THE PRECIOUS METALS CASE.

Judgement of the Lords of the Judicial Committee of the Privy Council on the Appeal of the Attorney-General of British Columbia v. *The Attorney-General of Canada, from the Supreme Court of Canada; delivered 3rd April, 1889.*

PRESENT:

THE LORD CHANCELLOR.
LORD WATSON.
LORD FITZGERALD.
LORD HOBHOUSE.
LORD MACNAGHTEN.

[*Delivered by Lord Watson.*]

The question involved in this appeal is one of considerable interest to the parties, but it will be found to lie within a very narrow compass, when the facts, as to which there is no dispute, are explained.

By an Order in Council, dated the 16th May, 1871, Her Majesty, in pursuance of the enactments of Section 146 of the "British North America Act, 1867," was pleased to ordain that the Province of British Columbia should, from the 29th day of July following, be admitted into and form part of the Dominion of Canada, subject to the provisions of that Act, and to certain Articles of Union which had been duly sanctioned by the Parliaments of Canada and by the Legislature of British Columbia. The eleventh of the Articles of Union is in these terms:—

"11. The Government of the Dominion undertake to secure the commencement simultaneously, within two years from the date of union, of the construction of a railway from the Pacific towards the Rocky Mountains, and from such point as may be selected east of the Rocky Mountains towards the Pacific, to connect the seaboard of British Columbia with the railway system of Canada; and further, to secure the completion of such railway within ten years from the date of the union.

"And the Government of British Columbia agree to convey to the Dominion Government, in trust, to be appropriated in such manner as the Dominion may deem advisable in furtherance of the construction of the said railway, a similar extent of public lands along the line of railway throughout its entire length in British Columbia, not to exceed, however, twenty (20) miles on each side of said line, as may be appropriated for the same purpose by the Dominion Government from the public lands in the North-West Territories and the Province of Manitoba. Provided, that the quantity of land which may be held under pre-emption right, or by Crown grant, within the limits of the tract of land in British Columbia to be so conveyed to the Dominion Government shall be made good to the Dominion from contiguous public lands; and, provided further, that until the commencement within two years, as aforesaid, from the date of the union, of the construction of the said railway, the Government of British Columbia shall not sell or alienate any further portions of the public lands of British Columbia in any other way than under right of pre-emption, requiring actual residence of the pre-emptor on the land claimed by him. In consideration of the land so to be conveyed in aid of the construction of the said railway, the Dominion Government agree to pay to British Columbia, from the date of the union, the sum of 100,000 dollars per annum, in half-yearly payments in advance."

After the union, owing to engineering and other difficulties, there was considerable delay in constructing the line of railway through British Columbia. Various differences arose between the two Governments, and these were ultimately settled, in the year 1883, by a provisional agreement, which was subsequently ratified by the respective Legislatures of Canada and the Province. Part of the agreement had reference to the eleventh Article of Union, which is modified to the following extent: The Government of British Columbia agreed to convey to the Government of the Dominion, as therein provided, the public lands along the railway, wherever it might be finally located, to a width of 20 miles on either side of the line, and, in addition, to convey to the Dominion Government three and a half millions of acres of land in the Peace River District, in one rectangular block, east of the Rocky Mountains, and joining the North-West Territory of Canada. On the other hand, the Dominion Government undertook, with all convenient speed, to offer for sale the lands within the railway belt, on liberal terms, to actual settlers; and also to give to persons who had squatted on these lands a prior right of purchasing the lands improved, at the rates charged to settlers generally. In accordance with this agreement, the lands forming the railway belt were granted to the Dominion Government, in terms of the eleventh Article of Union, by an Act of the Legislature of British Columbia, 47 Vict., cap. 14, sect. 2.

In 1884, a controversy arose between the Dominion and the Provincial Government in regard to the gold, which had then been found to exist in considerable quantities within the forty-mile belt. With the view of judicially ascertaining which of them was entitled to it, a special case was adjusted, commendable for its brevity, which simply states the issue to be, whether the precious metals in, upon, and under the lands within the forty-mile belt are vested in the Crown, as represented by the Government of Canada, or as represented by the Government of British Columbia? The case was first presented to Fournier, J., in the Exchequer Court of Canada, who, without hearing parties on the merits, gave a formal judgement in favour of the Dominion. On appeal, his judgement was, after a full hearing, affirmed by a majority of the Supreme Court of Canada, consisting of Sir William Ritchie, C. J., with Taschereau and Gwynne, J. J., the dissentient members of the Court being Fournier and Henry, J. J.

It was not disputed, in the arguments adressed to this Board, that the question raised in the special case must be decided according to the principles of the law of England, which,, "so "far as not from local circumstances inapplicable," was extended to all parts of the Colony of British Columbia by "The English Law Ordinance, 1867."

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 eleventh Article of Union. The Act 47 Vict., cap. 14, sect. 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 to appropriate their revenues. It was neither intended that the lands should be taken out of the Province, nor that the Dominion Government should occupy the position of a freeholder within the Province. The object of the Dominion Government was to recoup the cost of constructing the railway by selling the land to settlers. Whenever land is so disposed of, the interest of the Dominion comes to an end. The land then ceases to be public land, and reverts to the same position as if it had been settled by the Provincial Government in the ordinary course of its administration. That was apparantly the consideration which led to the insertion, in the Agreement of 1883, of the condition that the Government of Canada should offer the land for sale, on liberal terms, with all convenient speed.

According to the law of England, gold and silver mines, until they have been aptly severed from the title of the Crown, and vested in a subject, are not regarded as *partes soli*, or as incidents of the land in which they are found. Not only so, but the right of the Crown to land, and the baser metals which it contains, stands upon a different title from that to which its

right to the precious metals must be ascribed. In the Mines Case (1 Plowden, 366, 336*a*) all the Justices and Barons agreed that, in the case of the baser metals, no prerogative is given to the Crown; whereas "all mines of gold and silver within the realm, whether they be in the "lands of the Queen or of subjects, belong to the Queen by prerogative, with liberty to dig and "carry away the ores thereof, and with other such incidents thereto as are necessary to be used "for the getting of the ore." In British Columbia the right to public lands, and the right to precious metals in all provincial lands, whether public or private, still rest upon titles as distinct as if the Crown had never parted with its beneficial interests; and the Crown assigned these beneficial interests to the Government of the Province, in order that they might be appropriated to the same State purposes to which they would have been applicable, if they had remained in the possession of the Crown. Although the Provincial Government has now the disposal of all revenues derived from prerogative rights connected with land or minerals in British Columbia, these revenues differ in legal quality from the ordinary territorial revenues of the Crown. 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 appropriate 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 grounds upon which the majority of the learned Judges of the Supreme Court decided in favour of the Dominion are briefly and forcibly stated in the judgement delivered by Sir William Ritchie, C. J. They were of opinion that the rule of construction which excepts the precious metals from a conveyance of land by the Crown to a subject has no application to the provisions of the eleventh Article of Union, which they regarded as a statutory compact between two constitutional Governments. The learned Chief Justice said,—"This was a "statutory arrangement between the Government of the Dominion and the Government of "British Columbia, in settlement of a constitutional question between the two Governments, "or rather giving effect to and carrying out the constitutional compact under which British "Columbia became part and parcel of the Dominion of Canada, and, as a part of that arrange-"ment, the Government of British Columbia relinquished to the Dominion of Canada, as "represented by the Governor-General, all right to certain public lands belonging to the Crown, "or to the Province of British Columbia, as represented by the Lieutenant-Governor."

If the eleventh Article of Union had been an independent treaty between the two Governments, which obviously contemplated the cession by the Province of all its interests in the land forming the railway belt, Royal as well as territorial, to the Dominion Government, the conclusion of the Court below would have been inevitable. But their Lordships are unable to regard its provisions in that light. The eleventh 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 eleventh 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.

Their Lordships do not think it admits of doubt, and it was not disputed at the bar, that Section 109 of the British North America Act must now be read as if British Columbia was one of the Provinces therein enumerated. With that alteration, it enacts that "all lands, mines, "minerals, and royalties," which belonged to British Columbia at the time of the union, shall for the future belong to that Province and not to the Dominion. In order to construe the exception from that enactment, which is created by the eleventh Article of Union, it is necessary to ascertain what is comprehended in each of the words of the enumeration, and particularly in the word "royalties." The scope and meaning of that term, as it occurs in Section 109, underwent careful consideration in the case of "Attorney-General of Ontario *v.* Mercer" (8 Ap. Ca., 767), which was appealed to this Board by the Dominion Government, in name of Defendant Mercer. In that case, their Lordships were of opinion that the mention of "mines and minerals" in the context was not enough to deprive the word "royalties" of what would otherwise have been its proper force (8 Ap. Ca., 777). The Earl of Selborne, in delivering the judgement of the Board, said (8 Ap. Ca., 778), "It appears, however, to their Lordships to be "a fallacy to assume that because the word 'royalties' in this context would not be regarded

"as inofficious or insensible, if it were regarded as having reference to mines and minerals, it "ought, therefore, to be limited to those subjects. They see no reason why it should not have "its primary and appropriate sense, as to (at all events) all the subjects with which it is here "found associated, lands as well as mines and minerals,—even as to mines and minerals it here "necessarily signifies rights belonging to the Crown *jure coronæ*."

It is not necessary, for the purposes of this appeal, to consider whether the expression "royalties," as used in Section 109, includes *jura regalia* other than those connected with lands, mines, and minerals. "Attorney-General of Ontario *v.* Mercer" is an authority to the effect that, within the meaning of the clause, the word "royalties" comprehends, at least, all revenues arising from the prerogative rights of the Crown in connection with "lands," "mines," and "minerals." The exception created by the eleventh Article of Union, from the rights specially assigned to the Province by Section 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 Section 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 land in British Columbia. But *jura regala* are not accessories of land; and their Lordships are of opinion that the rights to which the Dominion Government became entitled under the eleventh Article did not, to any extent, derogate from the Provincial right to "royalties" connected with mines and minerals, under Section 109 of the British North America Act.

Their Lordships do not doubt that the eleventh Article of Union might have been so expressed as to show, by necessary implication, that some or all of the royalties dealt with by Section 109 were to pass to the Dominion along with the lands constituting the railway belt. But there is not a single expression in the context which is applicable to gold or gold mining rights. On the other hand, the whole terms of the Articles of Union, as well as of the subsequent Agreement of 1883, appear to their Lordships to point to the conclusion that the high contracting parties were dealing with public lands, in so far as these were available for the ordinary purposes of settlement, and had either excluded gold mines from their arrangements, or had them not in contemplation. It is right, however, to notice that the learned Chief Justice refers to a minute of the Council of British Columbia containing the recommendation of a Committee, which was communicated to the Government of Canada, as evidencing an understanding, on the part of the Provincial Government, that mines of gold and other precious metals were to be conveyed along with the belt lands. The passage upon which the learned Chief Justice relies is in these terms,—"That it be one of the conditions that the Dominion "Government, in dealing with lands in the Province, shall establish a land system equally as "liberal, both as to mining and agricultural industries, as that in force in this Province at the "present time, and that no delay shall take place in throwing open the land for settlement." The words "mining and agricultural industries," taken *per se*, might be of dubious import, because they would not disclose whether gold digging was referred to as one of the mining industries. But these industries are described as an integral part of the "land system;" and, when it is considered that, at the date of the report, the system of land settlement in the Province, which included the baser metals, was regulated by special statute, and that gold mines, which were not given off to settlers, were not treated as part of that system, but were the subject of separate legislation, it becomes apparent that the Committee did not make any reference to gold in their recommendation.

Their Lordships are for these reasons of opinion that the judgement appealed from must be reversed, and that it ought to be declared that the precious metals within the railway belt are vested in the Crown, subject to the control and disposal of the Government of British Columbia, and they will humbly advise Her Majesty to that effect. There will be no order as to costs.

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