Dominion before the transfer of the lands to the Province, and accordingly are to be carried out by the Province after the transfer. The word arrangement is as Parke B. said in *Manning* v. *Eastern Counties Railway Co.*, 12 M. & W. 237, "a very wide and indefinite one." Their Lordships need not repeat what they have already said above in explaining their conclusion that there was in each such case not simply an arrangement, but an arrangement whereby the entrant became entitled to an interest in land. Equally, for reasons already stated, the actual payment of dues under regulation 47 (*f*) constituted such an arrangement, which, if occasion arises, must be carried out in accordance with its terms by refunding the appropriate amounts.

It may seem at first sight unfair that the Province should refund amounts which the Dominion has received, but it must be remembered that this is only one term in a complicated agreement which contains other financial readjustments; it may well have appeared convenient to the parties to avoid all further cross accounts and draw a hard-and-fast line at the date at which the agreement should come into force. In any case their Lordships think that this conclusion results from the true construction of the words of the agreement.

On this basis it follows that the obligations in question are as between the Dominion and the Provinces, obligations falling on the Province. There remains the question whether the right of an entrant to claim against the Dominion to be refunded, has been in any way affected. It is clear that the agreement in itself in no way binds the entrant: he is not a party to it and so far his rights have not been in any way affected. Nor does the fact that the agreement has in each case been confirmed by the British North America Act, 1930, which enacts that these agreements shall have the force of law, necessarily change the position. The entrant is, *quoad* his claim to be refunded, in the position of a creditor, and a creditor is not in law (except in a few cases such as bankruptcy) compellable to accept as his debtor any other person than the original debtor unless he so agrees. If he does so agree, there is a novation, that is, a new contract, under which the original debtor is discharged and a new debtor substituted in his place. But their Lordships agree with the Supreme Court that in the special circumstances of this case the statute of 1930 did effect such a novation. Under clause 2 it is the Province, to which the lands have been transferred, that can alone as a matter of law thereafter grant the patent to an entrant; the agreement, made law by the Act of 1930, requires the Province to carry out the various specified obligations in respect of the lands transferred; these obligations are now imposed on the Province by law; by the same reasoning they do not any longer attach to the Dominion; that implies that by law the entrant must go to the Province to obtain the carrying out of the various obligations which the statute of 1930 by confirming the agreement requires the Province to fulfil. It follows that even *vis-à-vis* the entrant the obligation has by force of the law become the obligation of the Province. Thus there is effected by force of the law what may be called a statutory novation.

If that were not so, the entrant would retain his claim as against the Dominion, while the Dominion, on settling the claim, would be entitled to be recouped by the Province. But that position, though perhaps not different in the final incidence of the burden, is obviously much less convenient. Nor is the decision now arrived at likely to prejudice the entrant. In any case he is bound by law.

In the result their Lordships are of opinion that the question numbered one should be answered as it was by the Supreme Court, the question numbered two therefore not arising, and that the appeal should be dismissed. In accordance with the usual practice in such cases there will be no order as to costs.

They will humbly so advise His Majesty.

In the Privy Council.

THE ATTORNEY-GENERAL OF MANITOBA AND OTHERS

v.

THE ATTORNEY-GENERAL OF CANADA.

DELIVERED BY LORD WRIGHT.

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