1930

Sept. 17.
Oct. 23.

HIS MAJESTY THE KING.....PLAINTIFF;

VS.

GEORGE W. RICHARDS ET AL.....DEFENDANTS.

Crown—Land Patent—Cancellation—Soldier Settlement Act, 1919—9-10 Geo. V, ch. 71—Section 94 of Dominion Lands Act—Right of Attorney-General to take action.

The Information exhibited herein seeks to have certain letters patent for land issued to Richards declared void as having been issued improvidently and in error. Some of the defendants oppose the cancellation of the said patent unless they be paid the advances made by them to R. in good faith, and for which they held liens duly registered as encumbrances against the said lands.

Held that this Court has jurisdiction to hear and determine the present action. (*The King* v. *Deacon*, 18 Ex. C.R. 308 referred to.)

2. That those provisions of "The Soldier Settlement Act" 1919 (9-10 Geo. V, c. 71) purporting to provide security to the Board without registration of said security and in priority to other bona fide creditors whose security has been registered are intra vires of the powers of the Parliament of Canada.

3. That sec. 94 of the Dominion Lands Act does not give the Minister of the Interior the exclusive right to institute such actions and does not take away the usual right and power of the Attorney-General to institute the same. That right is cumulative and may be exercised by either of them.

1930

THE KING v. RICHARDS ET AL.

ACTION by the Crown to have certain Letters Patent for lands cancelled and annulled. Judgment was given against the grantee by default.

The issues between the Crown and certain creditors contesting were tried before the Honourable Mr. Justice Audette at Calgary.

C. W. Niblock for plaintiff.

J. J. Kelly for defendants contesting.

The facts as agreed upon are stated in the Reasons for Judgment.

AUDETTE J., now (October 23, 1930), delivered judgment.

This is an information exhibited by the Attorney-General of Canada, on behalf of His Majesty the King, whereby it is sought, *inter alia,* to have certain letters patent respecting land declared void, as having been issued improvidently and in error, under the circumstances hereinafter mentioned. Furthermore praying

that all instruments or documents setting forth a claim as against the said land or any estate or interest on the part of the said defendants the Municipal District of Acadia No. 241 and Joseph Nels Anderson, or either of them are null and void and of no effect and are clouds upon the title of His Majesty the King, and that the same be, as to the said land, set aside.

On the 20th January, 1920, judgment by default was rendered against the added defendants Alice B. Richards, widow of the defendant George Wellington Richards, in her own behalf and as guardian of their infant children, declaring the letters patent issued to the late George Wellington Richards null and void and of no effect as against them.

A joint statement in defence on behalf of the Municipal District of Acadia, No. 241, and Joseph Nels Anderson, duly signed by same counsel appearing at trial, has been duly filed.

At the opening of the trial, as no one seemed to appear for the Municipal District of Acadia, in answer to the Court, counsel for the defendant Anderson declared he had no special instruction, on behalf of the Municipal District, but had been informed that the Crown, the Treasurer's Department of Alberta, had satisfied the Municipal District. However, counsel admitted he was acting for the Municipal

1930

THE KING v. RICHARDS ET AL.

Audette J.

District and that he had been served with both the information and notice of trial.

The following admission of facts has been duly filed at trial and reads as follows, viz:—

The following facts have been agreed to by the solicitors both for the Plaintiff and the Defendants, the Municipal District of Acadia No. 241 and Joseph Nels Anderson and are respectfully submitted for the consideration of this honourable court in determining the matters in question herein.

1. On the 17th day of February, 1912, the Defendant George W. Richards made homestead entry under the provisions of the Dominion Lands Act for the Northwest quarter of Section 35, in Township 24, and Range 1 West of the 4th Meridian in the Province of Alberta;

2. On the 30th day of June, 1919, and before the issue of letters patent for the said land, the Defendant George W. Richards received from the Soldier Settlement Board of Canada an advance by way of loan of the sum of $2,555, which said sum was so advanced to the said Defendant under the authority of The Soldier Settlement Act, being Chapter 71 of the Statutes of Canada, 1919;

3. In consideration of the said advance, the Defendant George W. Richards on the said 30th day of June, 1919, did execute and deliver to The Soldier Settlement Board of Canada an agreement or charge in writing whereby he agreed that until the repayment of the said advance, together with interest in the manner set out in the said agreement, the amount so advanced should be a first lien and charge upon the homestead and pre-emption of the said defendant, and that neither the said defendant, nor his heirs, executors, administrators or assigns, should be entitled to the issue of Letters Patent for the said lands until the said amount with all interest thereon should have been fully paid and satisfied, but that if His Majesty, or any of His successors, should see fit to issue Letters Patent for the said lands, the said amount should continue to be and remain a first lien and charge thereon.

4. The said agreement was, on the 29th day of July, 1919, duly registered against the said homestead of the defendant in the office of the Agent of the Dominion Lands at Calgary, Alberta.

5. On the 8th day of July, 1920, the Defendant Richards further charged his said homestead with repayment to the said Board of the sum of $100 advanced to him by the said Board, and by the terms of the said charge agreed that the said advance should be a first lien or charge on the said land and that he should not be entitled to issue of Letters Patent for the said land until repayment of the said advance. Notice of the said charge was duly given to the Agent of Dominion Lands at Calgary, on or about the 17th day of July, 1920.

6. During the month of November, 1919, the said Defendant Richards made application for Letters Patent covering the said homestead;

7. On or about the 17th day of February, 1920, His Majesty in the right of the Dominion of Canada, having regard to the facts set forth in the first paragraph of the Information filed herein and His officers in that behalf overlooking the facts set forth in the second, third, fourth and fifth paragraphs of the said Information, issued a patent to the said George Wellington Richards for the lands described in the said first paragraph, which said patent was issued improvidently and in error, and on or about the 16th day of March, 1920, forwarded to the Registrar of the

South Alberta Land Registration District at Calgary and was registered by the said registrar in his office at Calgary aforesaid on the 23rd day of March, 1920, as No. 1683 C.V.;

8. On or about the 18th day of March, 1920, in good faith and having no knowledge of the facts as stated in Paragraphs 2, 3, 4 and 5 hereof the Defendant, the Municipal District of Acadia No. 241 on application having been made by the Defendant Richards, as provided for in the Municipal Districts Seed Grain Act of Alberta Chapter 3 of the Revised Statutes of Alberta, 1922, and by virtue of the powers granted to the said Municipal District under the said Act, through its officers supplied seed grain to the Defendant, George Wellington Richards, to the value of $51.50 and $173.70 and on or about the 10th day of May, 1920, caused two seed grain liens to be registered as Nos. 8011 CY and 8012 CY respectively in the Land Titles Office for the South Alberta Land Registration District at Calgary against the title to the land in question herein to secure payment to the said Municipal District of the said sums, no portion of which has been paid and the said liens still remain registered as encumbrances against the title to the said lands.

9. On or about the 20th day of September, 1920, the Defendant Richards applied to the Defendant, Joseph Nels Anderson, to purchase certain building materials on the said North West quarter of Section 35, in Township 24 and Range 1 West of the 4th Meridian and informed the said Joseph Nels Anderson that he had obtained patent to the said lands and that it was free from encumbrances with the exception of certain seed grain liens in favour of the Municipal District of Acadia No. 241 and certain unpaid taxes and the said Joseph Nels Anderson caused a search of the said title to be made which disclosed that the said title was as stated to be by the Defendant Richards, and relying on the then state of the title to the said lands and having no knowledge of the facts as referred to in Paragraphs 2, 3, 4 and 5 hereof and in good faith, the Defendant Joseph Nels Anderson, supplied material on credit to the Defendant, George W. Richards, to the value of $505 and on the 24th day of September, 1920, caused a mechanics lien, pursuant to the Mechanics Lien Act of Alberta and as therein provided for, to be registered in the Land Titles Office for the South Alberta Land Registration District at Calgary as No. 1214 CO to secure payment of the aforementioned sum and the materials so supplied were used in the construction of a building on and which still remains on the said lands and no portion of the said sum of $505 or interest thereon has been paid to the said Joseph Nels Anderson and the said lien still remains an encumbrance against the title to the said land.

10. The said advances made by the Soldier Settlement Board have not been repaid in whole or in part;

11. As a result of the improvident and erroneous issue of the said letters patent the liens of the Defendants, the Municipal District of Acadia and Joseph Nels Anderson are registered against the said land in the said Land Titles Office in priority to the charges made by the Defendant Richards against the said land in favour of the said board.

12. On or about the 5th day of April, 1922, the Defendant George Wellington Richards executed three separate mortgages in favour of the Soldier Settlement Board of Canada against the said lands under the Land Titles Act for the Province of Alberta for amounts then representing the total indebtedness of the said Richards to the said board, which said mortgages were registered in the Land Titles Office for the South Alberta Land Registration District at Calgary one on the 18th day of

1930

THE KING v. RICHARDS ET AL.

Audette J.

April, 1922, as No. 8043 CO and the other two said mortgages on the 27th day of April, 1922, as Nos. 8338 CO and 8339 CO by or on behalf of the Soldier Settlement Board of Canada and the said mortgages still remain encumbrances against the title to the said lands.

Agreed to and approved as to form.

It is admitted that the defendant George Wellington Richards was a returned soldier.

The Exchequer Court of Canada has ample power and jurisdiction to hear and determine the present issue and controversy for the reasons mentioned in the case of *The King* v. *Deacon* (1) and the cases therein cited.

The defendant contends that "The Soldier Settlement Act, 1919" (9-10 Geo. V, Ch. 71) is *ultra vires* of the Parliament of Canada, in so far as it purports to provide security to the Board without registration of the said security and in priority to other bona fide creditors whose securities have been registered (Par. 6 of Statement in Defence). Here again I must find, also for the reasons mentioned in the case of *The King* v. *Deacon* (2), that such legislation is within the power of the Parliament of Canada. See also *Veilleux* v. *The Atlantic and Lake Superior Railway Co.* (3).

Section 26 of The Soldier Settlement Act, 1919, reads as follows, viz:

> Sec. 26. When a settler obtains Dominion Lands, whether by soldier grant or otherwise, and whether before or after having secured from the Board any advance pursuant to this Act, while there is owing by him to the Board any sum or sums of money as the result of any sale made to him by the Board, or otherwise by reason of the exercise by the Board of any of its powers under this Act, such sum so owing shall constitute a first charge on the lands so obtained and no patent shall be issued to such settler therefor until such sum or sums, with accrued interest, have been fully paid or repaid.

See also sections 33 and following.

Moreover, in the present case, it may be added that the defendant has contracted himself into this very obligation, recited in the statute, by the agreement (Exhibit No. 1) mentioned in paragraph 3 of the admission hereinbefore recited, whereby he acknowledges that the advances made to him *shall* be a first lien and charge upon his homestead and pre-emption. He further acknowledges thereby that

(1) (1919) 18 Ex. C.R. 308, at p. 319.

(2) (1919) 18 Ex. C.R. 308, at p. 317.

(3) (1910) Q.R. 39, S.C. 127.

he will not be entitled to the issue of letters patent until the full amount of the advances have been paid and satisfied.

Section 25 of the Dominion Lands Act (7-8 Ed. VII, Ch. 20) ceased to apply when the defendant entered into the agreement exhibit No. 1 and obtained advances under section 26 of The Soldier Settlement Act, 1919. He is now controlled and bound by the latter statute by the agreement.

Furthermore, the defendants contend that the present action should not have been instituted on behalf of the Crown by the Minister of Justice; but by the Minister of the Interior, resting his contention on section 94 (now 92 of R.S.C., 1927) of The Dominion Lands Act (7-8 Ed. VII, Ch. 20).

This section 94 reads as follows, viz:

94. Whenever letters patent, leases or other instruments respecting lands have issued through fraud, or improvidence, or in error, any court having competent jurisdiction in cases respecting real property in the province where the lands are situate may, upon action, bill or plaint respecting the lands, and upon hearing the parties interested, or upon default of the said parties after such notice of proceeding as the said court orders, decree or adjudge the letters patent, lease or other instrument to be void; and upon the filing of the decree or adjudication in the Department of the Interior at Ottawa, the letters patent, lease or other instrument shall be void; and if the letters patent, lease or other instrument have been registered in the registry office or the land titles office for the district in which the land described in the letters patent, lease or other instrument is situate, and if such letters patent, lease or other instrument have been adjudged void at the suit of the Minister he shall cause a copy of the decree or adjudication, certified to be a copy as provided by section ninety-eight of this Act, to be recorded forthwith in the said registry office or land titles office.

What this section actually says is nothing more than " if such letters patent, lease or other instrument *have been adjudged void at the suit of the Minister,*" etc., then certain procedure should be resorted to. It does not say that all such actions as those provided by the section shall be instituted exclusively by the Minister, who under the Act is the Minister of the Interior. That section cannot be constructed in any manner that would deprive His Majesty's Attorney-General of his established capacity as the legal representative of the Crown in the Courts. See Robertson, On Civil Proceedings, 9 *et seq.*

1930

THE KING v. RICHARDS ET AL.

Audette J.

Under our Canadian Act, Ch. 106, R.S.C., 1927, the duties of the Minister of Justice are clearly defined. And under section 5 thereof he is given the regulation and conduct of all litigation for or against the Crown. Moreover, he is entrusted with the powers and charged with the duties which belong to the office of the Attorney-General of England by *law or usage,* so far as those powers and duties are applicable to Canada.

Under Rule 2 of the General Rules and Orders of the Exchequer Court of Canada, "All suits on behalf of the "Crown in the interest of the Dominion of Canada are to be instituted by information filed in the name of the Attorney-General of Canada, etc."

In England, as set out in 7 Hals. 71, the King cannot appear in his own courts to support his interest, but he is represented by his attorney, who bears the title of His Majesty's Attorney-General; and that would also obtain in Canada.

The term "action" used in section 94 of the Dominion Lands Act, would in England, under the Rules of the Supreme Court, also include a proceeding by the Attorney-General formerly known as an information (1).

If there were ambiguity, in respect to this question, in the phraseology of section 94 of The Dominion Lands Act, which I find does not exist, it should be construed with reference to the existing state of the law. It is a fundamental rule of statute construction that Parliament must be assumed to have legislated with reference to the existing state of the law, and if there are no express words or necessary intention to the contrary in the enactment the existing law will only be taken to be changed in so far as is necessary for the efficient working of the Act. Consequently when a new jurisdiction is created, and there is no express or implied intention to supersede, by the new remedy, any remedy existing at the time of the passage of the Statute in question, the new remedy will be taken as an additional one to that already existing—in other words it would be a case of cumulative remedies. Lord Mansfield said in *R.* v. *Loxdale* (2):

(1) (1907) 1 Hals. 3.

(2) (1758) 1 Burr. 447.

Where there are different statutes *in pari materia* though made at different times, or even expired, and not referring to each other, they shall be taken and *construed together,* as one system, and as explanatory of each other.

And see Maxwell, On Statutes, 7 Ed. 144.

But repeal by implication is not favoured. A sufficient Act ought not to be held to be repealed by implication without some strong reason. It is a reasonable presumption that the Legislature did not intend to keep really contradictory enactments on the statute-book, or, on the other hand, to effect so important a measure as the repeal of a law without expressing an intention to do so. Such an interpretation, therefore, is not to be adopted, unless it be inevitable. Any reasonable construction which offers an escape from it is more likely to be in consonant with the real intention.

It is sometimes found that the conflict of two statutes is apparent only, as their objects are different and the language of each is restricted, as pointed out in a preceding chapter, to its own object or subject. When their language is so confined, they run in parallel lines, without meeting.

Therefore I find that while section 94 of The Dominion Lands Act gives by implication the right, *with others,* to the Minister of Finance, to institute an action in such cases, that it does not take away the usual right and power of the Attorney-General to also institute such action. They both have the right to institute such action, the right is cumulative and may be exercised by either of them and I find that the present action is rightly instituted. This section 94 does not afford any ground for the contention that the action was wrongly instituted by His Majesty the King, on the information of the Attorney-General of Canada.

Therefore there will be judgment in the terms of the prayer of the information; but without costs to either party, as the circumstances of the case would not justify a condemnation for costs against either party.

Judgment accordingly.