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1887  
 • June 4.  
 • Dec. 14.

THE QUEEN ON THE INFORMATION }  
 OF THE ATTORNEY GENERAL } APPELLANT;  
 OF CANADA (PLAINTIFF)..... }

AND

ARTHUR STANHOPE FARWELL }  
 (DEFENDANT)..... } RESPONDENT.

ON APPEAL FROM THE EXCHEQUER COURT.

47 *Vic. c. 14 sec. 2 B. C.—Effect of—Provincial Crown grant—Illegality of.*

By section 11 of the order in council, admitting the Province of British Columbia into confederation, British Columbia agreed to convey

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

to the Dominion Government, in trust, to be appropriated in such manner as the Dominion Government might deem advisable, in furtherance of the construction of the Canadian Pacific Railway an extent of public lands along the line of railway. After certain negotiations between the governments of Canada and British Columbia, and in order to settle all disputes, an agreement was entered into, and on the 19th December, 1883, the legislature of British Columbia passed the statute 47 Vic. ch. 14, by which it was enacted *inter alia* 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 main land 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 said line, as provided in the order in council section 11 admitting the Province of British Columbia into Confederation." On the 20th November, 1883, by public notice the government of British Columbia reserved a belt of land of 20 miles in width along a line by way of Bow River Pass. In November, 1884, the respondent in order to comply with the provisions of the provincial statutes, filed a survey of a certain parcel of land situate within the said belt of 20 miles, and the survey having been finally accepted on the 13th January, 1885, letters patent under the great seal of the province were issued to F. for the land in question.

1887  
 THE QUEEN  
 v.  
 FARWELL.

The Attorney General of Canada by information of intrusion sought to recover possession of said land, and the Exchequer Court having dismissed the information with costs, on appeal to the Supreme Court of Canada, it was:

*Held*, reversing the judgment of the Exchequer Court, Henry J. dissenting, that at the date of the grant the Province of British Columbia had ceased to have any interest in the land covered by said grant and that the title to the same was in the crown for the use and benefit of Canada.

**APPEAL** from the judgment of the Exchequer Court, (Henry J.) dismissing the plaintiff's information and giving judgment for the defendant.

This was an information of the Attorney General of Canada, on behalf of Her Majesty the Queen, brought against the respondent for intrusion on lands known as lot number six, in group one of the District of

1887  
 THE QUEEN  
 v.  
 FARWELL.  
 Henry J.  
 in the  
 Exchequer.

Kootenay, in the Province of British Columbia, such lands being situated within the 20 miles belt of the Canadian Pacific Railway. The pleadings, documentary and oral evidence bearing upon the case are stated at length in the judgment of Henry J. in the Exchequer Court, and in the judgment of the Chief Justice hereinafter given.

The action was tried at Victoria, B. C., on the 23rd of September, 1886.

*Drake* Q.C. appeared for the crown.

*Richards* Q.C. and *T. Davie* for defendant.

On the 27th December, 1886, Henry J. delivered the following judgment in favor of the respondent:—

This action was commenced by an information of the Attorney General of Canada on behalf of Her Majesty, the Queen, as follows:

“To the Honorable the Chief Justice and Justices of the Exchequer Court of Canada.

“The information of Her Majesty’s Attorney General for the Dominion of Canada on behalf of Her Majesty sheweth as follows.

“1. That certain lands and premises situate in group one of the district of Kootenay, in the Province of British Columbia, within the railway belt of the Canadian Pacific Railway, and being composed of lot No. 6 in the said group number one in the district of Kootenay aforesaid, containing 1175 acres, more or less, on the 25th day of January, A.D., 1885, and long before that date were and still ought to be in the hands and possession of Her Majesty the Queen.

“2. That the defendant, to wit: on the said 25th January, A.D. 1885, in and upon the possession of our said lady the Queen of and in the premises, entered, intruded and made entry and the issues and profits thereof coming, received and had and yet doth receive and have to his own use,

## CLAIM.

1887

"The Attorney General on behalf of Her Majesty the Queen claims as follows:—

THE QUEEN  
v.  
FARWELL.

"1. Judgment for possession of the said lands and premises.

Henry J.  
in the  
Exchequer.

"2. Judgment for an account of the issues and profits of the said lands and premises, from the said 25th day of January A. D. 1885 till possession be given.

"3. Judgment for the costs of this action."

The statement of defence is as follows:

"1. In answer to paragraph one of the information herein the defendant says that on and prior to the 13th day of January, A. D. 1885, the said lands were in the hands and possession of Her Majesty and on the said day Her Majesty by patent duly issued under the great seal of the Province of British Columbia, granted the said lands unto and to the use of the defendant, his heirs and assigns for ever.

"Wherefore the defendant upon and since the said grant entered upon and has taken possession of the said lands and has since enjoyed and now enjoys possession, use and occupation of the same which is the intrusion and trespass complained of.

"And saving and except as herein is admitted the defendant denies all and every the allegations in the information set out."

To which statement of defence the following replication was filed:—

"1. Her Majesty's Attorney General for the Dominion of Canada on behalf of Her Majesty joins issue upon the defendant's statement in defence herein.

"2. And for a further replication to the said statement in defence of the defendant, Her Majesty's Attorney General says that the lands and premises in the information and statement in defence herein mentioned, were on 13th of January, A. D. 1885, in the

1887  
 THE QUEEN  
 v.  
 FARWELL.  
 Henry J.  
 in the  
 Exchequer.

hands and possession of Her Majesty, in the right of her Dominion of Canada and not in the right of her Province of British Columbia, and that a grant of the said lands under the great seal of the Province of British Columbia conveyed no interest therein to the defendant."

It will thus be seen that the issue raised is as to the title to the lands in question on the 13th of January, 1885, the date of the grant or patent issued to the defendant duly executed by the Lieutenant Governor under the great seal of the Province of British Columbia of the lands in question.

It having been admitted on the part of the plaintiff that the title to the lands up to the year 1883 was in Her Majesty for the Province of British Columbia it is claimed on the part of the plaintiff that previous to the grant or patent to the defendant the title of the province therein was by law transferred to Her Majesty in trust for the Dominion of Canada.

On reference to the exhibits and evidence it will be seen that the application by the defendant was duly made on the 22nd of November, 1883, under the statutes of British Columbia, for a patent of lands covering the locus. That under the authority of the Crown Lands Department it was surveyed as provided by the statutes in October, 1834, and the survey was formally approved and accepted by the Chief Commissioner of Crown Lands of the province on the 13th April, 1885, and the grant issued.

On the part of the defendant it is contended that he had earned under his application, accepted by the department, and by the payment of the purchase price, the right to complete his purchase by pursuing the terms of the statute in regard to the survey and other respects and finally to a grant or patent; and that the statutes of the Province and of the Dom-

inion subsequently passed in respect of the railway could not deprive him of his right to the land obtained under the provisions of the statute. The position may require to be dealt with in case of a decision in favor of the plaintiff on the issue raised more prominently by the pleadings.

1887  
 THE QUEEN  
 v.  
 FARWELL.  
 —  
 Henry J.  
 in the  
 Exchequer.  
 —

As before stated the plaintiff claims title as owner of the lands in dispute at the time and before the issue of the grant or patent to the defendant

That claim rests not upon any grant or other ordinary conveyance by which the title is alleged to have been transferred to the plaintiff but upon certain statutes passed by the Legislature of British Columbia and by the Parliament of Canada and on the minutes of council of the Government of Canada and of the Government of British Columbia and other documents put in evidence on both sides.

The first to which I consider it necessary to refer is the II article of the terms of the union of British Columbia with Canada as agreed upon by Government of the latter and the Legislature of the former of the 25th of July, 1870.

The article is as follows :—

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

And the Government of British Columbia agree to convey to the Dominion Government, in trust, to be appropriated in such manner as the Dominion 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 Northwest

1887  
 THE QUEEN  
 v.  
 FARWELL.  
 Henry J.  
 in the  
 Exchequer.

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 tracts 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 nor 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 the union, the sum of 100,000 dollars per annum, in half-yearly payments in advance.

The terms of the article were carried out by the government of British Columbia by withdrawing all its public lands from sale or alienation according to the terms of the article, but on the expiration of two years the railway not having in the interim been commenced the Government of British Columbia declined to convey certain lands on the east coast of Vancouver Island in British Columbia, that then being considered a part of the railway referred to in that article, although requested to do so by a communicated minute of council of the Government of Canada.

Numerous orders in council were during several years passed by the Dominion and Provincial governments, and despatches and telegrams passed the latter government complaining of delay in the building of the railway which, in my opinion, do not affect the issue in this case very much; a perusal of them, however, shows a continuous want of effective co-operation and ineffectual negotiations. Nothing was really done of any consequence to hasten the commencement of the railway for several years. The western terminus was at an early day fixed to be at Esquimalt and much difficulty had arisen in regard to the building of the line on Vancouver Island.

That difficulty was, however, removed by an order of the Dominion Council passed on the 29th of May, 1878, rescinding the previous order locating the terminus at Esquimalt and fixing it on the mainland at Burrard Inlet. The line then adopted was as notified to the Government of British Columbia to pass through Tête Jaune Cache by way of the Thomson river and Kamloops.

1887  
 THE QUEEN  
 v.  
 FARWELL.  
 Henry J.  
 in the  
 Exchequer.

By section 15 of the act of the Dominion of 1881 ch. 1, the line was provided to be built as continuous "from the terminus of the Canada Central Railway "near lake Nipissing known as Callender Station to "Port Moody," under the name of "The Canadian "Pacific Railway," and by "section 17" the consolidated Railway Act of 1879 with certain modifications was made applicable to that railway. It will be seen that by this act no change was made in the line through Manitoba, the North West Territories, or the mainland of British Columbia, except that involved by the adoption of Port Moody as the terminus instead or Esquimalt in Vancouver Island. On the contrary so far as this controversy is concerned the northern line by Tête Jaune Pass was that provided for. By the eleventh section of the schedule to the act and made part of it is provided as follows:—

The grant of land hereby agreed to be made to the company shall be so made in alternate sections of 640 acres each extending back 24 miles deep on each side of the railway from Winnipeg to Jasper House, in so far as such lands be vested in the government the company receiving the sections bearing uneven numbers.

No change that I can find was ever made in that appropriation appropriating the whole of the lands to the extent of twenty miles, or for any extent on each side of the railway except by alternate sections as before stated.

By the provision of the eleventh article of the terms of union the agreement of the Government of British



1887  
 THE QUEEN v. FARWELL.  
 Henry J. in the Exchequer.

Columbia was to convey to the Dominion Government:—

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.

By section 2 of the act of British Columbia of 1883, ch. 14 there was granted to the Dominion Government to aid in the construction of the portion of it on the mainland of that province:—

A similar extent of public lands along the line of the railway before mentioned, wherever it may be finally located (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 by the order in council section 11 admitting the Province of British Columbia into confederation.

By section one of the act of British Columbia of 1880, ch. 11, the same provision was made but the line was therein stated to be between Burrard Inlet and Yellow Head summit the line to begin:—

At English Bay or Burrard Inlet and following the Fraser river to Lytton thence by the valley of the Thomson river to Kamloops thence up the valley of the North Thomson, passing near to lakes Albrida 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. The grant of the said land shall be subject to the conditions contained in the said 11th section of the terms of union.

By section 2 of the Act of British Columbia of December, 1883, ch. 14, the section of the act just in part recited was amended 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 construction 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 line as provided in the Order in Council section 11 admitting the Province of British Columbia into Con-

federation.

That may be construed as a grant of twenty miles of the public lands of the Province as provided in section eleven, therein referred to. By section eleven, and the acts of British Columbia previously passed the extent was provided to be limited by that "appropriated for the same purpose by the Dominion Government from the public lands in the North West Territories and the Province of Manitoba." If then, but alternate sections were appropriated on the east side of the boundary line does not that limit the contribution to be made on the west side of the line?

If that be the true construction would the Province of British Columbia, under any circumstances be bound to do more than to convey each alternate mile to the extent of 20 miles on each side of the railway. Up to the date of a notice given by Mr. Trutch the agent of the Dominion Government to the Commissioner of Crown Lands of the Province, the route by the "Tête Jaune Pass" was that dealt with by the government of that province.

That notice dated on the 5th November, 1883, is as follows:—

Dominion Government Agent's Office,  
Victoria, British Columbia,  
5th November 1883.

SIR,—I have the honor to apprise you that I have to-day received from the Rt. Hon. Sir John A. MacDonal a reply by telegraph to the telegram and letter which I addressed to him on the 23th ulto. upon the subject matter of the interview which I had on that day with you and your colleagues in the Ministry.

Sir John MacDonal directs me to inform you that the Canadian Pacific Railway Company have definitely abandoned the Yellow Head Pass, and have adopted a line crossing the Rocky Mountains by the Bow River Pass and the Selkirk Range through what is known as Roger's Pass by the Beaver Creek and Illecillewaut River Valleys, and through Eagle Creek Pass to Kamloops.

Some improvement may be made in this line between the summit of the Rocky Mountains and the Columbia River before work is recommenced in the spring which may render it not strictly accurate

1887

THE QUEEN

v.

FARWELL.

Henry J.

in the

Exchequer.

1887  
 THE QUEEN  
 v.  
 FARWELL.  
 —  
 Henry J.  
 in the  
 Exchequer.  
 —

to speak of the line as following the Kicking Horse Pass although that pass is entirely practicable and will be followed unless some one of the alternative lines in the immediate vicinity which are now being examined is found to afford lighter work and easier grading.

Sir John Macdonald further directs me to request you to place the belt of land 20 miles on each side of the railway line along the route so above indicated under reservation as the land to be granted to the Dominion by British Columbia, instead of the land along the Yellow Head Pass conveyed by the British Columbia Act, ch. II, in accordance with the agreement now existing between your Government and that of the Dominion.

I beg accordingly that you will be pleased to have the said lands at once placed under reservation for this purpose.

I have the honor to be,

Your obedient servant,

(Sd). JOSEPH W. TRUTOR.

It will be seen that the object of that notice was to request the local government to place 20 miles on each side of the general line indicated under reservation instead of the land along the line by the Yellow Head Pass conveyed by the local act 43, vic., ch. 11, (1880).

The request to place the lands on the line referred to in the notice under reservation is a clear admission that such lands were then the lands of British Columbia, and subsequently to that notice the lands "were reserved until further notice." But that act of reservation conveyed no title to the Dominion Government nor did it prevent the Government from raising or removing such reservation by the receipt of application for the purchase of any portion of them or from conveying the same by grant or patent. The subsequent act did not grant according to that reservation.

On the 29th November, 1883, a notice signed by the Chief Commissioner of lands and works of the province was published in the *Provincial Gazette* which after reciting sec. 2, of 46 Vic., ch. 14 (1883) of British Columbia continues as follows:—

And whereas official information has been received that a definite route has been adopted by way of Bow River Pass and that via Yellow Head Pass has been abandoned.

Public notice is therefore given that the following belt of land is hereby reserved until further notice, viz: commencing at Kamloops, thence on a line by the valley of the South Thomson river and through Eagle Pass to the Columbia river, thence by the Illecillewant river and Beaver Creek Valley's, and by Roger's Pass through the Selkirk Range to the boundary of British Columbia at Bow River Pass and having a width of 20 miles on each side of said line.

1887  
 THE QUEEN  
 v.  
 FARWELL.  
 —  
 Henry J.  
 in the  
 Exchequer.  
 —

The Provincial act of December, 1883, does not however refer to any line in particular, but makes the provision in respect of the public lands along the line of the railway wherever it may be finally located as provided in the order in council, sec. 11, before recited and frequently referred to.

It is under the provisions of that act that the claim of the plaintiff to recover is made.

After the plaintiff's case was rested, council on behalf of the defendant urged substantially in defence the points and objections following:—

1st. That to make title the lands should have been conveyed by patent under the seal of the province.

2nd. That the grant to the "Dominion Government" passed no title to Her Majesty the Queen.

3rd. That the land is not described or defined.

4th. That the statute did not operate as an immediate transfer and is therefore void as a transfer.

5th. That the notice of location under the date of the 5th November, 1883, was not a sufficient notice of the final location of the line so as to enable the belt on each side to be definitely located and that no further notice was shown to have been given.

6th. That the location as by notice might have been changed.

7th. That no evidence was given that any lands in the North West Territories or Manitoba has been appropriated by the Dominion Government on the adopted line.

8th. As the charter gives to the Canadian Pacific

1887  
 THE QUEEN  
 v.  
 FARWELL.  
 Henry J.  
 in the  
 Exchequer.

Railway Company only alternate sections a survey was necessary of the lands in British Columbia before any title vested in the Dominion Government even of the alternate sections.

9th. The defendant having applied and his application having been received and acted on before any statute as to the railway was passed or reservation made, he became entitled to a grant as purchaser having been shown to have complied with the terms and conditions provided by statute.

As to the first point I have no doubt that the Legislature of British Columbia had the power of passing a title of public lands by an act and by doing so might repeal to that extent any previous statutory provisions to the contrary.

To the second point I have given attentive consideration and have failed to arrive at the conclusion that grant or conveyance to the "Dominion Government makes any title to Her Majesty the Queen. In the first place a grant or conveyance of land must be to one, or a body capable of receiving a title to and holding land with the power of transmitting or conveying it and I cannot see how the Dominion Government as such has any legal status or entitled or authorized to do any of those acts. When a conveyance for public uses is taken of land it is directly made to the Queen in trust. Nor can I conclude that even if the Dominion Government by that title could receive, hold and convey land why Her Majesty would necessarily have a title thereto; and in that case an action to recover possession should be, not by the Queen but by those to whom the title was made. Had the grant by the statute been to Canada or to the Dominion of Canada the application to it of the rules of law would be essentially different.

There is no statute providing for the purchase of land or receiving a title thereto by the Dominion Government

and there is none providing that, should such be done, a conveyance to it should be held or deemed to be a conveyance to Her Majesty. The fee simple of land is never in abeyance. If A owns land and conveys it to B the fee simple is immediately transferred to the latter if he is capable of holding it. If not, or if the conveyance be defective, the fee simply remains in A. If the Dominion Government as such is incapable of holding the title of the lands referred to in the statute the title remains in Her Majesty on behalf of the Province of British Columbia, the legal result of which is that the plaintiff has no title upon which to sustain this action, and that even if the defendant had no legal title from Her Majesty through his grant or patent he is entitled to the judgment of this court.

It may be suggested that the statute was intended to give a title to Her Majesty in the lands in question although the grant is to the "Dominion Government"; but we cannot go outside of the words used in it and must not speculate as to what may have been intended. The title to land is in question and we must not depart from the rules of construction necessary to sustain titles or, in an opposite direction, affect them. We cannot import words much less speculations as to intentions into conveyances, which on their face are capable of but one construction.

The third objection that the land is not described or defined is an important one.

In a grant, deed or other conveyance of land, the land requires to be so described that on the execution of the conveyance the location, quantity, and shape may be ascertained by the usual means.

The land may be described by a line commencing at a certain specified, and, at the date of the conveyance, ascertainable point and running by metes and bounds round it to the place of commencement. It may be

1887

THE QUEEN  
v.  
FARWELL.

Henry J.  
in the  
Exchequer.

1887 described by the lines of adjoining lands or in many  
 THE QUEEN other modes so as distinctly to point out the land con-  
 v. veyed. It may also do so by references to documents,  
 FARWELL. lines, boundaries, monuments, and otherwise then  
 Henry J. existing, but not subsequently to be made or estab-  
 in the Exchequer. lished.

The land must be capable in some way of being as-  
 certained by means of the directions of the conveyance  
 immediately after it is executed independently of other  
 supplementary evidence making an addition to the  
 words of the conveyance.

Testing then the statute of December, 1883, under  
 which the plaintiff claims title by the rules just stated  
 the question is: Who could immediately afterwards  
 lay out and ascertain the exact or even approximate  
 boundaries of the land?

By the statute the land referred to in it was enacted  
 to be 20 miles on each side of the railway wherever it  
 may be finally located. It is well known that from  
 the 49th parallel the southern boundary of British  
 Columbia to its northern boundary there are several  
 hundreds of miles. There is no evidence of any loca-  
 tion of the line of railway when that act was passed  
 and the act does not provide to give lands on any line  
 but one to be subsequently located. Who could then,  
 on the passing of that act, say what part of the terri-  
 tory of British Columbia of the hundreds of miles in  
 extent between its southern boundaries was con-  
 veyed?

There is nothing in the statute to determine it and  
 no reference to other objects then existing by which it  
 could be determined. If not then does any title to  
 any land pass by it?

An ordinary conveyance in such terms would be  
 void for uncertainty, and I know not why the statute  
 in question should be construed differently. It is un-

necessary for me to decide what the statute amounts to, whether an agreement or otherwise. It is only necessary in this case to ascertain if it amounts to an absolute conveyance, and I think it does not.

The fourth objection is, I think, equally available for the defence. The statute to amount to a transfer of title must operate to define the land, as it should in every other respect, as soon as passed. If not then a transfer in law, it could not afterwards become so as to affect any particular lands. It did not purport to convey all the lands of the province between the boundaries before mentioned, and it contained no directions by which on its passage a surveyor or any other party could have ascertained what particular lands were conveyed. In fact such an enquiry could not be made as the legislature that passed the act did not itself know where the line was to run.

I will deal with the fifth and sixth objections together.

The notice of the 5th November, 1883, signed by Mr. Trutch is certainly no evidence that any line had been finally located, but, on the contrary showed that it was not, and that alterations in the projected line were expected to be made. Under such circumstances no surveyor could have made measurements to cover 20 miles on either side of the railway, and if such had been attempted it was likely to have proved to have been labor lost. No surveyor could ascertain the land under the statute until the line was finally located on the ground and a plan of it correctly made shewing courses and distances. A survey without such being previously done could not properly locate the lands referred to in the statute, and, if otherwise done, would no doubt improperly place portions inside and other portions outside of the belt. As far as the evidence goes nothing of the kind has ever yet been done. It

1887  
 THE QUEEN  
 v.  
 FARWELL.  
 Henry J.  
 in the  
 Exchequer.



1887  
 THE QUEEN  
 v.  
 FARWELL.  
 Henry J.  
 in the  
 Exchequer.

may, however, be found that the lands now in question are within the belt, and, in fact, that seemed to me to be conceded at the trial. That, however, does not affect in any way the construction of the statute.

To the 7th objection I may say that although my attention on the trial to any appropriation of lands for the railway by the Government or Parliament of Canada on the side of the adopted line was not directed, and although I have not succeeded in finding any direct appropriation, I am of the opinion that it was inferentially done in a sufficient manner as was done in respect of the more northern line.

In reference to the 9th objection, I will only observe that in the view of the other parts of the case which I have taken, I have not thought it necessary to deal with that point.

I have reason to expect that an appeal to the whole court will be had whatever my judgment may be, and I have therefore principally endeavored to place the facts upon which the decision of the case depends in a compass to be easily ascertained.

In doing so, however, I have felt it but proper to give my views on the legal points generally, having reason to believe they will again be fully argued and my views if wrong corrected.

For the reason given I am of opinion that the plaintiff did not make out the case alleged in the information, and that the defendant is entitled to judgment with costs.

The *Attorney General of Canada* for the appellant:

This appeal involves the title to lands claimed by the Dominion Government in British Columbia, amounting to a million acres. The suit is by writ of intrusion for lot known as No. 6 group 1. The defendants claim under a grant from the Government of British Columbia. The Canadian Pacific Railway crosses the

lot at a quarter of a mile north of the location of Two Rivers.

1887

THE QUEEN  
v.  
FARWELL.

We claim this land in British Columbia as within the twenty mile belt. An order in council was passed under section 146 B. N. A. Act on March 16th, 1871, admitting British Columbia into the union. That order has the same effect in relation to British Columbia as the British North America Act has to the other Provinces. It has the effect of an Imperial statute.

On the question as to whether this was a present right or only an agreement, I would refer to the fact that the Dominion Government agreed to pay \$100,000 a year from the date of the agreement and has paid it.

This concession of lands in British Columbia is to be distinguished from the appropriation of lands in Manitoba. By the terms of the union the quantity of land in British Columbia was limited to twenty miles on each side of the railway. In Manitoba and the North West Territories we granted twenty-five millions of acres to the Canadian Pacific Railway and we are entitled to the whole twenty miles in British Columbia.

The British Columbia Government stipulated that no sales were to be made until the completion of the railway.

The defendants application bears date October 20, 1883. That is not the actual date as it was only delivered to the Government of British Columbia on 19th November, 1883. On November 5, 1883, it was understood that the present route of the railway would be selected. The patent is dated 16th January, 1885. The official acceptance of the application is the notice in the *Gazette* which is 13th January, 1885. The application was made under the Land Amendment Act of 1882.

1887  
 THE QUEEN  
 v.  
 FARWELL.

Some confusion arises from the contention of the defendant that the termini of the road were never fixed. The act of 1872 ch. 71. defines the termini. That act makes it perfectly plain that the termini were not uncertain.

I next refer to ch. 14 of the act of 1874 to show the quantity of land granted to the Canadian Pacific Railway in the North West Territories.

Ch. 11 of the acts of 1880, British Columbia, for the first time undertook to define the limit where the lands should be. That statute never had any effect, because it was opposed to the terms of union which had the force of an Imperial statute. Then the Dominion Act of 1881 ch. 1, the Canadian Pacific Railway incorporation act, finally fixed the quantity of land to be given in the North West Territories at twenty-five million acres.

Next is the statute of 1883 ch. 14 British Columbia. That repealed the act of 1880.

We say that no grant was necessary to pass these lands. They were held by Her Majesty for the benefit of the province. Her Majesty could not grant to herself. The Province of British Columbia undertook to use a larger word than was necessary to vest the lands in the Dominion Government.

The next point is this : It is contended that the words used do not vest any right in Her Majesty, because the expression used is "Dominion Government." The British North America Act says that Her Majesty shall continue to be the executive Governor of Canada. Then, the terms of union, having the effect of an Imperial statute, use that very expression.

Then, as regards the definiteness of the grant. It was a title capable of being vested immediately. When the statute passed in 1883, a large portion of the railway had been completed. There is evidence that the

construction in British Columbia had been begun nearly four years before.

1887  
 THE QUEEN  
 v.  
 FARWELL.  
 —

A good deal of contention appears in the case as to whether this was treated by either government as a grant vesting a title. It is contended by the respondent that it was treated only as an agreement.

[The Attorney General referred to the Dominion Act of 1875, ch. 51, providing for the sale of these lands. Statute of 1880 43 Vic. ch. 27, repealing 38 Vic. ch. 51, also to the Statute of 1884, ch. 6, and produced map to show that the land was never unsurveyed.]

*Burbidge* Q.C. follows: There was never any change of route west of Kamloops. From Port Moody to Kamloops the line follows the direction given in the act of 1880. In the contract the line is described as going by Yellow Head Pass. In 1882 this was found impracticable, and the Act 45 Vic. ch. 23 was passed. That authorizes a change from the Yellow Head to a more southerly pass.

In May, 1880, British Columbia passed an act reciting the agreement with the Dominion Government. Two matters in dispute were the Esquimalt and Nanaimo Railway and the Graving Dock. The Dominion Government could not confirm this legislation, because it was contrary to the terms of union.

Sir Alex. Campbell went to British Columbia in August, 1883, and an agreement was made between him and Mr. Smith.

On 5th November Mr. Trutch gave notice to Smith of the final line of the road. As far as Kamloops the line was located, and it could not be that there was to be a subsequent location. They had to strike Columbia river which is where these lands are. Mr. Trutch said that it might have to be improved when they came to strike the line at Columbia River, and that is their whole agreement.

1887

THE QUEEN  
v.  
FARWELL.

*Theodore Davie* for the respondent :

The title of the Dominion Government to these lands takes its origin from the terms of union. The order in council contains a provision, that the government of the province should convey to the Dominion a quantity of land similar in extent to that in the North West Territories. No attempt had been made to survey it, and it was thought it would take at least two years to make a survey. The contracting parties had two difficulties. The settlement of the country must go on, and it was thought that the lands should not be locked up, and again, that they should not be sold to the Dominion. And the agreement was, that after two years the province should deal with the lands as before. Work was not commenced within two years and a good deal of dispute arose. The Dominion Government had nominated Esquimalt as on the line of railway. Application was made to the local government to reserve land on Vancouver Island. On June 30, 1873, Esquimalt was fixed as the terminus. (Refers to act of 1875 granting land to Dominion Government.)

In 1878 Burrard Inlet was by order in council made the terminus.

(Refers to statute of 8th May, 1880, B. C. Reads sec. 1.)

On November 5 Mr. Trutch gave his notice of the abandonment of the Yellow Head Pass route. Before this notice respondent had made his application to purchase.

In 1883 negotiations were entered into between the Province and the Dominion for the settlement of this dispute as to the lands for the Canadian Pacific Railway in British Columbia, and under these negotiations the Province agreed to concede the claim of the Dominion to additional land to make up for valueless portions within the railway belt, and to meet this point, as well as the question of alienation, it was arranged

that the Province should cede to the Dominion three and a half millions of acres in Peace River. This was subsequently embodied in an act which was disallowed by the Dominion, and finally the agreement between Sir Alex. Campbell and Mr. Smith was made. This agreement resulted in the act known as the 2nd Settlement Act of British Columbia.

1887  
 THE QUEEN  
 v.  
 FARWELL.

The Dominion Parliament did not ratify this agreement until April 1884, 47 V., c. 46. Therefore the title of the Dominion to lands under the settlement act did not arise until that date.

47 V., c. 16 B. C., the land act under which the defendant's grant was made, was assented to on 18th February, 1884, before the ratification of the Settlement Act. Sec. 76 of that act is as follows:—

76. Notwithstanding anything in this act contained any person or persons who have prior to the passing of this act, *bonâ fide* located and applied for land under the provisions of the act hereby repealed, or any, or either of them shall be entitled to acquire such land in like manner as he or they would have been or would be entitled, if this act had not been passed, but subject to proof to the satisfaction of the Chief Commissioner of Lands and Works that the provisions of the previous act have been complied with, provided however, that unless all the provisions of the said acts, including payment, are complied with by the applicant within nine months from the passage of this act all claims of the applicant to be entitled to complete his purchase shall cease and determine.

The case for the crown is defective in two particulars. It is not shown what quantity of land has been appropriated for railway purposes in Manitoba and the North West Territories. They can only claim in British Columbia the same quantity. It is said that they have appropriated 25,000,000 of acres. (refers to Act of 1881, c. 1 D). The Settlement Act points to a new appropriation.

There is no evidence to show that the line was ever located. There is no evidence of surveyors running the line.

1887  
 THE QUEEN *Gold and Silver Mining Co.* (1); *Ehrhardt v. Hogabone*  
 v. FARWELL. (2); *Butt v. Northern Pacific Railway Company* (3).

*Attorney General of Canada* in reply.

The legitimate conclusion of the defendant's argument is that the line can never be located, the rights of the crown can never accrue, and the grant is inoperative.

Then as to the quality of land granted to North West Territories, (reads from S. 11 of 44, V. c. 1.)

Sir W. J. RITCHIE C. J.—The crown seeks to recover possession of certain property known as lot No. 6, in group number one, of the district of Kootenay in the Province of British Columbia. The Canadian Pacific Railway runs through this lot which is situate on the Columbia river at and near where the Illecillewaut river empties into the Columbia. The defendant claims the lands in question by virtue of a grant or letters patent under the Great Seal of the Province of British Columbia, dated the 16th January 1885. The evidence shows that the defendant made an application for certain lands under the land amendment act, 1882, (B.C.) as follows:—

LAND AMENDMENT ACT, 1882.

Sale of Unsurveyed Land,  
 District of Kootenay, British Columbia,  
 October 20th 1883.

To the Hon. the Chief Commissioner of Lands and Works, Victoria.

SIR,—I have the honor to inform you that I desire to purchase, under clause 1 of the "Land Amendment Act, 1882" one hundred and fifteen thousand (115,000) acres of unsurveyed, unoccupied, and unreserved crown land, situate in the land recording district of Kootenay; a sketch plan of the land required is drawn on the back of this application, and I propose employing Mr. Edward Stephens,

(1) 93 U. S. 634.

(2) 116 U. S. R. 67.

(3) 116 U. S. R. 100.

C. E., to survey the same and request you to forward instructions to him in reference thereto addressed to post office, Victoria.

I have the honor to be, Sir,

Your obedient servant,

A. S. FARWELL.

1887

THE QUEEN  
v.  
FARWELL.

Ritchie C.J.

N. B.—A sketch plan of the land required, giving distances and boundaries, must be drawn on the back of this application.

This application though dated the 20th October, 1883, does not appear to have been received at the office of the Surveyor General until the 19th November, 1883, and a survey came to the office some time in the autumn of 1884, prior the surveyor general says, to the 17th and 18th November, at which date under clause 79 application was made, but this survey was never accepted by the government until 13th January 1885.

The evidence bearing on the application is as follows: Mr. Gore, Surveyor General of British Columbia:

Q. Will you produce Mr. Farwell's application? (Application produced).

Q. When was that received at the office? A. It is stamped November 19th, 1883. It is an application for 115,000 acres.

Q. Is that the only application you have with regard to Mr. Farwell's land grant? A. Yes.

Q. Is the land conveyed to him a portion of that land? A. Yes.

Q. Was any plan furnished to the office of Mr. Farwell? A. There is a plan drawn on the back of the application for 115,000 acres.

Q. Any with regard to the 1175 acres? A. He furnished a plan with the field notes of the survey of 1175 acres.

Q. Then he reduced his application afterwards? A. This is the only application I had.

Q. There was not an application for 1175 acres? A. None.

Q. When was the plan accepted by the Chief Commissioner? A. It was finally accepted in January, 1885 I believe. (Application handed in marked D.)

\* \* \* \* \*

Q. You were aware of Mr. Farwell's application of that date I suppose? A. Oh yes.

Q. And when did the survey come in? A. The survey came in sometime in the autumn of 1884, prior to the 17th or 18th November, at which date under clause 79 application was made. The acceptance of the survey was on the 13th January, 1885 in the *Gazette*.



1887

## EXTRACT FROM THE BRITISH COLUMBIA GAZETTE.

THE QUEEN  
v.  
FARWELL.

DATED VICTORIA JANUARY 15TH, 1885.

## NOTICE TO CLAIMANTS OF LAND.

KOOTENAY DISTRICT.

Ritchie C.J.

Notice is hereby given that the undermentioned lots, situate at the Big Eddy, Columbia River, have been surveyed, and a plan of same can be seen at the Lands and Works Office, Victoria:

Lot 6, Group 1—A. S. Farwell, application to purchase, October 20th, 1883.

Lot 7, Group 1.—G. B. Wright, application to purchase, October 19th, 1883.

WM. SMITH,

Chief Com. Lands and Works.

Land and Works Department,

Victoria, B. C., January 13th, 1885.

On the 16th January, 1885, letters patent were issued to defendant as follows:—

To all to whom these presents shall come, Greeting:

Know ye, that We by these presents, for Us, our Heirs and Successors, in consideration of the sum of eleven hundred and seventy-five dollars to us paid, give and grant unto Arthur Stanhope Farwell, his heirs and assigns, all that Parcel or Lot of Land situate in Kootenay District, said to contain eleven hundred and seventy-five acres, more or less, and more particularly described on the map or plan hereunto annexed and coloured red and numbered Lot six (6) Group one (1) on the Official Plan or Survey of the said Kootenay District, in the Province of British Columbia, to have and to hold the said Parcel or Lot of Land and all and singular the premises hereby granted with their appurtenances, unto the said Arthur Stanhope Farwell, his heirs and assigns forever.

Many of the questions raised in this case (I may say all the questions on which the case turned in the court below) have been disposed of in the case of *The Attorney General of British Columbia v. The Attorney General of Canada*, and the only question remaining to be decided, it appears to me is: Had the Government of British Columbia any right to make this grant?

By 47 Vic. ch. 14 passed on 19 December, 1883, the act of 1880 is amended to read as follows:—

From and after the passing of this act there shall be, and there is 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 20 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; 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 section 11 of the terms of union.

1887  
 THE QUEEN  
 v.  
 FARWELL.  
 Ritchie C.J.

With no other proviso than that the line of railway 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.

On the 19th April, 1884, the Dominion parliament passed an act similar to the British Columbia act approving and ratifying the agreement set out in both acts, so that assuming the provincial act was inoperative until the legislation of the Dominion parliament in relation thereto, from that time I am of opinion that the legislature of British Columbia had put it out of the power of the executive of British Columbia to deal with the lands so referred to and granted by the said act, otherwise than in the manner and for the purpose provided for by the act.

There can be no question that before the passing of either of these acts the Government of British Columbia knew full well of the abandonment of the Yellow Head Pass and the adoption of the line on which the road was subsequently constructed, as the following correspondence clearly demonstrates:—

The Hon. Mr. Trutch, C.M.G., to the Hon. Mr. Smithe.

DOMINION GOVERNMENT AGENT'S OFFICE,

VICTORIA, B.C., November 5, 1883.

SIR,—I have the honour to apprise you that I have received from the Right Honorable Sir John A. Macdonald, a reply by telegraph to the telegram and letter which I addressed to him on the 24th ult.

1887  
 THE QUEEN  
 v.  
 FARWELL.  
 Ritchie C.J.

upon the subject matter of the interview which I had on that day with you and your colleagues in the ministry.

Sir John Macdonald directs me to inform you that the Canadian Pacific Railway have definitely abandoned the Yellow Head Pass, and have adopted a line crossing the Rocky Mountains by the Bow River Pass and the Selkirk Range, through what is known as Roger's Pass, by Beaver Creek and Illecillewaut River Valleys, and through Eagle Creek Pass to Kamloops. Some improvements may be made in this line between the summit of the Rocky Mountains and the Columbia River before work is recommenced in the spring, which may render it not strictly accurate to speak of the line as following the Kicking Horse Pass, although that Pass is entirely practicable and will be followed, unless some one of the alternative lines in the immediate vicinity, which are now being examined, is found to afford lighter work and easier grading.

Sir John Macdonald further directs me to request you to place the belt of land, 20 miles on each side of the railway line along the route so above indicated, under reservation, as the land to be granted to the Dominion by British Columbia, instead of the land along the Yellow Head Pass conveyed by the British Columbia Act, 43 Vic. ch. 11, in accordance with the agreement now existing between your government and that of the Dominion.

I beg, accordingly, that you will be pleased to have the said lands at once placed under reservation for this purpose.

I have, etc.,  
 (Signed) JOSEPH W. TRUTCH.

And which the Government of British Columbia acted upon on the 20th November, 1883, by a public notice in the *Royal Gazette* as follows:—

PUBLIC NOTICE.

Whereas section 2 of 46 Vic. ch. 14 grants to the Dominion Government, for the purpose of aiding in the construction of the portion of the Canadian Pacific Railway on the mainland of British Columbia, a tract of land not exceeding 20 miles in width on each side of the line of the railway, wherever it may be finally located, in lieu of that heretofore conveyed along the line located to Yellow Head Pass.

And whereas official information has been received that a definite route has been adopted by way of Bow River Pass, and that via Yellow Head Pass abandoned.

Public notice is therefore hereby given, that the following belt of land is hereby reserved until further notice, viz:—

Commencing at Kamloops thence on a line by the Valley to the South Thompson River and through Eagle Creek Pass to the Columbia River, thence by the Illecillewaut River and Beaver [Creek Val-

leys, and by Roger's Pass through the Selkirk range to the boundary of British Columbia at the Bow River Pass, and having a width of 20 miles on each side of said line.

1887

THE QUEEN  
v.

FARWELL.

WM. SMITHE,  
Chief Com. of Lands and Works.

Ritchie C.J.

Lands and Works Department,  
Victoria, B.C., November 20, 1883.

Mr. Smithe on 24th November, 1883, replied as follows to the above letter of Mr. Trutch:—

Hon. Mr. Smithe to Hon. Mr. Trutch, C.M.G.

VICTORIA, 24th November, 1883.

SIR,—I have the honor to acknowledge the receipt of your letter, dated the 5th instant, in which you advise me of a telegram received from the Right Honorable Sir John A. Macdonald, which conveys intelligence that the Canadian Pacific Railway Company have definitely abandoned the Yellow Head Pass route, and have adopted one by way of Bow River Pass, and through what is known as Roger's Pass in the Selkirk Range of Mountains by Beaver Creek and Illecillewaut River Valleys, through Eagle Creek Pass to Kamloops, and in which you request that, pending the final passage of the Settlement Bill, a reserve shall be placed on the land along the proposed new line of railway.

In complying with the request of the Dominion Government, thus conveyed to me, I cannot refrain from urging on you the pressing necessity that exists for giving facilities to settlers to take up lands within this belt. The Yellow Head Pass route has been under reserve for many years, to the great injury of provincial interests, and that reserve and the conveyance of lands was made by the province in fulfilment of the terms of union, and hitherto the province has had just cause of complaint owing to the delays which have occurred by reason of the Dominion Government not having recognised its own responsibilities.

The clause in the Settlement Act under which alone the demand can properly be made for a grant along the new line of railway in place of that abandoned along the old route, can only be fully acted on when the conditions upon which it is based have been complied with.

This government, however, recognize the fact that the Dominion Government have partially assumed the responsibilities which that act entails on them, and giving that government the fullest credit for a sincere desire to complete the arrangements which have been agreed upon, have made the reserve asked for.

It will of course be necessary before any actual possession of these lands can be allowed to the Dominion Government under the act that the Dominion Parliament shall have passed a confirming act,

1887  
 THE QUEEN  
 v.  
 FARWELL.  
 Ritchie C.J.

and that the Dominion Government by order in council shall have formally abandoned the Yellow Head route and have adopted one by way of Bow River Pass.

I have, etc.,  
 (Signed)

WM. SMITHE.

This notice and letter which I have just read likewise show that the only objection raised to the Dominion Government taking the actual possession of these lands was that before a clear possession could be allowed to the Dominion, it was necessary that the Dominion Parliament should have passed a confirming act, and have formally abandoned the Yellow Head route and adopted one by way of Bow River Pass.

On this point Mr. Trutch, agent of the Dominion Government, thus speaks and there is nothing to the contrary in the evidence:—

Q. You say in this letter of 1883 that Sir John Macdonald requests that a reservation be placed upon the land along the line of Yellow Head Pass? A. It was of course granted.

Q. Then what was the objection of the Dominion Government? A. It is very clear; the statute says that the conveyance made at that date was for a railway belt along the line wherever finally located. On the 5th November I wrote that the line had been officially located along Eagle and Rogers Passes, and therefore that is the line claimed under the statute.

Q. If the land was already conveyed there was no necessity for asking the Local Government to place it under reservation. Does it not appear to you as if the act of 1883 was not operating as a conveyance. A. The Local Government desired to place it under reservation.

Q. Did you request them to do it? A. Yes; they were requested because it was their desire, as they wanted to know where the belt would be.

Q. It was in consequence of the request of the Provincial Government that the specific line was located in order that the rest of the land might be released? A. Yes undoubtedly. My letter was communicated to the Premier in order that the act relieving the land not identified in that letter from reservation should be passed, and as a matter of fact that was the course taken.

Therefore so soon as the act of the Dominion adopting and confirming the legislation of the Province was passed, the line of the Canadian Pacific Railway thus

selected by the Dominion Government and adopted by British Columbia passed out of the control of the executive government of British Columbia, and was held by the crown as represented by the Governor General of Canada, no necessity existing for, nor indeed could there be, any actual change of possession because the possession was always in the crown whether held for British Columbia or the Dominion.

1887  
 THE QUEEN  
 v.  
 FARWELL.  
 Ritchie C.J.

This line indicated in Mr. Trutch's letter was no doubt taken possession of by the Dominion Government.

Mr. Trutch says:—

Q. In May 1886 was railway construction going on in the province? A. Certainly.

Q. When did that commence? A. In the month of May 1880.

Q. The construction from Yale up to Savona? A. On the section contracted for between Emory and Boston Bar was the first section that was commenced.

Q. That was by the Dominion Government? A. By Onderdonk under contract with the Minister of Railways.

Q. When did construction commence east of Kamloops towards Kicking Horse Pass, east of Savona? A. It commenced in the spring of 1884, about April or May. That work was under contract between Savona and Kamloops between Onderdonk and the Canadian Pacific Railway.

Q. That was along the line as defined in your letter of the 5th November? A. Yes, on the south shore of Kamloops Lake.

Q. Does the railway pass through the land claimed by defendant? A. I don't know exactly, I believe it does. Mr. Davie: Speak as to your own knowledge. Mr. Drake: You will know if you see the plan? A. I presume I shall be able to identify the land. (Plan produced).

Q. On looking on that plan you say that the railway passes through? A. Yes, I recognize at this sketch the Illecillewaut river emptying into the Columbia, and I know that the railway crosses about three quarters of a mile north of that, which places the line of railway within the tract of land colored red, Gp. 1, lot 6.

And this line so far as can be discovered from the evidence has never been departed from, and it has not been disputed that the railway has been constructed on the line thus indicated, nor is it denied that the land in dispute is within the 20 miles' belt. But the defendant claims this land under and by virtue of the 45 Vic.

1887

THE QUEEN

v.

FARWELL.

ch. 6 (21 April, 1882), "An Act to amend the Land Act, 1872," which is as follows:—

Statutes of British Columbia, 1882, 45 Vic., ch. 6.

SECTION 1 SUB. SEC. 4.—"SALE OF UNSURVEYED LANDS."

Ritchie C.J.

1. Every person desiring to purchase unsurveyed, unoccupied, and unreserved Crown lands shall give two months notice of his intended application to purchase by a notice inserted, at the expense of the applicant, in the *British Columbia Gazette*, and in any newspaper circulating in the district wherein such land lies; and such notice shall state the name of the applicant, the locality, boundaries and extent of the land applied for, such notice shall be dated, and shall be posted in a conspicuous place on the land sought to be acquired, and on the government office, if any, in the district. He shall also place at each angle or corner of the land to be applied for a stake or post at least four inches square and standing not less than four feet above the surface of the ground. Except such land is so staked off before the above notice is given all the proceedings taken by the applicant shall be void. He shall also have the land required surveyed, at his own cost, by a surveyor approved of and acting under the instructions of the Chief Commissioner of Lands and Works or Surveyor General; and such lands shall be surveyed on the rectangular or square system now adopted by the government, and all lines shall be run due north and south and due east and west, except where from the nature of surveys made it would be impossible to conform to the above system; and the said survey of the said land shall be connected with some known point in previous surveys, or with some other known point or boundary, unless otherwise ordered by the Chief Commissioner of Land and Works or Surveyor General; and the price of said land shall, except as further provided, be one dollar per acre, which shall be paid in full at the time of the purchase; but no title can be acquired to any such land until after such land shall have been surveyed, and such survey shall have been accepted by the Chief Commissioner of Lands and Works or Surveyor General in writing and payment made for the said land; provided always, that it shall not be lawful to survey or sell any lands under authority of this section in such manner as to dispose of a less quantity of land than 160 acres, measuring 40 chains by 40 chains, except where such area cannot be obtained or such measurement carried out, nor shall the application above mentioned of itself confer any right or title to the land applied for upon the applicant.

The defendant thus claims that on the 22nd November, 1883, he made application for a patent of lands covering the lands in dispute, that these lands were surveyed in October, 1884, and that the survey was

accepted by the Chief Commissioner of Crown Lands in British Columbia on 13th January, 1885, and that his grant issued on the 16th January, 1885.

. I am clearly of opinion that the application of the defendant on the 22nd November, 1883, conferred on him no right, title, or interest in the land applied for. I am also of opinion that the line of the Canadian Pacific Railway, as well in law as in fact, was on the 13th January, 1885, when the survey and plan were filed in the Lands and Works Department of British Columbia, duly located, that the filing of such survey and plan conferred on defendant no right, title, or interest in the land, and that on the 16th day of January, 1885, the date of the grant, the Province of British Columbia had ceased to have any interest in the land covered by said grant, and that the title to the same was in the crown for the use and benefit of the Dominion of Canada and consequently conveyed no right, title, or interest to the defendant in said lands.

There was nothing in the objection that as Canada only gave the company every alternate section only the alternate sections could be appropriated in British Columbia and until a survey it was not possible to say whether the land in question belonged to Canada or not, but the conclusive answer to this is that British Columbia, agreed to grant a similar extent of public lands along the line of railway throughout the entire length of British Columbia (not exceeding 20 miles on each side thereof) as might be appropriated for the same purpose by Canada from the public lands in the Territories and Manitoba. Canada appropriated 25 millions of acres. A belt of land 20 miles wide on each side of the Canadian Pacific Railway, viz., 508 miles long, the length then in British Columbia by 40 miles wide would contain 13,004,809 acres, so that it is quite clear there is not the slightest pretence for

1887

THE QUEEN

v.

FARWELL.

Ritchie C.J.



1887  
 THE QUEEN  
 v.  
 FARWELL.  
 Ritchie, C.J.

the claim set up that the Dominion are entitled only to alternate sections in British Columbia, which would not give them nearly the amount of land to which they would be entitled. Under these circumstances the judgment of the Exchequer Court should be reversed and the contention of the crown on behalf of the Dominion Government should prevail.

STRONG J.—The title of the crown depends upon section 2 of the British Columbia Act 47 Vic. ch. 14 passed on the 19th December, 1883, which is as follows:—

2. Section 1 of the act of the legislature of British Columbia, No. 11, 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 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; 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 section 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 sea-board of British Columbia with the Canadian Pacific Railway, now under construction on the east of the Rocky Mountains.

The land which the crown by this information seeks to recover is within the belt of twenty miles on each side of the Canadian Pacific Railway, as that line of railway was finally located and constructed.

The respondent claims title by virtue of a grant by the crown under the great seal of British Columbia made upon the 16th January, 1885.

I am of opinion that the objection that the statute required a grant or some subsequent instrument to carry it into execution wholly fails. It was clearly self executing and operated immediately and conclusively so soon as the event on which it was limited to take effect happened, that is as soon as the "line of railway was finally located." Whether upon that event occurring it operated by relation from the date of its enactment so as to avoid intermediate grants by the Province of British Columbia is an inquiry which the facts of the present case do not require us to enter upon for the respondent acquired no title to this land until after the line of railway was finally located.

The objection that the statute is void and inoperative (for it amounts to that) because the grant made by the statute is to the "Dominion Government" instead of to the Queen her heirs and successors is equally untenable. This statute is not to be construed according to technical rules applicable to deeds, but according to the general rules of statutory construction one of which is that it must be so construed as to be effective, and it shall not be held to fail for want of certainty unless it is impossible to put a sensible meaning upon the language in which it is expressed. The expression "Dominion Government" used in making the grant which the statute was intended to effect is, it is true, a colloquial and not a technical designation for the crown in the right of the Dominion to whom the grant was doubtless intended to be made, but it is not so devoid of meaning as to warrant us in holding the statute ineffectual because of its use; it must on the contrary be read as symbolising the proper technical words which might have been used, and for which it was meant to be an equivalent, viz.: "there is hereby granted to Her Majesty, her heirs and successors in right of, and for the use of her Dominion of Canada,"

1887

THE QUEEN

v.

FARWELL.

Strong J.

1887  
 THE QUEEN  
 v.  
 FARWELL.  
 ———  
 Strong J.  
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and if these terms had been actually used in the act, no force of ingenuity would have been able to raise a doubt as to their conclusive effect in vesting the property in the lands in question in the crown in right of the Dominion.

As regards the words "final location of the railway" I am unable to see that any difficulty can arise as to the meaning to be attached to them. It was of course a necessary preliminary to the making of the railway that the line on which it was to be made should be finally ascertained, surveyed and marked out, and it was the final completion of this preliminary work which is clearly meant and most appropriately and correctly designated in the statute as the final location of the line of railway. The word location is one of common use in this country as a term to designate the selection of a line of railway or a line of road, or the ascertainment of a parcel of wild land for the purpose of settlement, and used as we find it here it can possibly mean nothing else than the final selection of the line upon which the railway was afterwards to be laid down. To give it the only other meaning which has been suggested, namely, that it is used as convertible with "construction or completion" so far from being a just interpretation would be doing nothing less than wresting it from the well known and understood meaning which usage has attached to it.

That the line was finally located in the sense just adverted to at a date anterior to the 15th January, 1885, the earliest date to which the respondent's title can be ascribed, is a fact of common notoriety, and I do not consider that any objection was raised to a defect of formal proof on this head. Should any such objection be insisted upon, this court may, as having jurisdiction to pronounce the judgment which the Exchequer Court ought to have given, order that the crown may be

at liberty to establish the fact by the affidavit of the Chief Engineer of the Pacific Railway pursuant to the general orders of the Exchequer Court.

1887  
 THE QUEEN  
 v.  
 FARWELL.  
 Strong J.

As regards the respondent's title that, as I have said, cannot be referred to any earlier date than the 15th January 1885, the day before the grant to him was made when the defendant's survey was delivered to the Commissioner of lands in British Columbia, (if indeed any title pre-emptive or otherwise vested in him prior to the date of the letters patent), and the line of railway had been finally located long before that date. The respondent clearly got no title under what he pretends was his original location of 115,000 acres by his letter to the Commissioner of the 20th October, 1883. No statutory provision can be referred to as conferring any title or right of pre-emption as a consequence of that letter. At most the handing in of the survey of a particular parcel of land on the 15th January, 1885, gave the respondent a claim of right for the first time though that too is not free from doubt and question which, however, it is not worth while to consider as the grant passed the next day. Section 76 of the British Columbia Land Act, 1884, does not help the respondent, it only saves rights of pre-emption previously acquired; and none had been acquired as regards the 1175 acres now in question.

The result is that when the letters patent under the great seal of British Columbia, issued on the 16th January, 1885, assuming to grant this land to the respondent, the province had no title to the land, and consequently nothing to grant, an absolute title thereto, having previously vested in the Dominion under the statute, 47 Vic., ch 14, upon the final location and ascertainment of the line of railway.

The judgment of the Exchequer Court must therefore, on the affidavit mentioned being filed if the res-

1887  
 THE QUEEN  
 v.  
 FARWELL.

pendent requires it, be reversed and judgment entered for the crown with costs in both courts.

STRONG J.  
 Fournier J.—In this case I am in favor of allowing the appeal. In the case of *Attorney General of British Columbia v. Attorney General of Canada* (1); which was decided by this court yesterday, I had occasion to express my opinion upon the question of the ownership of the precious metals in these railway lands, but as regards the construction to be put upon the statute granting provincial lands in aid of the construction of the Canadian Pacific Railway, I think the expressions used are quite sufficient to convey the lands to the Dominion, and therefore Farwell's title from the Government of British Columbia is void; but I come to this conclusion, with the reserve I made in the other case, that the conveyance does not cover the gold and silver mines.

HENRY J.—My judgment has already been given in this case. I adhere to the same views as I entertained when I delivered the judgment in the Exchequer Court, and I refer to it and think the appeal should be dismissed.

GWYNNE J.—I concur with the majority of this court that the appeal should be allowed for the reasons sufficiently stated in the case of *Attorney General of British Columbia v. Attorney General of Canada* (1); the title of Canada is referable to the treaty alone, and the acts of Parliament which were passed to carry out the provisions of that treaty.

*Appeal allowed with costs.*

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

Solicitors for respondent: *McIntyre, Lewis & Code.*

(1) P. 345.