THE ATTORNEY GENERAL OF BRITISH COLUMBIA ..... } APPELLANT;

AND

THE ATTORNEY GENERAL OF CANADA ..... } RESPONDENT.

1886
Nov. 29.
1887
Dec. 13.

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA.

B. N. A. Act sec. 92 sub-sec. 5, ss. 109 & 146—47 Vic. ch. 14 sec. 2 (B.C.)—Provincial public lands—transfer of to Dominion of Canada—Effect of—Precious metals—Claim of Dominion Government to.

By section 11 of the Order in Council passed in virtue of sec. 146 of the B. N. A. act, under which British Columbia was admitted into the Union it was provided as follows:—

And the Government of British Columbia agree to convey to the Dominion Government, in trust, to be appropriated in such manner as the Dominion Government may deem advisable in furtherance of the construction of the said railway, (C. P. R.) 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 the said line, as may be appropriated for the same purpose by the Dominion Government from the public lands of the North-West Territories and the Province of Manitoba.

By 47 Vic. ch. 14 sec. 2 (B. C.) it was enacted as follows:—From and after the passing of this act there shall be, and there is hereby granted to the Dominion Government, for the purpose of constructing and to aid in the construction of the portion of the Canadian Pacific Railway on the mainland of British Columbia, in trust, to be appropriated as the Dominion Government may deem advisable, the public lands along the line of railway before mentioned, wherever it may be finally located to a width of twenty miles on each side of the said line, as provided in the Order in Council, sec. 11, admitting the Province of British Columbia into confederation.

A controversy having arisen in respect of the ownership of the precious metals in and under the lands so conveyed, the Exchequer

---

*PRESENT—Sir W. J. Ritchie C.J. and Fournier, Henry, Taschereau and Gwynne JJ.

1886

ATTY. GEN. OF BRITISH COLUMBIA v. ATTY. GEN. OF CANADA.

Court, upon consent and without argument, gave judgment in favor of the Dominion Government. On appeal to the Supreme Court:

Held, affirming the judgment of the Exchequer Court, Fournier and Henry JJ. dissenting, that under the order in council admitting British Columbia into confederation and the statutes transferring the public lands described therein, the precious metals in, upon, and under such public lands are now vested in the crown as represented by the Dominion Government.

APPEAL from the judgment of the Exchequer Court rendered in favor of the respondent upon a stated case between the Attorney General of Canada and the Attorney General of British Columbia. The stated case was as follows:—

"The Attorney General of Canada alleges, and

"The Attorney General of British Columbia denies:

"That the precious metals in, upon and under the "public lands mentioned in section 2 of the act of the "Legislature of British Columbia, 47 Vic. ch. 14, inti- "tuled, 'An Act relating to the Island Railway, the "Graving Dock and Railway Lands of the Province,' "are vested in the crown as represented by the Gov- "ernment of Canada, and not as represented by the "Government of British Columbia.

"A controversy having arisen in respect of the "premises, it is submitted for the decision of the said "court pursuant to the provisions of 'The Supreme "and Exchequer Court Act,' and the act of the Legis- "lature of British Columbia, 45 Vic. ch. 2, intituled, "'An Act to amend the act respecting the Supreme "Court of Canada and the Exchequer Court of "Canada.'"

The judgment appealed from is as follows:—

"The special case herein coming on to be heard be- "fore this court this day, in presence of counsel as well "for the Attorney-General of Canada, as for the Attorney- "General of British Columbia, whereupon and upon "reading the said special case, and hearing what was

"alleged by counsel aforesaid, this court did order and "adjudge, that the precious metals in, upon and under "the public lands mentioned in sec. 2 of the act of the "Legislature of British Columbia, 47 Vic., ch. 14, in- "tituled "An Act relating to the Island Railway, "the Graving Dock and Railway Lands of the Pro- "vince" are vested in the crown as represented by the "Government of Canada, and not as represented by the "Government of British Columbia."

The Orders in Council and statutes upon which the controversy arose are fully set out in the judgments hereinafter given.

The decision of the Exchequer Court was taken by consent and without argument, in order to facilitate the bringing of the case directly to the Supreme Court.

McCarthy Q.C. for the appellant:

The object of the grant of these public lands was to enable the Dominion Government to assist the Canadian Pacific Railway; it was not for the purpose of handing them over as forming part of the territory over which the Dominion legislature exercise control as over the North-West Territories, but to aid in the construction of the Canadian Pacific Railway.

[TASCHEREAU J.—If the lands had been granted to the Canadian Pacific Railway Co., is it admitted the gold and silver mines would belong to British Columbia?]

Yes, that point is admitted. By section 10 of the terms of union, the provisions of the British North America Act are made applicable to British Columbia, as if it had been one of the Provinces originally united, and by section 146 of the British North America Act the terms of union have the same effect as if enacted by the Imperial Parliament.

By section 92 of the British North America Act, par. 5, the management and sale of the public lands of the Province, and of the timber and wood thereon,

1886

ATTY. GEN. OF BRITISH COLUMBIA. v. ATTY. GEN OF CANADA.

are preserved to the Province. So also, by sec. 109, it is distinctly enacted that "all lands, mines, minerals "and royalties belonging to the several Provinces " . . . shall belong to the several Provinces . . " . . subject to any trusts existing in respect there- "of, and to any interest other than that of the Province "in the same."

We contend, therefore, that the words "public "lands, "in the terms of union, in the B. N. A. Act, and in the section under discussion, do not include mines or minerals; the words have their ordinary significance only, and are so dealt with in the B. N. A. Act, and as not including mines or minerals, or royalties. Where the latter are intended to be dealt with, apt and precise words are used so as to designate them as a subject matter wholly distinct from public lands.

The prerogative right of the crown to gold and silver found in mines will not pass under a grant from the crown unless by apt and precise words the intention of the crown be expressed that it shall pass, and the prerogative rights of the crown can be affected only by express words. The great case of Mines (1), followed by *Woolly* v. *Attorney-General of Victoria* (2), and cases there cited. See also *Attorney-General of Ontario* v. *Mercer* (3) as to construction of sec. 109 of the British North America Act. Now, the Province, though it has conveyed this railway belt to the Dominion has not excised that tract of land from the Province; it remains part of the Provincial territory, subject to Provincial legislation. If it does not so remain, or if, in other words, the Dominion Government is to be treated in a better manner than an ordinary grantee from the crown, the argument carried to its legitimate conclusion would eliminate the railway belt from the bound-

(1) 1 Plow. 310 (2) 2 App. Cas. 166.
(3) 8 App. Cas. 767.

aries of the Province. In the different land laws from time to time passed by the colony and the Province, provision has invariably been made in reservation of the right of free miners to enter *sub modo* upon lands alienated by the crown, and to mine therein for the precious metals. Vancouver Island Land Proclamation, 1862, sec. 32, No. 9, Appendix Revised Statues ; Proclamation No. 15, Appendix, Revised Statutes, ss. 4 and 14 ; Pre-emption Consolidation Act, 1861, No. 21, Appendix Revised Statutes, ss. 16, 17 and 25 ; Land Ordinance, 1865, No. 24, Appendix, Revised Statutes, ss. 40 and 56 ; Land Ordinance, 1870 ; No. 144, Revised Statutes. ss. 48 and 50 ; " Land Act, 1875," ss. 80 and 81 ; " Land Act, 1884," ss. 64 and 65. So also the colonial and Provincial mining laws have made similar provision. " Gold Mining Ordinance, 1865," ss. 15 and 16 ; " Gold Mining Ordinance, 1867," ss. 22 and 23 ; and " Mineral Act, 1884," ss. 22 and 23. The Provincial land laws also authorize the taking of water from streams passing through private property for irrigating or manufacturing purposes, and prescribe that no person shall have the right to water, whether it flow naturally through or past his land or not, unless the right be recorded and exercised. These are Provincial laws applicable to all lands in the Province. Why is the Dominion not to be subject to them as regards the railway belt ? The title paramount is in us. Lands both within and without the belt are subject to escheat to the Province and not to the Dominion—for the belt is only conveyed to the Dominion in trust for railroad purposes ; and when the Dominion, in furtherance of that trust, have sold the land it loses further interest therein. The purchaser holds it from the Province, and subject to its title paramount. *Regina* v. *St. Catherines Milling Co.* (1).

(1) 10 O. R. 196 ; 13 Can. S. C. R. 577.

1886

ATTY. GEN. OF BRITISH COLUMBIA v. ATTY. GEN. OF CANADA.

Section 13 of the terms of union provides that the Local Government shall, from time to time, convey to the Dominion Government, in trust for the use and benefit of the Indians, tracts of land of such extent as it has hitherto been the practice of the British Columbia Government to appropriate for that purpose.

Here is an undertaking made with reference to a well-known policy, the establishment of reserves for Indians. But the British Columbia Government never reserved the minerals for the Indians, yet, consistently, the Dominion should contend that the word "lands" in this section mentioned also includes the precious metals.

It was because the railroad belt did not contain much land fit for settlement, and of that so fit much had been alienated by the Province, that the Legislature granted to the Dominion three and a half millions of acres of land in the Peace River country, mentioned in sec. 7 of the act referred to in the case.

In the same act there is, by sec. 3, a grant of lands on Vancouver Island to the Dominion, to aid in the construction of a line of railway from Esquimalt to Nanaimo. This grant is in express terms made to include all minerals, though it may be open to doubt whether the precious metals are included within the term "minerals." This express grant of the minerals excludes the notion that under the grant of the mainland belt, in which no mention of them is made, they were intended to be included. This argument is fortified by reason of the whole of this act, 46 Vic cap. 14, having been arranged between the Dominion and the Province; *vide* Sir Alexander Campbell's report and the memorandum of arrangement between him and the Premier of the province, dated 20th August, 1883, set out in the report.

The judicious administration of the minerals would

not produce revenue in excess of the cost of administration. Neither the mining laws of the province, nor the mining regulations of the Dominion, are calculated to produce more revenue than would be sufficient to cover the cost of administration ; while, however, it is true that the more liberal the conditions are under which mining may be followed, the greater will be the number of persons engaged in that industry, with corresponding advantage indirectly to both the Dominion and the province.

It was not until the 8th of March, 1884, that the Dominion made any mining regulations (see p. 71, Orders in Council, Statutes of Canada, 1884). Most of those regulations are transcripts of the provincial mining laws, but in some particulars, notably in quartz claims, there is a great difference; and though it may be of no service to point out that the Provincial regulations are more conducive to the prosecution of mining industries than the Dominion, yet if the argument as to what is politic and convenient is to have any effect, it may be urged how extremely impolitic it would be to have a strip of land administered for mining purposes by one set of regulations and adjacent lands governed by another set. The limits of the 20-mile belt have not yet been ascertained, and miners have something else to do than to enquire whether a proposed location is to be governed by Dominion or Provincial legislation, or whether a mining claim is within or without the railroad belt.

The incongruity of such a dual system is more apparent when the Dominion regulations, 68-75, are considered. They profess to establish a court to determine mining disputes (involving, possibly, scores of thousands of dollars), when the constitution of such courts remains, under sec. 92 of the British North America Act, with the Province.

1886

ATTY. GEN. OF BRITISH COLUMBIA v. ATTY. GEN. OF CANADA.

Lastly, it is difficult to understand how the Dominion can receive the railway belt other than a *quasi* corporation, and for the purposes mentioned in the terms of union. The lands were provincial public lands vested in Her Majesty. They were transferred by the province without any words indicating the parting with any prerogative or sovereign incidents, and rights of escheat remain. The Queen cannot convey to herself, and no words are employed which even remotely suggest that Her Majesty's prerogative or sovereign rights in the railway belt or those general powers of legislation preserved to the province by section 92 of the British North America Act, have been transferred to the Dominion. The latter, it is submitted, could only have been done by an amendment to or modification of that act by the Imperial Parliament.

Burbidge Q.C. for the respondent :

The conveyance to the Dominion Government by sec. 2 of 47 Vic. ch. 14 was of "certain public lands" not for the use of the Canadian Pacific Railway Company, but "to be appropriated as the Dominion Govern- "ment may deem advisable," in other words to deal with them as they pleased. Mr. Campbell's report strengthens this view. British Columbia does not dispute that the Dominion Government is entitled to the base metals. The question on this appeal will have to be decided upon principle without reference to decided cases as there is no federal constitution similar to ours.

In the United States there is one case which can throw some light on this question. *Moore* v. *Smaw* (1) over ruling *Hicks* v. *Bell* (2). The question is also discussed in Rogers on Mines and Minerals (3). This is a question of title and not one of the relative powers

(1) 17 Cal. R. 200. (2) 3 Cal. 219.
(3) 2 Ed. Ch. 4 pp. 102, 124.

of the Local Legislature and of the Dominion Parliament over the lands and minerals. It is possible such a question may arise, it was tried to put it as part of this case whether the mining regulations of British Columbia or of the Dominion should govern, but this was left out and we only want a decision upon the question of title.

The present case is not the case of a grant of land by the crown to a subject. The title to the land and to the minerals has at all times been in the crown; and the statute of British Columbia, 47 Vic. ch. 14, amounts to nothing more than a declaration that lands of which the crown theretofore was seized in the right of the Province of British Columbia, should thereafter remain vested in the crown in the right of the Dominion of Canada, and the interest in the Government of Canada would thereafter be as great as the interest of the government of British Columbia was before the passing of the act referred to.

In the grant of the lands in aid of the Esquimalt and Nanaimo Railway, the grant is stated to include all coal, coal oil, ores, stones, clay, marble, slate, mines, minerals and substances whatsoever thereupon, therein and thereunder.

The difference in the language used in the grants in the different cases, indicates that in the two cases of the Railway Belt and the Peace River lands it was the intention that the crown should stand seized thereof in as large an interest for the Government of Canada as that in which it had previously stood seized thereof for the Province of British Columbia; while in the case of the Esquimalt and Nanaimo Railway, in which the Government of Canada was simply a medium through which the lands would be transferred to the Esquimalt and Nanaimo Railway, it was not the intention to give the company any interest in the precious

1886

ATTY. GEN. OF BRITISH COLUMBIA v. ATTY. GEN. OF CANADA.

metals in the lands mentioned, and therefore the minerals which it was proposed to convey were enumerated, omitting the precious metals.

It is quite clear that none of the reasons on which "The Great Case of Mines" was decided can be urged in favor of the contention of British Columbia. It is therefore submitted that Her Majesty is now seized of the said lands in the right of the Dominion for an as large and the same estate as that of which she was formerly seized in the right of British Columbia, and that she does not stand seized thereof for the Dominion, subject to a sovereign or prerogative right of the Province of British Columbia in the precious metals.

The learned counsel cited and relied on Blanchard & Weeks on Mines and Minerals (1); Rogers on Mines and Minerals (2); Bainbridge on Mines and Minerals (3); Chitty on Prerogatives of the Crown (4).

Sir W. J. RITCHIE C.J.—By the 11th paragraph of the Order in Council, under which British Columbia was admitted into the union, it is provided:—

And the Government of British Columbia agree to convey to the Dominion Government, in trust, to be appropriated in such manner as the Dominion Government 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 of British Columbia (not to exceed, however, twenty (20) miles on each side of the said line) as may be appropriated for the same purpose by the Dominion Government from the public lands of 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

(1) P. 82.
(2) P. 247.
(3) Pp. 122, 128, 367.
(4) P. 145.

1887

ATTY. GEN. OF BRITISH COLUMBIA v. ATTY. GEN. OF CANADA.

Ritchie C.J.

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 to be so 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 per annum, in half-yearly payments in advance.

On the 8th of May, 1880, the Legislature of British Columbia passed the following statute:—

An act to authorize the grant of certain public lands on the mainland of British Columbia to the Government of the Dominion of Canada for Canadian Pacific Railway purposes:—

Her Majesty, by and with the advice and consent of the Legislative Assembly of the Province of British Columbia enacts as follows:—

1. From and after the passing of this act, there shall be, and there is hereby, granted to the Dominion Government for the purpose of constructing and to aid in the construction of the portion of the Canadian Pacific Railway line located between Burrard Inlet and Yellow Head summit, in trust, to be appropriated in such manner as the Dominion Government may deem advisable, a similar extent of public lands along the line of railway before mentioned (not to exceed twenty miles on each side of the said line), as may be appropriated for the same purpose by the Dominion from the public lands of the North West Territories and the Province of Manitoba, as provided in the order in council, section 11, admitting the Province of British Columbia into confederation. The land intended to be hereby conveyed is more particularly described in a despatch to the Lieutenant Governor from the Honourable the Secretary of State, dated the 31st day of May, 1878, as a tract of land lying along the line of said railway, beginning at English Bay or Burrard Inlet and following the Fraser River to Lytton; thence by the valley of the River Thompson to Kamloops; thence up the valley of the North Thompson, passing near to Lake Albreda and Cranberry, to Tête Jaune Cache; thence up the valley of the Fraser River to the summit of Yellow Head, or boundary between British Columbia and the North West Territories, and is also defined on a plan accompanying a further despatch to the Lieutenant Governor from the Secretary of State, dated the 23rd day of September, 1878. The grant of the said land shall be subject otherwise to the conditions contained in the said 11th section of the terms of union.

2. This act shall not affect or prejudice the rights of the public with respect to common and public highways existing at the date hereof within the limits of the lands hereby intended to be conveyed.

1887

ATTY. GEN. OF BRITISH COLUMBIA v. ATTY. GEN. OF CANADA.

Ritchie C.J.

3. This act may be cited as "An Act to grant public lands on the mainland to the Dominion in aid of the Canadian Pacific Railway, 1880."

In August, 1883, the Hon. Sir Alexander Campbell, Minister of Justice, visited British Columbia, and adjusted with the Provincial Government certain matters in difference between the two Governments, which adjustment led to the passage of the Provincial statute referred to in the case.

The following is a copy of the statute :—

47 Vic. ch. 14. An act relating to the Island Railway, the Graving Dock, and Railway Lands of the province.

[19*th December*, 1883.]

WHEREAS negotiations between the Governments of Canada and British Columbia have been recently pending, relative to delays in the commencement and construction of the Canadian Pacific Railway, and relative to the Island Railway, the Graving Dock, and the Railway lands of the province.

And whereas, for the purpose of settling all existing disputes and difficulties between the two governments, it hath been agreed as follows :—

The agreement is then set out at length and the act proceeds :—

Therefore Her Majesty, by and with the advice and consent of the Legislative Assembly of the Province of British Columbia, enacts as follows :—

1. The hereinbefore recited agreement shall be and is hereby ratified and adopted.

2. Section 1 of the Act of the Legislature of British Columbia, No. 11 of 1880, intituled "An act to authorize the grant of certain public lands on the mainland of British Columbia to the Government of the Dominion of Canada for Canadian Pacific Railway purposes," is hereby amended so as to read as follows :—

From and after the passing of this act there shall be, and there is hereby granted to the Dominion Government for the purpose of constructing and to aid in the construction of the portion of the Canadian Pacific Railway on the mainland of British Columbia, in trust, to be appropriated as the Dominion Government may deem advisable, the public lands along the line of railway before mentioned, wherever it may be finally located, to a width of 20 miles on each side of the said line, as provided in the Order in Council, sec. 11, admitting the Province of British Columbia into Confederation ; but nothing in this section contained shall prejudice the right of the

province to receive and be paid by the Dominion Government the sum of $100,000 per annum, in half yearly payments in advance, in consideration of the lands so conveyed, as provided in sec. 11 of the Terms of Union; provided always, that the line of railway before referred to shall be one continuous line of railway only, connecting the seaboard of British Columbia with the Canadian Pacific Railway now under construction on the east of the Rocky Mountains.

1887

ATTY. GEN. OF BRITISH COLUMBIA v. ATTY. GEN. OF CANADA.

Ritchie C.J.

3. There is hereby granted to the Dominion Government, for the purpose of constructing, and to aid in the construction of a railway between Esquimalt and Nanaimo, and in trust to be appropriated as they may deem advisable (but save as is hereinafter excepted), all that piece or parcel of land situate in Vancouver Island, described as follows:—

Then follows a description of the land and in addition No. 7:—

7. There is hereby granted to the Dominion Government three and a half million acres of land in that portion of the Peace River district of British Columbia lying east of the Rocky Mountains and adjoining the North West Territories of Canada, to be located by the Dominion in one rectangular block.

On the argument of this case it was not contended on the part of the Province of British Columbia that the lands mentioned in section 2 of the act of British Columbia, 47 Vic. ch. 14, did not pass to the Dominion government. The sole question raised and argued is, as to the right to the precious metals in, upon or under those lands.

The principle acted on in the construction of grants or conveyances to private persons, namely, that by a grant of land from the crown the precious metals would not pass unless the intention of the crown that they should pass was expressed in apt and precise words, is in no way, in my opinion, applicable to the present case. This is not to be looked upon as a transaction between the crown and a private individual, or to be governed by principles applicable to transfers between private parties. 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,

1887

ATTY. GEN. OF BRITISH COLUMBIA v. ATTY. GEN. OF CANADA.

Ritchie C.J.

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 arrangement 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; it was a statutory transfer or relinquishment by the Province of British Columbia of the right of that province in or to such public lands to the Dominion of Canada, to be managed, controlled and dealt with by the Dominion government in as full and ample a manner as the provincial government could have done, had no such act been passed, and, in my opinion, having the same force and effect as if the British North America Act, instead of declaring that the several provinces should retain all their respective public property, &c., and that all lands belonging to the several provinces should continue to belong to the several provinces, there had been engrafted thereon an exception of certain portions of such public lands which should belong to the Dominion government. This, it seems to me, is just what the legislature of British Columbia intended to do and did do. There was no necessity for any grant or conveyance; in fact there could be no grant or conveyance from the crown to the crown. The title to the land was never out of the crown, but was in the crown as represented by the Lieutenant Governor of British Columbia; and when the Legislature of British Columbia granted to the Dominion of Canada the interest the Province of British Columbia had in these public lands the right to deal with, and dispose of, the lands which belonged to the Province of British Columbia passed, by operation of the statute, to the use and control of the

1887

ATTY. GEN. OF BRITISH COLUMBIA v. ATTY. GEN OF CANADA.

Ritchie C.J.

Dominion government as represented by the Governor General, to be dealt with by the Dominion government in all respects as the Province of British Columbia could have done, the title to the lands, as I said before, continuing throughout in the crown, the disposal of the lands or the right of dealing with that title being simply transferred from the government of British Columbia to the government of the Dominion, and consequently whatever control over, or right or interest the Province of British Columbia had in, these lands when subject to the control of the government of British Columbia ceased by the legislation of British Columbia, and such control, rights and interest were thereby transferred to the government of Canada in as full and ample a manner as they had been held and enjoyed by the Province of British Columbia.

The only reservation or limitation on the Dominion Government in the appropriation of public lands along the line of railway is to be found in the second section of the act of British Columbia, passed on the 8th of May, 1880, which provides that "this act shall not "affect or prejudice the rights of the public with respect "to common or public highways existing at the date "thereof within the limits of the lands hereby intended "to be conveyed." Beyond this I can discover no exception or reservation, narrowing or limiting the right of the crown, as represented by the Dominion Government, from that possessed by the Government of British Columbia as representing the crown previous to the transfer, and therefore, in my opinion, the prerogative rights of the crown in such public lands simply continued in the crown as represented by the Dominion of Canada instead of in the crown as represented by the Government of British Columbia.

If we look at the negotiations which preceded the final arrangement as set out in the act it will, I think,

1887

ATTY. GEN. OF BRITISH COLUMBIA v. ATTY. GEN. OF CANADA.

Ritchie C.J.

appear tolerably clear, as a matter of fact, that it was the intention of the Government of British Columbia that the mines should pass to and be under the control of the Dominion Government. This appears to me to be indicated in the British Columbia minute of council, dated 10th February, 1883, and transmitted to the Government of Canada on the same day. The council having had under consideration the subject of the dry dock, railway lands and the Island railway, reported, after dealing with the dry dock question and after discussing the Island railway question and affirming the obligation of the Dominion Government to build it as a part of the Canadian Pacific Railway, the committee proceeded to discuss the subject of the railway lands of British Columbia, and the report *inter alia*, says :—

That the committee by an order in council of 4th May, 1880, stated that in the event of railway work being actively prosecuted the application of the Dominion government through Mr. Trutch contained in Mr. Trutch's letter of the 14th April, 1880, should receive a liberal consideration, and suggested that the lands which might be considered valueless for agricultural or economic purposes should be defined, and that the Dominion government should indicate the lands which might be desired in lieu of the valueless lands, and to state how the Dominion government proposed to deal with them. That Mr. Trutch replied to this order by a letter dated 8th May, 1880, to which no reply appears to have been given.

It is admitted that a very considerable portion of the lands included in the railway belt, and of the lands contiguous to those lands which have been dealt with by the province, consist of impassable mountains and rocky lands useless for agricultural purposes.

The committee feel satisfied that a settlement of this question will conduce to the best interests of the province and enable the country to settle up.

And the committee go on to say :—

That the land on the east coast of Vancouver Island has been continuously withheld from settlement since July, 1873, up to the present time, and the development of that fertile tract of country abounding in mineral wealth has been retarded to an incalculable extent, and the commercial and industrial interests of an important section of the province have been prejudicially affected to a serious

1887

ATTY. GEN. OF BRITISH COLUMBIA v. ATTY. GEN. OF CANADA.

Ritchie C.J

degree.

The committee therefore recommend as a basis of settlement between the Governments of the Dominion and the province of the railway and railway lands question. that the Dominion Government be urgently requested to carry out its obligation to the province by commencing at the earliest possible period the construction of the Island Railway, and complete the same with all practicable despatch; or by giving to the province such fair compensation for failure to build such Island railway as will enable the government of the province to build it as a provincial work and open the east coast lands for settlement and that the Dominion Government be earnestly requested to take over the Graving Dock at Esquimalt, upon such terms as shall recoup and relieve the province of all expense in respect thereof, and to complete and operate it as a Federal work, or as a joint Imperial and Dominion work, and the committee further recommend that in lieu of any expensive and dilatory method of ascertaining the exact acreage of lands alienated within the railway belt and otherwise rendered unavailable, there be set apart for the use of the Dominion, a tract of land of 2,000,000 acres in extent to be taken up in blocks of not less than 500,000 acres in such localities on the main land as may be agreed upon, the land to be taken up and defined within two years, and that it be one of the conditions that the Dominion Government in dealing with lands in this 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 take place in throwing open the land for settlement.

The committee advise that the recommendations be approved, and that a copy be forwarded to the Honorable Secretary of State for Canada.

What is the meaning of this last paragraph if it is not that the Government of British Columbia knew and intended that, in dealing with the public lands in the province, the Dominion Government was to have the control of such public lands including both mining and agricultural industries connected therewith? And how could they deal with the mining industries if no interest in, or control over, the mines passed to the Dominion Government? That apart from this when the public lands of the province, set apart by the Legislation of the Province of British Columbia for the construction of the Canadian Pacific Railway, ceased by such Legislation to belong to that province that

1887

ATTY. GEN. OF BRITISH COLUMBIA v. ATTY. GEN. OF CANADA.

Ritchie C.J.

province necessarily ceased to have any interest in the mines under these lands, because the province only obtained an interest in the mines by reason of their being part and parcel of the public lands of the province; when therefore, the public lands in question ceased to be the public lands of the province the mines forming part of such public lands, as a necessary consequence, ceased to belong to the province. No doubt the mines might have been reserved to the province, but such not having been the case they passed to the Dominion as part and parcel of the public lands granted to them by the Province of British Columbia.

FOURNIER J.—La question soulevée en cette cause est de savoir à qui du gouvernement fédéral ou du gouvernement local de la Colombie-Anglaise appartient la propriété des mines de métaux précieux dans les terrains octroyés par le dernier gouvernement au premier, pour la construction du chemin de fer Pacifique du Canada.

S'il s'agissait ici des droits de la Couronne aux mines d'or et d'argent dans une concession faite à un particulier, la question ne souffrirait aucune difficulté. Elle a été réglée depuis longtemps par les décisions, en Angleterre, qui sont considérées comme faisant loi à cet égard. et particulièrement par celle de *The Great Case of Mines* (1) Voir la même cause discutée dans l'édition de 1878 par Brown, du traité de Law of Mines and Minerals (2) de Bainbridge.

Dans une cause de *Wooley* v. *The Attorney General* (3) of Victoria, Sir James W. Colville en rendant le jugement s'est exprimé ainsi :—

Now, whatever may be the reasons assigned in the case of Plowden for the rule thereby established, and whether they approve themselves or not to modern minds, it is perfectly clear that ever since that decision it has been settled law in England that the prerogative

(1) Plow. 310. (2) Pp. 122, 128.
(3) 2 App. Cas. 163, 168.

right of the crown to gold and silver found in mines will not pass under a grant of land from the crown, unless by apt and precise words the intention of the crown be expressed that it shall pass

1887

ATTY. GEN. OF BRITISH COLUMBIA v. ATTY. GEN. OF CANADA.

Fournier J.

La loi anglaise à cet égard fait indubitablement partie de la loi de la Colombie. Ainsi le principe énoncé dans ce jugement "that the prerogative right "of the crown to gold and silver found in mines will "not pass under grant of land from the crown, unless "by apt and precise words the intention of the crown "be expressed that it shall pass," doit recevoir ici son application.

Dans le fait que la concession n'est pas faite à un particulier, mais en apparence à la Couronne par la Couronne, on a cru trouver un argument qui donne la solution de la question. En effet, a-t-on dit, il serait absurde que Sa Majesté pût traiter ou contracter avec elle-même. Le savant conseil de l'intimé prétend que Sa Majesté étant toujours investie du droit aux terres et aux mines, la 47 Vict. ch. 14 n'a pas d'autre effet que celui de déclarer que les terres dont la Couronne était jusqu'alors investie au nom de la Colombie-Anglaise seraient à l'avenir investies (*vested*) dans la Couronne pour la Puissance du Canada. C'est tout simplement énoncer la question soumise et non la résoudre.

Dans notre système de gouvernement Sa Majesté, comme chef de l'exécutif fédéral et provincial, doit être considérée comme présente dans chaque gouvernement où elle possède les droits et prérogatives qui lui sont attribués par l'Acte de l'Amérique Britannique du Nord. Comme chef de ces divers gouvernements elle ne doit y être considérée non comme présente en sa qualité de Reine de l'Empire Britannique, mais seulement comme la Reine, n'exercant que les droits et prérogatives qui lui sont attribués par les lois et la constitution de chaque gouvernement. Il n'est pas vrai en pratique de dire que Sa Majesté, comme chef de l'exécutif fédéral, est la même personnalité légale que Sa Majesté comme chef du pouvoir exécutif provincial, car on ne

1887

ATTY. GEN. OF BRITISH COLUMBIA v. ATTY. GEN. OF CANADA.

Fournier J.

peut pas la séparer des attributions particulières et souvent contradictoires que la constitution lui reconnaît. Partant il n'y a aucune anomalie et encore moins d'absurdité à dire que la Reine, représentée par l'exécutif provincial de la Colombie, puisse traiter ou contracter avec la Reine représentée par l'exécutif fédéral, sans que, par ce fait, aucun de ces gouvernements ne soit exposé à perdre ou gagner un avantage quelconque. Ils ne seront liés que par les conventions arrêtées entre eux. Elle les représente tous deux dans les limites de leurs pouvoirs respectifs, et dans le fait ce sont les deux gouvernements qui traitent ensemble avec l'assentiment de Sa Majesté.

La proposition générale absolue et sans restriction énoncée par le savant conseil de l'intimé, que "The "title to land and to the minerals has at all times been "in the crown," pourrait être vraie s'il ne s'agissait que de propriétés appartenant à Sa Majesté en vertu de sa prérogative royale, mais appliquée aux propriétés dont Sa Majesté est investie en vertu d'un statut provincial, elle n'est vraie qu'avec la modification des restrictions apportées par le statut ou par celles que pourrait y mettre la législation de la province.

Par la sec. 92, ss. 5, de l'Acte de l'Amérique Britannique du Nord, la vente et l'administration des terres publiques et des bois et forêts appartiennent à la province. La section 109 va plus loin et déclare que non-seulement les terres, mais que les mines et minéraux et *royautés* appartiendront aussi aux provinces. Le langage de ces sections fait voir que le législateur ne pensait pas que la propriété des mines aurait été tacitement transférée avec le sol, puisqu'il en a fait le sujet d'une disposition à part. En outre par la décision de cette cour, confirmée par le Conseil privé, dans la cause de *Mercer* v. la *Reine* (1), l'expression *royauté* dans la section 109 a été interprétée comme comprenant les

(1) 5 Can. S. C. R. 538.

prérogatives royales au sujet de la propriété. Les mines d'or et d'argent appartiennent donc par l'acte constitutionnel aux provinces dont les gouvernements respectifs ont seuls le droit d'exercer la prérogative royale à cet égard. Cette prérogative ne peut en conséquence être cédée ou modifiée que par un acte du pouvoir législatif ou exécutif des gouvernements provinciaux aliénant en termes précis et spéciaux cette prérogative.

Dans le traité intervenu entre les deux gouvernements au sujet de l'entrée de la Colombie dans la Confédération Canadienne, ou dans la législation respective des deux gouvernements au sujet de l'octroi des terres pour aider à la construction du chemin de fer du Pacifique, trouve-t-on quelque dispositions ou expressions comportant une cession expresse des mines d'or et d'argent, en même temps que les terres. Pour s'en assurer il est nécessaire de référer aux principales transactions des deux gouvernements à ce sujet.

Par la sec. 11 des conditions arrêtées par les deux gouvernements, le gouvernement fédéral s'est obligé, dans deux ans de l'acte d'union, à faire commencer la construction du chemin de fer du Pacifique qui était une des conditions mises par la Colombie à son entrée dans la Confédération.

De son côté le gouvernement de la Colombie, pour aider à la construction de ce chemin, s'obligeait dans les termes suivants :—

To convey to the Dominion Government, in trust, to be appropriated in such manner as the Dominion Government 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

1887

ATTY. GEN. OF BRITISH COLUMBIA v. ATTY. GEN. OF CANADA.

Fournier J.

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 to be so conveyed in aid of the construction of the said railway, the Dominion Government agree to pay to British Columbia, from the date of union, the sum of one hundred thousand dollars per annum, in half-yearly payments in advance.

Plus tard, la législature de la Colombie, pour donner effet à son obligation mentionnée dans la sec. 11 ci-dessus citée, a passé l'acte 43 Vict. ch. 11, contenant la disposition suivante :—

The lands being granted to the Dominion Government for the purpose of constructing and to aid in the construction of the portion of the Canadian Pacific Railway line located between Burrard Inlet and Yellow Head Summit, in trust, to be appropriated in such manner as the Dominion Government may deem advisable.

Par la 2e sec. de l'acte 47 Vict. ch. 14, de la Colombie, il est décrété ainsi qu'il suit :—

From and after the passing of this Act there shall be, and there is hereby granted to the Dominion Government for the purpose of constructing and to aid in the construction of the portion of the Canadian Pacific Railway on the mainland of British Columbia, in trust, to be appropriated as the Dominion Government may deem advisable, the public lands along the line of the railway before mentioned, wherever it may be finally located, to a width of twenty miles on each side of the said line, as provided in the Order in Council, section 11, admitting the Province of British Columbia into Confederation.

Le proviso qui termine cette section ne peut aucunement affecter la question sous considération.

Par ce dernier acte, sec. 3, il est aussi accordé au gouvernement fédéral comme aide à la construction du chemin de fer d'Esquimalt à Nanaïmo, en fidéicommis, une certaine étendue de terre y décrite avec cette déclaration :—

And including all coal, coal oil, ores, stones, clay, marble, slate, mines, minerals and substances whatsoever thereupon, therein and thereunder.

La sec. 7 en accorde une autre dans les termes suivants :—

There is hereby granted to the Dominion Government, three and a half million acres of land in that portion of the Peace River District of British Columbia lying east of the Rocky Mountains and adjoining the North-West Territory of Canada, to be located by the Dominion in one rectangular block.

Cette législation a été adoptée par le parlement fédéral en vertu de l'acte 47 Vict. ch. 6. La sec. 11 de cet acte pourvoit à l'administration des terres dans cette région le long de la ligne du chemin de fer, et la sec. 12 à celle des terres dans la région de la Rivière à la Paix.

A part de la correspondance entre les deux gouvernements au sujet des retards et des difficultés survenus dans l'exécution des conditions de la sec. 11 du traité, tels sont les principaux actes législatifs à consulter pour définir la nature de l'octroi fait par le gouvernement de la Colombie au gouvernement fédéral.

La Colombie faisant de la construction du chemin de fer du Pacifique une des principales conditions de son entrée dans la Confédération, a fait, comme c'est assez l'usage, des concessions de terres, en fidéicommis, au gouvernement fédéral pour en assurer la construction. Bien que cette condition se trouve dans un traité où il s'agissait de grands intérêts politiques et gouvernementaux, il n'en est pas moins évident que la transaction au sujet des terres n'est que la cession d'un avantage matériel pour assurer la construction du chemin de fer et qu'elle doit être interprétée d'après les termes qui ont établi ce contrat, sans égard aux autres parties de ce traité qui ont rapport aux arrangements politiques entre les deux gouvernements. On ne peut en conclure, comme le fait le savant conseil de l'intimé, que le statut de la Colombie 47 Vict. ch. 14 n'est au fond qu'une déclaration que les terres, dont la Couronne était saisie pour le bénéfice de la Colombie, seraient à l'avenir investies dans la Couronne pour le bénéfice du

1887

ATTY. GEN. OF BRITISH COLUMBIA v. ATTY. GEN. OF CANADA.

Fournier J.

gouvernement fédéral et que l'intérêt de ce dernier gouvernement serait à l'avenir, aussi grand que celui de la Colombie après la passation de cet acte. Ceci n'est qu'une induction qu'aucune expression du statut ne peut justifier. Il faut donner aux termes employés toute leur signification légale et rien de plus. L'idée qu'un gouvernement s'est trouvé substitué entièrement aux droits de l'autre dans les terres octroyées n'est qu'une pure supposition que repousse les expressions employées pour faire la concession.

Dans le traité, sec. 11, l'obligation est "to convey to "Dominion Government, &c., &c., a similar extent of "public lands," dans l'acte 43 Vict. ch. 11, "lands being "*granted* to the Dominion for the purpose, &c., &c.," dans la 47e Vict. ch. 14 (Colombie) sec. 2, "there shall "be, and there is hereby granted to the Dominion Gov- "ernment, in trust, &c., &c., to be appropriated as the "Dominion Government may deem advisable, the *public* "*lands* along the line of the railway, &c., &c." Dans la sec. 7 de ce dernier acte les expressions sont: "There is hereby granted to the Dominion Government, three and a half million acres of land, &c., &c." On voit que dans toutes les expressions employées pour faire l'octroi, il n'en est pas une seule qui comporte l'idée qu'il y ait autre chose que la terre qui soit octroyée. Toutes les expressions sont claires, précises, n'accordant qu'une seule chose, la terre, et ne laissent aucune place au doute. D'après le principe reconnu du droit anglais que l'octroi de la terre n'entraîne pas la concession de la prérogative royale au sujet des mines, il n'y a donc pas eu dans le cas présent d'octroi des mines. Ce principe doit être appliqué à l'interprétation des octrois faits par statut, de même qu'à ceux faits administrativement à des particuliers, car il est de principe que la prérogative royale n'est jamais affectée par un statut, à moins qu'il n'en soit fait une mention expresse. Dans tous les statuts cités, à l'exception d'un, et dans

1887

ATTY. GEN. OF BRITISH COLUMBIA v. ATTY. GEN. OF CANADA.

Fournier J.

tous les documents officiels concernant cette affaire, on ne trouve rien qui puisse justifier la prétention que la prérogative royale devait ou pouvait être affectée par les octrois de terres. Deux principes indiscutables s'opposent donc à ce que les mines de métaux précieux soient considérées comme ayant passé au gouvernement fédéral,—d'abord, le principe que l'octroi de terres n'entraîne jamais la prérogative au sujet des mines, ensuite, que la prérogative ne peut jamais être affectée que par une loi qui en fait mention spéciale.

J'ai dit qu'il n'y avait qu'une seule exception dans le langage employé par les divers statuts, c'est celle que l'on trouve dans la sec. 3 de la 47 Vic. ch. 14 (Colombie), au sujet de l'octroi de terres pour le chemin de fer d'Esquimalt à Nanaimo, elle est en ces termes :—

And including all coal, coal oil, ores, stones, clay, marble, slate, mines, minerals, and substances whatever thereupon, therein and thereunder.

Si l'on pouvait interpréter ces termes comme suffisants pour opérer la concession des mines d'or et d'argent, cela prouverait du moins que la législature savait en faire la différence, et que lorsqu'elle voulait les concéder elle employait un langage suffisant à cet effet. Cette exception ne ferait que confirmer la règle que la propriété des mines ne peut être transférée que par une concession spéciale. Mais elle n'a même pas été faite par cette disposition.

Si l'on peut référer à la correspondance qui a amené un arrangement final entre les deux gouvernements, on acquerra la conviction que l'idée de réclamer les mines d'or et d'argent est de date récente, et qu'elle n'existait pas lors des négociations qui ont eu lieu au sujet des divers octrois en question. Le but, en effet, était d'obtenir une aide efficace pour la construction du chemin et pour cela on comptait sur des terres d'une valeur réelle, et non pas sur une valeur aléatoire comme celle des mines. Aussi voit-on dans divers documents cités qu'il y est toujours question de terres

1887

ATTY. GEN. OF BRITISH COLUMBIA v. ATTY. GEN. OF CANADA.

Fournier J.

available for farming or other purposes. Dans la lettre de M. Trutch, agent du gouvernement fédéral auprès du gouvernement de la Colombie, les terres dont il est question sont toujours décrites comme *available for farming or other valuable purpose.* Cette dernière qualification *or other valuable purposes* ne peut pas comprendre les mines d'or puisqu'il est de principe qu'elles ne sont transférées que par des expressions expresses, mais les mots *other valuable purposes* qui doivent recevoir leur application pourraient sans doute comprendre les terres favorables à l'exploitation des bois, les mines de charbon, et carrières, etc., et ranches, mais non les mines d'or et d'argent. Dans le ch. 14 de l'acte de 1883, mettant à la disposition des colons des terres dans l'île de Vancouver, il est fait une distinction entre les terrains miniers, *coal and other minerals*, et les terres à bois. Ces terrains pourraient aussi, sans doute, être compris dans les termes *other valuable purposes.* Quoi qu'il en soit, on ne trouve dans aucune des dispositions législatives sur ce sujet des expressions suffisantes pour opérer le transport de la prérogative royale au sujet des mines de métaux précieux, et encore moins en trouve-t-on qui permettent de conclure que l'autorité législative et exécutive de la Colombie dans les territoires où sont situées les terres octroyées a été passée au gouvernement fédéral par suite d'une transaction d'intérêts purement matériels, comme celle du subside au Pacifique. Pour opérer un tel transfert du pouvoir politique il ne faudrait rien moins qu'un acte impérial modifiant les limites de la Colombie Anglaise telles que définies au moment de son entrée dans la Confédération canadienne, et il n'en existe certainement pas.

Quoique le jugement en cour d'Echiquier ait été rendu par moi, je suis tout de même d'avis qu'il doit être infirmé. Je dois ajouter que, du consentement des parties intéressées, ce jugement a été rendu sans audition, et purement par forme, afin de leur permettre de porter sans délai cette cause devant la cour Suprême.

1887

ATTY. GEN. OF BRITISH COLUMBIA v. ATTY. GEN. OF CANADA.

Henry J.

HENRY J.—This case has been presented to obtain the decision of this court as to the title to gold, deposits of silver and other precious metals in lands in British Columbia known as the twenty mile belt on each side of the Canadian Pacific Railway. In the case of *The Queen* v. *Farwell* (1) and in four other cases tried before me at Victoria in 1886, I decided that the title to the lands comprising the belt in question was not vested in Her Majesty the Queen, and being still of that opinion I must necessarily decide that the deposits of gold, silver, and other precious metals are not vested in Her Majesty for the use and benefit of Canada, but in Her Majesty for the use and benefit of British Columbia. The case of *The Queen* v. *Farwell* appealed from my judgment to this court has been argued, and is now pending for judgment. In the special case therein my judgment will be found, and I refer to it for my reasons and conclusions in that case which govern the decision of this.

TASCHEREAU J.—I concur with Mr. Justice Gwynne.

GWYNNE J.—There can be no doubt that the right of Her Majesty to the precious metals does not depend upon her being seized of the lands in which they are found, her right to them whether they be in her own lands or in the land of a subject is by the same title, namely, by prerogative royal in right of her crown, but such her title or the rule that the transfer of land, *eo nomine*, by grant from the crown to a subject, does not transfer to the grantee any interest in the precious metals which may be in the land so granted, has not, in my opinion, any application in the determination of the question arising in the present case. What was the intention of the parties to the contract under consideration is the question before us, and that must be gathered from the nature of the transaction and of the

(1) The next reported case.

1887

ATTY. GEN. OF BRITISH COLUMBIA v. ATTY. GEN. OF CANADA.

Gwynne J.

instruments in which the contract is contained and the circumstances under which and the parties between whom such instruments were framed.

By the 146 section of the British North America Act, it was enacted that it should be lawful for the Queen, by and with the advice of Her Majesty's most honorable Privy Council on addresses from the Houses of the Parliament of Canada, and from the houses of the respective legislatures of the colonies or provinces of Newfoundland, Prince Edward Island and British Columbia, to admit those colonies or provinces or any of them into the union constituted by the act the Dominion of Canada, on such terms and conditions as are in the addresses expressed, and as the Queen thinks fit to approve, subject to the provisions of the British North America Act, and that the provisions of any order in council in that behalf should have effect as if they had been enacted by the parliament of the United Kingdom of Great Britain and Ireland.

The effect of this enactment was, in my opinion, to constitute the Province of British Columbia, represented by its Legislative Council, an independent power to the extent of enabling it to negotiate a treaty with the Dominion of Canada, represented by the two Houses of the Parliament of Canada, as another independent power, and together to agree upon terms upon which the Province of British Columbia should be received into and become part of the Dominion of Canada, which treaty, if and when approved of and ratified by Her Majesty in her Privy Council, should have the force and effect of an act of the Imperial parliament.

The transaction thus authorized being of the nature of a treaty between these two independent bodies, the Province of British Columbia represented by its Legislative Council on the one part and the Dominion of

Canada represented by the House of Commons and the Senate of Canada on the other; and Her Majesty being in no wise concerned in it, save as ratifying and approving the terms of the treaty when agreed upon by and between the parties interested, the case must be regarded not at all in the light of a grant of land by the crown to a subject, but in the light of a treaty between the two independent contracting parties upon the faith of which alone the Province of British Columbia was received into and became part of the Dominion of Canada, and being given by the British North America Act the force of an act of parliament. The addresses of the Legislature of British Columbia and of the House of Commons and Senate of Canada respectively to Her Majesty in pursuance of the above section of the British North America Act show the proceedings taken by the province and the dominion respectively for the purpose of negotiating a treaty of union.

The address of the Legislative Council of British Columbia is as follows:—

To the Queen's most excellent Majesty, most gracious Sovereign:

We, your Majesty's most dutiful and loyal subjects, the members of the Legislative Council of British Columbia in Council assembled, humbly approach your Majesty for the purpose of representing that during the last session of the Legislative Council the subject of the admission of the colony of British Columbia into the union or Dominion of Canada was taken into consideration, and a resolution on the subject was agreed to embodying the terms upon which it was proposed that this colony should enter the union.

That after the close of the session delegates were sent by the government of this colony to Canada to confer with the government of the Dominion with respect to the admission of British Columbia into the union upon the terms proposed.

That after considerable discussion by the delegates with the members of the government of the Dominion of Canada the terms and conditions hereinafter specified were adopted by a committee of the Privy Council of Canada and were by them reported to the Governor General for his approval.

That such terms were communicated to the government of this colony by the Governor General of Canada in a despatch dated July

1887

ATTY. GEN. OF BRITISH COLUMBIA v. ATTY. GEN. OF CANADA.

Gwynne J.

7th, 1870, and are as follows:—

1. Canada shall be liable for the debts and liabilities of British Columbia existing at the time of the union.

The 2nd to the 10th paragraphs inclusive it is not necessary to set out.

11. The government of the Dominion undertake to secure the commencement simultaneously within two years from the date of the 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 government 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 the said line as may be appropriated for the same purpose by the Dominion government from the public lands in the North West Territory 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 to be so conveyed in aid of the construction of the said railway the Dominion government agree to pay British Columbia from the date of the union the sum of $100,000 per annum in half yearly payments in advance.

The 12th to the 14th paragraphs it is unnecessary to set out. The address then proceeds:—

That such terms have proved generally acceptable to the people of this colony.

That this council is therefore willing to enter into union with the Dominion of Canada upon such terms, and humbly submits that under the circumstances it is expedient that the admission of this colony into such union as aforesaid should be effected at as early a date as may be found practicable under the provisions of the 146th

section of the British North America Act, 1867.

We, therefore, humbly pray that your Majesty will be graciously pleased by and with the advice of your Majesty's most honourable Privy Council under the provisions of the 146th section of the British North America Act, 1867, to admit British Columbia into the union or Dominion of Canada on the basis of the terms and conditions offered to this colony by the government of the Dominion of Canada hereinbefore set forth.

Similar addresses having been presented to Her Majesty from the House of Commons and the Senate of Canada, Her Majesty was pleased by an order in council at the court at Windsor, dated the 16th May, 1871, to approve of the said terms and conditions, and it was thereby ordered and declared by Her Majesty by and with the advice of her Privy Council, that from and after the 20th day of July, 1871, the said colony of British Columbia should be admitted into and become part of the Dominion of Canada upon the terms and conditions set forth in the said addresses, copies of which are annexed to the said order in council.

This language of the 11th article of the treaty with reference to the transfer from British Columbia to the Dominion of Canada of this tract of land never could be literally complied with, that is to say that by no species of conveyance could the land be conveyed to the Dominion government as grantees thereof. That government, from the nature of the constitution of the Dominion, could not take lands by grant or otherwise, nor could it have the power of appropriation of the tract in question, otherwise than under the direction and control of the parliament of Canada. When therefore, as part of the terms upon which British Columbia was received into the Dominion, it was agreed that a tract of the public lands of the Province of British Columbia should be conveyed in such manner as to be subjected to being appropriated as the Dominion government may deem advisable, what was intended plainly was, as it appears to me, that the beneficial

1887

ATTY. GEN. OF BRITISH COLUMBIA v. ATTY. GEN. OF CANADA.

Gwynne J.

interest which the province had in the particular tract of land as part of the public domain of the province should be divested, and that the tract, although still remaining within the Province of British Columbia, should be placed under the control of the Dominion parliament as part of the public property of the Dominion for the purpose of being appropriated by the Dominion government, in such manner as that government should deem advisable in furtherance of the construction of the railway which that government had undertaken to construct, subject, however, to a payment for ever by the Dominion to the Provincial government of $100,000 per annum by half yearly payments in advance. That this was the view entertained by the Dominion government and parliament as to this provision of the treaty of union entered into by them with the Province of British Columbia is apparent from an act of the parliament of Canada passed in 1875, 38 Vic. ch. 51, of the passing of which act the Province of British Columbia must have become aware, by which it was enacted that the Dominion Land Acts of 1872 and 1874 and the several provisions thereof should be, and were thereby extended, and should apply to all lands to which the government of Canada were then, or should at any time become entitled, or which were or should be subject to the disposal of parliament, in the Province of British Columbia.

It is now contended on the part of British Columbia that the 11th article of the treaty of union does not cover, and was not intended to cover, the precious metals in the tract of land in question; and this contention is based wholly upon the rule applied to a grant of land, *eo nomino*, by the crown to a subject, that under such a grant the precious metals do not pass. That rule, as I have already said, has not, in my opinion, any application to a contract of the nature of

1887

ATTY. GEN. OF BRITISH COLUMBIA v. ATTY. GEN. OF CANADA.

Gwynne J.

the treaty under consideration made between two independent powers of such constitutional character as are the Province of British Columbia and the Dominion of Canada. The question here is not between the crown and a subject, so that no question arises as to the prerogative rights of the crown. Indeed, if such a narrow construction should be put upon this treaty upon the faith of which British Columbia was received into the union, the chief benefit expected to accrue to the Dominion under the clause under consideration would be disappointed for as the Canada Pacific Railway through almost its whole extent within the Province of British Columbia passes through and across the two ranges of the Rocky Mountains, the lands on either side of which, except when the railway lies in the valleys of the mountain streams, are wholly unsuitable for agricultural purposes, and have little or no value other than that which consists in the precious metals which are believed to abound in them; if those metals should be regarded as excepted from the operation of the treaty, the exception would effectually deprive the Dominion Government of all benefit from the tract of land so declared to have been intended to be subjected to appropriation in such manner as the Dominion Government should deem advisable, and would make the 11th article of the treaty in so far as the Dominion in this tract is concerned quite illusory.

The contention of British Columbia is that the precious metals in the tract of land referred to in the 11th article are the property of the province, notwithstanding the treaty and that the search for them and all things relating to the prospecting for, and the opening and working of the mines are to be governed by the laws of British Columbia relating to gold mining, and for the benefit of the Provincial Government. It will be convenient here to refer to those laws, for the purpose of seeing what benefit from the tract in question

1887

ATTY. GEN. OF BRITISH COLUMBIA v. ATTY. GEN. OF CANADA.

Gwynne J

would remain to be enjoyed by the Dominion after the exercise by the Provincial Government of the powers vested in them by the laws relating to gold mining if the precious metals in the tract in question be reserved as the property of the province.

By an act of the Provincial Legislature passed in 1867 to amend the land relating to gold mining, it is enacted: "That the Governor of the Province may from time to time appoint such persons as he should think proper to be Chief Gold Commissioner and Gold Commissioners either for the whole province or any particular districts therein. That every gold commissioner upon payment of the sums in the act mentioned to the use of the province should deliver to any person over the age of 16 years applying for the same a certificate to be called a Free Miner's certificate entitling the person to whom it is given to all the rights and privileges by the act conferred on Free Miners. That such Free Miners certificate shall, at the request of the applicant be granted, and continue in force for one year or three years from the date thereof upon payment by such applicant to the use of the province of the sum of five dollars for one year and fifteen dollars for three years. That every free miner shall during the continuance of his certificate have the right to enter upon any of the waste lands of the crown not for the time being occupied by any other person; but in the event of such entry being made on lands already lawfully occupied for other than mining purposes, previous to entry free compensation shall be made to the occupant or owner for any loss or damage he may sustain by reason of any such entry, such compensation to be determined by the nearest stipendiary magistrate or gold commissioner with or without a jury of not less than five.

That no person shall be recognized as having any right or interest in, or to any mining claim or ditch or

1887

ATTY. GEN. OF BRITISH COLUMBIA v. ATTY. GEN. OF CANADA.

Gwynne J.

any of the gold therein unless he shall be, or in case of disputed ownership unless he shall have been at the time of the dispute arising, a free miner.

That all claims must be accorded annually, but any free miner shall upon application be entitled to record his claim for a period of two or more years upon payment of the sum of two dollars and fifty cents for each year included in such record. That the interest which a miner has in a claim shall be deemed to be a chattel interest equivalent to a lease for such period, as the same may have been recorded renewable at the end thereof.

That it shall be lawful for the Gold Commissioner upon being so requested to mark out for business purposes or gardens, on or near any mining ground, a plot of ground of such size as he shall deem advisable subject, however, to all the existing rights of free miners, then lawfully holding such mining ground, and any buildings erected or improvements made thereon for any such purpose, shall in every such case be erected and made at the risk of the person erecting and making the same; and they shall not be entitled to any compensation for damage done thereto by such free miners so entitled in working their claims *bonâ fide*.

That it shall also be lawful for the Gold Commissioner upon being so requested, to mark out for business purposes or gardens on or near any mining ground not previously pre-empted a plot of land of such size as he shall deem advisable to be held, subject to all the rights of free miners to enter upon and use such lands for mining purposes upon reasonable notice to quit being given to the occupier, such notice to be subject to the approval of the Gold Commissioner; and further upon due compensation for any crops thereon, and for the buildings and improvements erected on such plots, such compensation to be assessed by the Gold Commissioner previous to entry, with or without

1887

ATTY. GEN. OF BRITISH COLUMBIA v. ATTY. GEN. OF CANADA.

Gwynne J

a jury of not less than three; and that a monthly rent of five dollars shall in every such case be payable by the grantees of such plot or their assigns to the Gold Commissioners.

That every registered Free Miner shall be entitled to the use of so much of the water naturally flowing through or past his claim, and not already lawfully appropriated, as shall, in the opinion of the Gold Commissioner, be necessary for the due working thereof. That the size of claims should be as follows: For "Bar Diggings" a strip of land 100 feet wide at high water mark and, thence, extending into the river to its lowest water level.

For "Dry Diggings" 100 feet square. "Creek Claims" one hundred feet long measured in the direction of the general course of the stream and extending in width from base to base of the hill on each side Where the bed of the stream or valley is more than 300 feet in width each claim shall be only 50 feet in length, extending 600 feet in width; when the valley is not 100 feet wide the claims shall be 100 feet square.

"Bench Claims" shall be 100 feet square.

The Gold Commisssoner shall have authority in cases where benches are narrow to mark the claims in such manner as he shall think fit, so as to include an adequate claim.

Every claim situated on the face of any hill and fronting on any natural stream or ravine shall have a base line or frontage of 100 feet, drawn parallel to the main direction thereof. Parallel lines drawn from each end of the base line, at right angles thereto, and running to the summit of the hill shall constitute the side lines thereof. The whole area included within such boundary lines shall form a "*Hill Claim.*"

For the more convenient working of back claims, or benches or slopes, it was enacted that the Gold

Commissioner may, upon application made to him, permit the owners thereof to drive a tunnel through the claim fronting on any creek, ravine or water course and impose such terms and conditions upon all parties as shall seem to him expedient. It was further enacted that "Quartz Claims" should be 150 feet in length, measured along the lode or vein, with power to follow the lode or vein and its spurs, dips and angles anywhere *on* or below the surface included between the two extremities of such length of 150 feet but not to advance *upon* or beneath the surface of the earth more than 100 feet in a lateral direction from the main lode or vein along which the claim is to be measured. That it should be lawful for the gold commissioner upon the application thereinafter mentioned to grant to any bed rock flume company for any term not exceeding five years, exclusive rights of way through and entry upon any mining ground in his district for the purpose of constructing laying and maintaining bed rock flumes. That such companies upon obtaining such grant, for which they should pay $125 into the colonial treasury should be entitled, among others, to the following rights and privileges. The rights of way through and entry upon any new and unworked river, creek, gulch or ravine, and the exclusive right to locate and work a strip of ground one hundred feet wide and 200 feet long in the bed thereof to each individul of the company also. The rights of way through and entry upon any river, creek, gulch, or ravine worked by miners for any period longer than two years prior to such entry, and already wholly or partially abandoned, and the exclusive rights to stake out and work both the unworked and abandoned portions thereof one hundred feet in width, and one-quarter of a mile in length. Also the use and enjoyment of so much of the unoccupied and unappropriated water of the stream on which they

1887

ATTY. GEN. OF BRITISH COLUMBIA v. ATTY. GEN. OF CANADA.

Gwynne J.

may be located, and of other adjacent streams as may be necessary for the use of their flumes, hydraulic power and machinery, to carry on their mining operations, and they shall have their right of way for ditches and flumes to convey the necessary water to their works, they being liable to other parties for any damage which may arise from running such ditch or flumes through or over their ground, and they shall have a right to all the gold in their flumes. And, further, it was enacted that all bed rock flume companies should register their grant when obtained, and that a registration fee of $25.00 (twenty-five dollars) should be charged therefor, and that they should also pay an annual rent of $12.50 (twelve dollars and fifty cents) for each quarter of a mile of right of way legally held by such company. It was further enacted that leases for a term of ten years might be granted upon payment of the sum of $125.00 (one hundred and twenty-five dollars) into the colonial treasury for the quantities of land following, that is to say:—

In Dry Diggings, ten acres.

In Bar Diggings unworked half a mile in length along the high water mark.

In Bar Diggings worked and abandoned one mile and a half in length along the high water mark.

In Quartz Reefs unworked half a mile in length.

In Quartz Reefs worked and abandoned one mile and a half in length with liberty in the two last cases to follow the spurs, dips and angles on and within the surface for 200 feet on each side of the main lead or seam.

Now from the conformation of the country through which, within the Province of British Columbia, the Canada Pacific Railway must necessarily have been located it may be confidently affirmed that the tract of land on either side of it intended by the treaty of union to be appropriated by the Dominion Govern-

ment, as they should deem advisable, had no appreciable value except such as might consist in the precious metals which might be found therein, and that the above Gold Mining Regulations of the Province of British Columbia would, if they apply to the above tract, absorb the whole of so much of the tract as did not consist of inaccessible mountain ranges of naked rock. The chief value, even, of the valleys through which the mountain streams flow consists, or is deemed to consist, of the gold found therein, and it is no doubt because of the gold that is therein that the above mining regulations give to the miner what may be said to be almost absolute control over the beds of the streams and the lands in the valleys through which the streams flow, in whatever lands those gold mining regulations apply to and, therefore, if they be held to apply to the railway belt in question, and if the Province of British Columbia retains a right to the precious metals therein, the right of appropriation of that belt by the Dominion Government, as expressed to be intended to be secured to it by the terms of the treaty of union would be so utterly illusory that it is, in my judgment, impossible to conceive that it was the intention of either of the parties to that treaty that what constituted what may be said to be the sole value of the tract should be exempt from the operation of the 11th article, and should be retained still as the property of the Province of British Columbia, and we can not, in my opinion, impute to them such an intention by implication, because of the existence of a rule which is applicable to the particular case of a grant of land by the crown to a subject, which establishes that such a grant does not pass the precious metals unless they be specifically named. The conditions which gave birth to that rule not existing, the rule itself cannot have any application.

1887

ATTY. GEN. OF BRITISH COLUMBIA v. ATTY. GEN. OF CANADA.

Gwynne J.

In the month of September, 1878, the Secretary of State of the Dominion in pursuance of an order in council in that behalf addressed a communication to the government of British Columbia informing them of the route of the line of railway, as then recently adopted and notifying them that all public lands in the Province of Manitoba and the North West Territories within 20 miles on each side of the line had been set apart to be appropriated in such manner as the Dominion government may deem advisable in furtherance of the construction of the said railway, and requesting the government of British Columbia in accordance with their agreement in that behalf on their entering the Dominion to convey to the Dominion government in trust to be appropriated in such manner as the Dominion government may deem advisable in furtherance of the construction of the railway, a similar extent of public lands along the line of railway throughout the entire length of British Columbia, and to make good to the Dominion from contiguous public lands, the quantity of land, if any, which may be held under pre-emption right or by crown grant within the limits of the land in British Columbia to be so conveyed to the Dominion government. In the interval between the sending of this communication and the month of May, 1880, it was found so impracticable to apply the provisions of the Dominion Lands Act, as was contemplated by the 38 Vic. ch. 51 to the survey and administration of the tract on either side of the railway in British Columbia, that this latter statute was repealed by an act passed on the 7th May, 1880, 43 Vic. ch. 27. By that act, after reciting that it had been ascertained that the conformation of the country upon and in the vicinity of the located line of the Canadian Pacific Railway through the Province of British Columbia, is such that it is inexpedient to attempt to apply the provisions of the Dominion Lands Act to the survey,

administration and management of the lands hereinafter mentioned it was enacted.

1st. That the act 38 Vic. ch. 51 is hereby repealed.

2nd. The governor in council shall have full power and authority by orders to be made from time to time to regulate the manner, terms and conditions, in and on which any lands which may have been or may be hereafter transferred to the Dominion of Canada under the terms and conditions of the admission of British Columbia into the Dominion shall be surveyed, laid out and administered, dealt with and disposed of, and from time to time to alter and repeal any such order and the regulations therein made and make others in their stead; provided that no regulations respecting the sale, leasing, or other disposition of such lands shall come into force until they shall have been published in the *Canada Gazette*, and shall have been laid before both houses of parliament for one month without being disapproved of by either house. Simultaneously with the passing of this act an act was passed by the Legislature of British Columbia for the purpose of giving effect to the 11th article of the treaty of union, which enacts as follows (1):—

Now, it is to be observed that this act, as, indeed upon its face appears, was passed for the purpose of effectually fulfilling the terms of the 11th article of the treaty of union, it must therefore be construed in the light of the treaty, and not in the light of the narrow rule applicable to the case of a grant of land by the crown to a subject.

The Legislature of British Columbia in passing the act, must, as it appears to me, be held to have intended to divest itself of all control over the tract or belt described in the act as public property of the province, and to have placed it under the control of the Dominion

(1) See page 355.

1887

ATTY. GEN. OF BRITISH COLUMBIA v. ATTY. GEN. OF CANADA.

Gwynne J.

parliament as public property of the Dominion, and thus to give effect to the condition upon which British Columbia was received into the union, although the tract being within the limits of the province, (where granted by the Dominion government to individuals like all other lands vested in individuals) will be subject to the laws of the province affecting the estate granted to such individuals as to local taxation, &c.

Title to any part of the land within the described belt can only be acquired by individuals under and in virtue of a grant from the Dominion authorities, that is to say by a crown grant executed under and in pursuance of the authority of the laws of the Dominion affecting Dominion lands; if, therefore, the rule as to crown grants of land not passing the precious metals unless they be specifically named therein is to have any application in the present case, it seems to me that as the power to grant the lands to individuals is transferred from the province to the Dominion unrestricted by any qualification as to the precious metals, it must be intended that the Dominion authorities should have power to grant them in such manner as the authorities having control of Dominion lands should think fit, and that therefore in a grant of the land or of any part thereof they might specifically grant also the precious metals therein by using appropriate language for that purpose, and if they could do so, then the rule as to the precious metals not passing if appropriate language should not be used would enure to the benefit of the Dominion and not to that of the province. The power to pass title to the land by grant from the crown being acknowledged to be in the Dominion authorities, all the incidents to that power must be in the Dominion also in the absence of any express qualification of the power contained in the instrument, in this case the treaty, vesting the

power in the Dominion.

1887

ATTY. GEN. OF BRITISH COLUMBIA v. ATTY. GEN. OF CANADA.

Gwynne J.

Subsequently to the passing of this act, some delay took place in the construction of the railway occasioned partly by reason of a contemplated change in the manner of constructing the railway, that is to say, through the means of a company to be incorporated for the purpose instead of by the government as a government work in which manner it was being constructed in 1878, and partly by reason of searching for a better line through the Rocky Mountains than that which had been located in 1878.

In 1881 an act was passed entitled an act respecting the Canadian Pacific Railway, incorporating a company to construct and work it when constructed. By this act the railway was divided into three sections, the eastern, the central and the western—the central extending from Selkirk on the east side of the Red River in Manitoba to Kamloops in the Rocky Mountains, and the western extending from Kamloops to Port Moody on Burrard Inlet; the Dominion government undertook the completion of this western section. The search for a better line through the Rocky Mountains to Kamloops than that which had been located in 1878 occupied some time, and while this search was still in progress an act was passed by the Dominion parliament in the month of May, 1882, whereby it was enacted that the Canadian Pacific Railway Company might, subject to the approval of the Governor in council, lay out and locate their main line of railway from Selkirk to the junction in the western section at Kamloops by way of some pass other than the Yellow Head Pass.

Difficulties also had arisen between the Dominion and the Provincial governments in relation to the construction of a railway and graving dock on Vancouver Island and other matters. At length in the month of

1887

ATTY. GEN. OF BRITISH COLUMBIA v. ATTY. GEN. OF CANADA.

Gwynne J.

February, 1883, the Provincial government in a paper addressed by them to the Dominion government setting forth the view taken by the Provincial government of the various matters therein stated in relation to the railway and graving dock on Vancouver Island, made a proposition as a basis to lead to a final settlement between the two governments as well in relation to the delay in the construction of the railway as in relation to the said other matters, which proposition is as follows :—

That the Domininion government be urgently requested to carry out its obligation to the province either by commencing at the earliest possible period the construction of the island railway and completing the same with all possible despatch, or by giving to the province such fair compensation for failure to build such island railway as will enable the government of the province to build it as a provincial work and open the east coast lands for settlement; and that the Dominion government be earnestly requested to take over the graving dock at Esquimalt upon such terms as shall recoup and relieve the province of all expense in respect thereof, and to complete and operate it as a federal work or as a joint imperial and Dominion work; and that in lieu of any expensive and dilatory method of ascertaining the exact acreage of lands alienated within the railway belt and otherwise rendered unavailable there be set apart for the use of the Dominion a tract of 2,000,000 acres of land in extent, to be taken up in blocks of not less than 500,000 acres in such localities on the main land as may be agreed upon, the land to be taken up and defined within two years, and that it be one of the conditions that the Dominion government in dealing with lands in this 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 take place in throwing open the land for settlement.

This last clause clearly shows that up to this time the idea has not been conceived that the precious metals were not intended to pass under the provisions of the 11th article of the treaty of union. It shows also that the provincial government's understanding of that article was that the lands in British Columbia, which by that article were agreed to be transferred to, and placed under the control of, the Dominion authori-

ties, should be under such control for all purposes, mining as well as agricultural.

In the summer of 1883 Sir Alex. Campbell, then Minister of Justice, was sent by the Dominion government to British Columbia with instructions to negotiate a settlement of all existing differences, and to procure a change in the lands to be transferred by the province to the dominion between Kamloops and the eastern limit of the province rendered necessary by the contemplated change in the location of the line through the mountains east of Kamloops. The provincial authorities and Sir Alex. Campbell agreed upon terms of settlement, which were embodied in an agreement which contained a clause that the terms agreed upon should be taken by the province in full of all claims of the province against the Dominion in respect of delays in the commencement and construction of the Canadian Pacific Railway, and in respect of the non-construction of the Esquimalt and Nanaimo railway and should be taken by the Dominion government in satisfaction of all claims for additional lands under the terms of union, but should not be binding unless and until the same should be ratified by the parliament of Canada and the legislature of British Columbia. In the month of December, 1883, the legislature of British Columbia accordingly passed an act in which after setting out the agreement at large they ratified it and enacted that (1):

These sections comprised the whole of the act which relates to the lands agreed to be given to the Dominion government by the 11th article of the treaty of union; the three and one-half million of acres in the Peace River district being given in satisfaction of all claims of the Dominion for additional lands in substitution for such lands within the limits of the railway belt as

(1) See page 356.

1887

ATTY. GEN. OF BRITISH COLUMBIA v. ATTY. GEN. OF CANADA.

Gwynne J.

might be held under pre-emption right or crown grant as provided by the said 11th article of the treaty. The residue of the act relates wholly to giving effect to the agreement made between Sir Alexander Campbell and the provincial government in respect of the Vancouver Island railway, and the graving dock and has no bearing whatever upon the subject under consideration. It was argued, however, that in the clause which appropriates certain lands in aid of the construction of this railway the words "including all coal, coal oil, ores, stones, clay, marble, "slate, mines, minerals, and substances whatsoever "thereupon, therein, and thereunder," being inserted, and nothing being mentioned in the clause relating to the Canadian Pacific railway belt but "public lands "along the line of the railway wherever it may be "finally located, &c.," it must be inferred that mines and minerals were not intended to pass under the latter designation. But it is quite an accidental circumstance that the two matters are referred to in the same act. It is by the treaty of union and not by anything contained in this act that the extent of interest in the public lands within the limits of the railway belt intended by the treaty of union to be placed under the control and administration of the dominion government and parliament is to be determined; whereas the interest in the lands appropriated in aid of the construction of the Island railway, the beneficial interest in which lands was to be vested in the company to be incorporated to construct the railway, is determined by this act, which adopts the language of the act No. 15, of 1882, referred to in the agreement with Sir Alexander Campbell, whereby like provision was made in the interest of the company thereby incorporated. The dominion government having no beneficial interest whatever in the lands so

appropriated, were naturally indifferent to the language used by the provincial authorities in making the appropriation, and they cannot be prejudiced in their title to the lands within the railway belt in which they are beneficially interested by the language used in making the appropriation of lands in which they have no beneficial interest. From the provision, therefore, made in the interest of the company which should construct the Island railway no inference can be drawn to qualify the extent of the interest of the Dominion of Canada under the treaty of union in the Canadian Pacific railway belt, any more than such an inference can be drawn from like language used in a grant of land from the crown to a subject. The intention of the parties to the treaty of union is alone what must govern; and that the intention of both parties to that treaty was that the precious metals should pass to the dominion in the sense of being under the absolute administration and control of and for the exclusive benefit of the dominion authorities appears to me to be clear for the reasons already given.

The Dominion parliament by the Act 47 Vic. ch. 6 has enacted:—

Sec. 11. That the lands granted to Her Majesty represented by the government of Canada in pursuance of the 11th section of the terms of union by the act of the legislature of the Province of British Columbia, number eleven of one thousand eight hundred and eighty as amended by the act of the said legislature, assented to on the 19th December, 1883, shall be placed upon the market at the earliest date possible and shall be offered for sale on liberal terms to actual settlers.

2. The said lands shall be open for entry to *bonâ fide* settlers in such lots and at such prices as the Governor in Council may determine.

3. Every person who has squatted on any of the said lands prior to the 19th day of December. 1883, and who has made substantial improvements thereon shall have a prior right of purchasing the lands so improved at the rates charged to settlers generally.

4. The Governor in Council may from time to time regulate the

1887

ATTY. GEN. OF BRITISH COLUMBIA v. ATTY. GEN. OF CANADA.

Gwynne J.

manner in which, and the terms and conditions upon which, the said lands shall be surveyed, laid out, administered, dealt with and disposed of, provided that regulations respecting the sale, leasing or other disposition of such lands shall not come into force until they are published in the *Canada Gazette*.

By the 12th section it is enacted that the three and one-half million acres of lands in the Peace River district in British Columbia granted to Her Majesty as represented by the government of Canada by the said act assented to on the 19th day of December, 1883, shall be held to be Dominion lands within the meaning of the Dominion Lands Act, 1883.

In placing these lands in this manner by the Dominion parliament under the administration and control of the Dominion government as dominion lands, the parliament has, in my opinion, acted in perfect accordance with the letter and spirit, true intent and meaning of the 11th article of the treaty of union and the question therefore submitted in the case must be answered in favor of the affirment, The Attorney General of Canada, and the appeal must be dismissed with costs.

Appeal dismissed with costs.

Solicitors for appellant: *McIntyre & Lewis.*

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