

ARTHUR STANHOPE FARWELL } APPELLANT;
 (DEFENDANT).....

1893
 *Oct. 19.

AND

THE QUEEN, ON THE INFORMATION OF THE ATTORNEY GENERAL FOR THE DOMINION OF CANADA (PLAINTIFF)..... } RESPONDENT.

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 *Feb. 20.

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA.

Information of intrusion—Subsequent action—Res judicata—Beneficial interest in land—Jurisdiction of the Exchequer Court—British North America Act, section 101.

In proceedings on an information of intrusion exhibited by the Attorney General of Canada against the appellant, it had been adjudged that the appellant, who claimed title under a grant from the crown under the Great Seal of British Columbia, should deliver up possession of certain lands situate within the railway belt in that province. *The Queen v. Farwell* (14 Can. S. C. R. 392.)

The appellant having registered his grant and taken steps to procure an indefeasible title from the registrar of titles of British Columbia, thus preventing grantees of the crown from obtaining a registered title, another information was exhibited by the Attorney General to direct the appellant to execute to the crown in right of Canada a surrender or conveyance of the said lands.

Held. 1. That the judgement in intrusion was conclusive against the appellant as to the title. *The Queen v. Farwell* (14 Can. S. C. R. 392) and *Attorney General of British Columbia v. Attorney General of Canada*, (14 App. Cas. 295) commented on and distinguished.

2. That the proceedings on the information of intrusion did not preclude the crown from the further remedy claimed.
3. That the crown in right of the Dominion had a right to take proceedings to restrain an individual from making use of a provincial grant in a way to embarrass the Dominion in the exercise of its territorial rights.

*PRESENT :—Sir Henry Strong C. J., and Fournier, Taschereau, Gwynne and King JJ.

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4. That the rights of the crown, territorial or prerogative, are to be passed under the Great Seal of the Dominion or Province (as the case may be) in which is vested the beneficial interest therein.
5. And that the Parliament of Canada had the right to enact that all actions and suits of a civil nature at common law or equity, in which the crown in right of the Dominion is plaintiff or petitioner, may be brought in the Exchequer Court. *Taschereau J. dubitante.*

APPEAL from a judgment of the Exchequer Court of Canada (1), ordering the appellant to execute to Her Majesty the Queen, in the right of Canada, a surrender or conveyance of certain lands in British Columbia and reserving to the crown the right to apply for an order restraining the defendant from further prosecuting his proceedings before the Registrar General of Titles.

This was an information at the suit of Her Majesty's Attorney General for the Dominion of Canada, to obtain an order of the court directing the defendant to execute a conveyance to Her Majesty, in right of the Dominion, of certain lands in the railway belt of British Columbia.

The facts and pleadings are fully stated in the judgment hereinafter given. See also the report of the case in the Exchequer Court (1).

McCarthy Q.C. for appellant contended, 1st, that the Parliament of Canada could not give concurrent original jurisdiction to the Exchequer Court in actions and suits of a civil nature at common law or equity.

2. That the Exchequer Court had no jurisdiction in the premises, inasmuch as the respondent is not entitled to the legal estate in the said lands by reason of the judgment of the Privy Council in the "Precious Metals Case." (2)

3. That the said court had no jurisdiction to entertain an action, the gist of which is the direct impeachment of a provincial crown grant.

(1) 3 Ex. C.R. 271.

(2) 14 App. Cas. 295.

4. That if the said court had jurisdiction the court erred in holding that the matter of the validity of the appellant's crown grant was *res judicata*, the respondent's right to possession being alone determined.

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5. That if the question of the validity of the said crown grant is *res judicata* by reason of the former judgment of this court, no further relief in respect of the same should be awarded against the appellant, said judgment being erroneous.

6. That the appellant was protected by virtue of the provisions of the Land Registry Act which bound the Government of Canada.

7. That if the whole matter of the appellant's title by conveyance from Prevost was *res judicata*, and the court had jurisdiction, then the respondent was barred from bringing this action by reason of the former recovery. And in addition to the cases and authorities cited in the Exchequer Court (1), the learned counsel referred to British North America Act, section 101, and section 92, subsections 13 and 14; Clement's Canadian Constitution (2); Chitty on Prerogatives (3); Freeman on judgments (4); *Sawyer v. Woodbury* (5); *Barrs v. Jackson* (6); *Queen v. Hutchings* (7); *Abouloff v. Oppenheimer* (8); *Russell v. Place* (9); *Bell v. Merrifield* (1); Consolidated Acts, 1888, B. C. ch. 31, secs 18 and 35; *Flint v. Attorney General of Canada* (11); Everest & Strode on Estoppel (12).

Hogg Q.C. for the respondent, on the question of jurisdiction, cited and relied on 50 & 51 Vic. ch. 16, sec. 17, ss. (d); British North America Act, sec. 101.

(1) See 3 Ex. C. R. 271.

(7) 6 Q. B. D. 304.

(2) P. 228 *et seq.*, and 513 *et seq.*

(8) 10 Q. B. D. 307.

(3) P. 389, sec. 2.

(9) 94 U.S.R. 606.

(4) Ed. 1892 sec. 2.

(10) 109 N.Y. 202; 4 Am. St.

(5) 7 Gray (Mass.) 499.

Repts. 436.

(6) 1 Y. & C. Chy. Repts. 585.

(11) 16 Can. S. C. R. 707.

(12) P. 60.

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As to *res judicata* the decision of this court in the former action of *Furwell v. The Queen* concludes the appellants (1); also see *Chitty on Prerogatives* (2); *Dynes v. Bales* (3); *Harkin v. Rabidon* (4); *Truesdell v. Cook* (5); *Shaw v. Ledyard* (6); *Keefer v. Mackay* (7); *Manning's Exchequer Pr.* (8); *Cons. Acts of B.C.*, 1888, ch. 67, secs. 13, 18, 20, 31, 54, 74 and 89; *Story's Equity Jurisprudence* (9); *Ont. Industrial Loan and Investment Company v. Lindsay* (10); *Charlton v. Watson* (11); *Re Bobier & Ont. Investment Association* (12); *Ftower v. Martin* (13); See also argument for plaintiff in 3 Ex. C. R. p. 279 *et seq.*

THE CHIEF JUSTICE.—I am of opinion that this appeal should be dismissed for the reasons given in the judgment of Mr. Justice King.

FOURNIER J.—I have also come to the same conclusion.

TASCHEREAU J.—I have doubts on the question of jurisdiction of the Exchequer Court on this information. On the merits, I concur in the dismissal of the appeal upon the grounds set forth in the judgment of the Exchequer Court.

GWYNNE J.—I am also of opinion that this appeal should be dismissed.

KING J.—By the judgment of the Exchequer Court the appellant (the defendant below) was ordered to

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| (1) 14 Can. S. C. R. 392. | (7) 10 Ont. P. R. 345. |
| (2) P. 334-381. | (8) 200 and 106, 122. |
| (3) 25 Gr. 593. | (9) Sec. 705. |
| (4) 7 Gr. 243. | (10) 3 O. R. 66. |
| (5) 18 Gr. 532. | (11) 4 O. R. 489. |
| (6) 12 Gr. 382. | (12) 16 O. R. 259. |

(13) 2 Mylne and C. 459.

execute to the Queen, in right of Canada, a surrender or conveyance of the unsold portions of certain lands in British Columbia.

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These lands are within what is known as the railway belt, a tract of land transferred to the Dominion by Act of British Columbia, 47 Vic. ch. 14 (1883). In October, 1885, an information of intrusion was filed against Farwell in respect of the lands in question. He then set up as a defence that his possession was under a grant to him issued by the Queen under the great seal of British Columbia in January, 1885, and that prior thereto the lands were in the hands and possession of the Queen. To this the Attorney General of Canada replied that, at the date referred to, the lands were in the hands and possession of the Queen, in right of the Dominion, and not in right of the province. It was so held by the Supreme Court of Canada, (1) and the defendant was put out of possession on 6th January, 1892.

Prior to the filing of information of the intrusion, *i.e.*, in March, 1885, Farwell began to take steps to secure for himself a certificate of indefeasible title under the "Land Registry Act" of British Columbia, and upon the lapse of the statutable period of seven years, sought to perfect his title under the land laws of the province by applying to the registrar of titles for certificate of indefeasible title. The effect of this, if granted, would be to prevent any purchaser from the crown in right of Canada from obtaining registry of his title, and to put a blot upon the title of the crown; and accordingly, upon public notice by the Registrar General of defendant's application, objections to the issue of the certificate were made on behalf of the Attorney General of Canada, and subsequently it was agreed that the matter before the registrar should stand

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

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over until the final determination of the present action that had been previously begun.

The appellant contends that he is not concluded by the former judgment, because it related to the possession only, and that no further effect should be given to the judgment in that case, because, as he contends, the judgment of the judicial committee in *Attorney General of British Columbia v. Attorney General of Canada* (1) has subverted or weakened the foundations of the judgment in *Queen v. Farwell* (2). As to the first point: Where the parties (themselves or privies) are the same, and the cause of action is the same, the estoppel extends to all matters which were, or might properly have been, brought into litigation. Where the parties (themselves or privies) are the same, but the cause of action is different, the estoppel is as to matters which, having been brought in issue, the finding upon them was material to the former decision. Here the rights of the province and the Dominion were before the court, not as a matter collateral or incidentally cognizable, but as material, upon the pleadings, in the determination of whether there had been an intrusion or not.

But, secondly, there is no inconsistency between *Queen v. Farwell* (2), and *Attorney General of British Columbia v. Attorney General of Canada* (1). The former case held that the act of British Columbia transferred to the Dominion the rights in the lands which had been formerly enjoyed by the province. The latter held that the act transferred to the Dominion those rights only, and did not transfer the *jura regalia*, including therein the precious metals then in question. These were held to be in the crown, subject to the control and disposal of the Government of British Columbia.

(1) 14 App. Cas. 295.

(2) 14 Can. S.C.R. 392.

Certain expressions in the latter judgment, at pp. 301 and 302 are relied upon by the learned counsel for appellant to show that the right of the Dominion is not as great as the respondent contends for. Mr. Justice Burbidge has, however, explained these passages satisfactorily.

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Perhaps a reference to other passages in confirmation may not be superfluous.

In the *St. Catherines Milling Co. v. The Queen* (1), the same learned Lord who delivered the opinion of the judicial committee in the "precious metal case," speaking of the effect of the Imperial Civil List Act of 1840, in relation to the crown lands in Canada, says:—

There was no transfer to the province of any legal estate in the crown lands, which continued to be vested in the Sovereign; but all moneys realized by sales or in any other manner became the property of the province. In other words, all beneficial interest in such lands within the provincial boundaries belonging to the Queen, and either producing or capable of producing revenue, passed to the province, the title still remaining in the Crown.

And then, speaking of the distribution of property under the British North America Act:—

It must always be kept in view that, wherever public land with its incidents is described as 'the property of' or as 'belonging to' the Dominion or a province, these expressions merely import that the right to its beneficial use, or to its proceeds, has been appropriated to the Dominion or the province, as the case may be, and is subject to the control of the legislature, the land of itself being vested in the crown.

Then in the case under consideration, the "precious metal case," (2) the same principles are stated in their application to the territorial rights of the crown on the one hand, and to the prerogative rights of the crown in connection with such lands on the other. In the one case, as in the other, the title is in the Sovereign; but whilst, prior to the act of 1883, the entire beneficial interest, both as to the territorial and the prerogative

(1) 14 App. Cas. 46.

(2) 14 App. Cas. 295.

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rights of the crown, was in the province, and subject to the control of the government and legislature of the province, the effect of that act was to sever the beneficial interests, and to assign or appropriate the beneficial interest in the crown's territorial rights to the Dominion, retaining to the province the beneficial interest in the *jura regalia* or prerogative rights of the crown in connection with such lands.

Thus, at page 302, it is said :—

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, those 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.

Again at page 305 :—

The expression 'lands' in the 11th article of Union admittedly carries with it the baser metals, *i.e.* 'mines' and 'minerals' in the sense of section 109 of the British North America Act. Mines and minerals, in that sense, are incidents of land. But *jura regalia* are not accessories of land ; and their Lordships are of opinion that the rights to which the Dominion Government became entitled under the 11th article did not, to any extent, derogate from the provincial right to 'royalties' connected with mines and minerals under section 109 of the British North America Act.

It is thus abundantly (and perhaps unnecessarily) shown that the beneficial interest in the crown's territorial rights, as distinguished from the *jura regalia*, are appropriated to and held by the Dominion as fully and

effectually, and by the same tenure, as the same had been previously appropriated to and held by the province. The title is in the Sovereign in right of the Dominion, in the same sense (as to territorial rights) as it was in the Sovereign in the right of British Columbia before the act of 1883. Mr. Justice Burbidge has effectually disposed of the suggestion that, upon a sale of the lands by the Dominion, the grant is to be passed under the great seal of British Columbia on application of the Dominion. The rights of the crown, territorial or prerogative, are to be passed under the great seal of the Dominion or province (as the case may be) in which is vested the beneficial interest therein, otherwise they cannot be said to be enjoyed by it, or under its control.

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It is further contended that the Exchequer Court has no jurisdiction to entertain an action to impeach a provincial crown grant. But the effect of this action is to restrain an individual from making use of a provincial grant in a way to embarrass the Dominion in the exercise of territorial rights which a statute of the province had previously vested in the Dominion. Having taken his provincial grant with knowledge of the Dominion's rights, and having put a blot on the title of the Dominion in the registry of titles in British Columbia, he is required to remove the blot, and so give unrestrained effect to what the province had agreed to do.

It is then said that the crown should have sought this remedy in the action for intrusion. This is also dealt with effectually in the judgment appealed from, and, on principle, there is nothing requiring dissimilar rights to be enforced at the same time.

The remaining objection is that the Parliament of Canada had no power to give to the Exchequer Court original jurisdiction "in all actions and suits of a civil

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nature at common law or equity in which the crown is plaintiff or petitioner." It is contended that the power of Parliament, in the establishment of courts, is limited by the British North America Act to the establishing of a court of appeal or other courts for the better administration of the laws of Canada. But "the King has the undoubted privilege of suing in any court he pleases." Chitty on Prerogatives. (1)

And where the matter in suit in another court concerns the revenue, or touches the profit of the King, he has the right to remove the suit into the Exchequer.

See the illustrations given of this in *Cawthorne v. Campbell* (2). This privilege is said to be "without the least mixture of prerogative process; or whether it is a proper subject for prerogative process only to act upon or not, that is not an ingredient." (3)

It follows, in my mind, that the crown, by and with the advice and consent of the Houses of Parliament, must have the right (a right which it would need clear words to take away) to enact that all actions and suits of a civil nature at common law or equity, in which the crown in right of the Dominion is plaintiff or petitioner, may be brought in the Exchequer Court—the right to establish which with its other branches of jurisdiction is undisputed and indisputable.

Agreeing with the judgment of Mr. Justice Burbidge I think the appeal should be dismissed.

Appeal dismissed with costs.

Solicitors for appellant: *McIntyre, Code & Orde.*

Solicitors for respondent: *O'Connor & Hogg.*

(1) P. 244.

(2) 1 Anstruther, p. 205 in note.

(3) P. 218.