THE QUEEN ON THE INFORMATION OF THE ATTORNEY-GENERAL FOR THE DOMINION OF CANADA..... PLAINTIFF; 1893 Mar. 13.

AND

LUDGER O. DEMERS AND NUMA DEMERS..... DEFENDANTS.

Federal and provincial rights—Title to lands in railway belt in British Columbia—Unsurveyed lands held under pre-emption record at time grant of railway lands came into operation—British Columbia Land Acts of 1875 *and* 1879—*Terms of Union, section* 11—*Construction.*

Held:—Lands that were held under pre-emption right, or Crown grant, at the time the statutory conveyance of the railway belt by the Province of British Columbia to the Dominion of Canada took effect, are exempt from the operation of such statutory conveyance, and upon such pre-emption right being abandoned or cancelled all lands held thereunder become the property of the Crown in the right of the province and not in the right of the Dominion.

2. Unsurveyed lands recorded under the British Columbia Land Acts of 1875 and 1879 are lands held under "pre-emption right" within the meaning of the 11th section of the Terms of Union between the Province of British Columbia and the Domin ion of Canada. [See Statutes of Canada, 1872, p. XCVII.]

INFORMATION of intrusion by the Attorney-General for the Dominion of Canada to recover possession of a lot of land within the railway belt in the Province of British Columbia.

The facts of the case are stated in the judgment.

The case was tried at Victoria, B.C., on the 1st and 3rd of October, 1892.

Richards, Q.C. (with whom was *Helmcken*) for the plaintiff: It will, doubtless, be contended, on behalf of the defence, that the lands in question in this case were held under pre-emption right at the time of the setting out of the railway lands under the grant to the

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Dominion by the province. They were first held under what purported to be a pre-emption record by Messrs. Dunbar, Wilson and Pillmore, but the lands were unsurveyed by them, and under the British Columbia Land Acts of 1875 and 1879, in unsurveyed land no one could acquire pre-emption rights. Unsurveyed lands were recorded merely, and only surveyed land could be regularly pre-empted. Therefore, they were not exempted from the operation of the statutory grant, nor were they lands held under pre-emption right within the meaning of the Terms of Union. Again, even if Dunbar, Wilson and Pillmore had acquired pre-emption rights they abandoned them, as appears by the record; and upon such abandonment, and in view of the fact that it was the obvious intention of the two Governments that the railway reservation should apply to all lands within the railway belt, the escheat would enure to the benefit of the Crown in right of the Dominion. The lands having so passed to the Dominion, there could be no new pre-emption of them by the defendants. (He cited secs. 10, 11 and 12 of the British Columbia *Land Act*, 1875.)

Davie, Q. C. (A.-G. B. C.) for the defendants: The issues in this case are substantially the same as in the first case of *The Queen* v. *Farwell* (1), and we are now in a position to discuss the question which arose in that case in the new light which is thrown upon it by the judgment of their lordships of the Privy Council in the *Precious Metals Case* (2).

The result of that decision seems very plainly to amount to this, that while the object of the provincial Government in conveying the lands in the railway belt to the Dominion was to indemnify the latter for building the railway, there never was any intention

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

(2) *The Attorney-General of British Columbia* v. *The Attorney-General of Canada*. 14 App. Cas. 295.

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of making it a freeholder in the province. The Dominion has the right to take the revenues of the lands merely. It might be said that the province holds these lands in trust for the Dominion to recoup the latter for the outlay in building the railway. (He here refers to the judgment of Chancellor Boyd in *The Queen* v. *The St. Catharines Milling and Lumber Company*) (1). The decision of the Supreme Court of Canadain *The Queen* v. *Farwell* (2) is virtually overruled by the Privy Council in the *Precious Metals Case*, and this court ought not to follow the former. (He here cites *Mercer* v. *The Attorney-General of Ontario.*) (3)

It is very clear on the facts of this case that the plaintiff is out of court. The lands in question were held under a pre-emption record at the time the statutory grant to the Dominion came into operation, and it is our contention that, under the provisions of the eleventh section of the Terms of Union, they were expressly exempted from the lands affected thereby. There can be no difficulty about the construction of this section as applied to the case before the court.

Smith, following on the same side, contended that insomuch as the lands were held under a pre-emption record, dated the 10th September, 1883, by Dunbar, Wilson and Pillmore at the time of the statutory grant by the province to the Dominion, the only time when they could by any possibility have become affected by the reservation for railway purposes would be within the very few minutes it would take for the first pre-emptors to formally abandon their claim in the provincial land office and for the new papers to be made out on behalf of the defendants. This would probably not take over ten minutes' time, and both the abandonment and the new pre-emption were made on the same

(1) 10 Ont. 234. (2) 14 Can. S.C.R. 392.
(3) 8 App. Cas. 767.

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day. If the final location of the railway lands was made before the 29th August, 1885, then the lands in question were held under pre-emption record at the time; if it was made on that day then in order to bind these lands it must have been made during the very brief interval that elapsed between the formal abandonment of the first pre-emption and the issuing of the new pre-emption papers to the defendants, and I am of the opinion that such is not the case.*

As to the question whether the first pre-emption record was a regular one, under the 11th section of the Terms of Union, we rely on the practice of the provincial lands office as explained by the evidence of the Deputy-Commissioner of Lands.

Under the Provincial Lands Acts of 1875 and 1879, even where a pre-emptor had died without obtaining a certificate of improvements, the province did not enforce an escheat but allowed the heirs to get a Crown grant after performing certain requirements. Clearly, then, the pre-emption of Dunbar, Wilson and Pillmore was within the exception contained in the Terms of Union.

A class of cases similar to this has received very careful consideration in courts in the United States. (He here cites *Sioux City Land Company* v. *Griffey* (1) *Kansas Pacific Railway Company* v. *Dunmeyer*.) (2).

Richards, Q.C. replied.

BURBIDGE, J. now (March 13th, 1893) delivered judgment.

The information of intrusion is exhibited in this case to recover possession of lot number 237, in group

*REPORTER'S NOTE.—The learned judge at the trial reserved leave to the plaintiff to prove by affidavit the date of the final location of the railway through the district where the lands in question are situated. Such date was so ascertained to be the 16th January, 1885.

(1) 143 U.S. Rep. 32. (2) 113 U. S. Rep. 629.

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one, in the Osoyoos Division of Yale District, in the Province of British Columbia, situate within the railway belt and containing six hundred and forty acres, more or less. The defendants plead title, and justify their intrusion under letters-patent issued to them on the 31st day of July, 1889, under the Great Seal of the province. To this defence the Attorney-General of Canada replies that on the day on which such letters-patent were issued the lands mentioned were in the hands and possession of Her Majesty, in the right of the Dominion of Canada, and not in the right of the Province of British Columbia; and that the grant thereof under the Great Seal of the province conveyed no interest therein to the defendants. The issue is in terms the same as that which was decided in *The Queen* v. *Farwell* (1), but the facts and questions to be determined are different.

By the Terms of Union between the Province of British Columbia and the Dominion of Canada, the Government of the Dominion undertook to secure the construction of a railway to connect the seaboard of British Columbia with the railway system of Canada, and the Government of British Columbia agreed to convey 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 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 miles on each side of said line), as might be appropriated for the same purpose by the Dominion Government from the public lands of the North-west Territories and Province of Manitoba; provided that the quantity of land which might be held under pre-emption right, or by Crown grant, within the limits of the tract of land in

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

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British Columbia to be so conveyed to the Dominion Government should be made good to the Dominion from contiguous public lands (1).

The history of the controversies and negotiations that grew out of this agreement makes a long story. But for the determination of the issue raised in this case, it will not be necessary to go back of the year 1883. On the 10th of September of that year three settlers, named Dunbar, Wilson and Pillmore, obtained, under the British Columbia *Land Act*, 1875, and the *Land Amendment Act*, 1879, what purported to be a certificate of pre-emption record to the lands in question, which are situated some eighty miles east of Kamloops and within the twenty-mile belt south of the Canadian Pacific Railway, but which, at the time this certificate was issued, were unoccupied, unsurveyed and unreserved public lands of the province. On the 5th of November, 1883, the Government of British Columbia were informed, on behalf of the Government of Canada, of the adoption of a line of railway crossing the Rocky Mountains by the Bow River Pass, and the Selkirk Range through Roger's Pass, by the Beaver Creek and Illicillewaet River Valleys, and through Eagle Creek Pass to Kamloops, and were requested to place a belt of land twenty miles wide on each side of the line along the route so indicated under reservation, as the land to be granted to the Dominion by British Columbia, instead of the land along the line from Kamloops to the Yellow Head Pass, conveyed with other lands by the British Columbia Act, 43 Vic. c. 11. The reservation was made on the 29th of November, 1883, by public notice published in *The British Columbia Gazette* of that date. In the notice, reference was made to an Act of the province, 46 Vic. c. 14, passed on the 12th of May of that year, to ratify, so

(1) Statutes of Can. 1872 p. xcvii.

far as British Columbia was concerned, an agreement which at the time was thought to have been made between the two Governments. The last-mentioned Act was, however, repealed on the 19th of December following, by the Act 47 Vic. c. 14, which confirmed on the part of the province the agreement finally concluded between the Governments of the Dominion and of the province, for the purpose of settling all disputes and differences then existing between them. By this agreement, which was ratified by the Parliament of Canada on the 19th of April, 1884 (1), it was, among other things, in substance agreed that the grant of public lands in aid of the Canadian Pacific Railway should be made of lands on each side of the railway, wherever finally settled; that three and one-half millions of acres of land in the Peace River District of British Columbia should be conveyed to the Government of Canada, and that the agreement should be taken by the Dominion Government in satisfaction of all claims for additional lands under the Terms of Union, that is, in satisfaction of the right of the Dominion, under the Terms of Union, to have made good to it, from public lands contiguous to the railway belt, the quantity of land that might, at the date of the conveyance, be held under pre-emption right or by Crown grant. By the second section of the Act 47 Vic. c. 14, by which, as we have seen, the agreement of 1883 was confirmed by the Legislative Assembly of the province, it was, in amendment of the first section of the Act No. 11 of 1880, provided that from and after the passing of the first-mentioned Act, there should be and there was 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

(1) 47 Vic. c. 6.

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to be appropriated as the Dominion Government might deem advisable, the public lands along the line of railway wherever it might be 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. The location of such line of railway between Sicamous Narrows to a point west of Shuswap Lake, a distance of fifty miles south of which and within twenty miles thereof, are situate the lands in question, was approved by an order of His Excellency the Governor-General in Council on the sixteenth day of January, 1885. On the 29th of August, 1885, the certificate of pre-emption record issued to Dunbar and his associates was cancelled, and on the same day a like certificate for the same lands was issued to the defendants, to whom, the provisions of the Land Acts of the province having been complied with, letters-patent for such lands were issued on the 31st day of July, 1889, under the Great Seal of British Columbia.

The question that arises on this state of facts is: Did the statutory grant or conveyance from the province to the Dominion attach to such lands? The defendants say that it did not. They contend that as the lands were at the time held under pre-emption right, they were not affected either by the reservation of 29th November, 1883, or by the Act of the 19th of December following (1). To this contention the Crown makes two answers. In the first place, it is objected that Dunbar and his associates did not hold the lands under pre-emption right within the meaning of the Terms of Union, and in the second place, that when their rights under the certificate were abandoned, the grant to the Dominion attached to the lands mentioned therein.

(1) 47 Vic. (B.C.) c. 14.

In support of the first objection, it is said that by the provisions of the British Columbia *Land Act*, 1875, under which the certificate was issued, surveyed lands might have been pre-empted, but not unsurveyed lands; that an intending settler "recorded" unsurveyed lands and "pre-empted" surveyed lands, and that as the lands in question were unsurveyed lands, the Dunbar certificate was improperly denominated a certificate of pre-emption record. In 1871, when the Queen's order was passed giving effect to the Terms of Union between British Columbia and Canada, the *Land Ordinance*, 1870 (1), was in force in the province; by the third section of which it was provided that a right of pre-emption might be acquired in unsurveyed lands. In 1874, the laws of the province relating to Crown lands were amended and consolidated by the *Land Act*, 1874 (2), by which provision was made for "recording" unsurveyed lands and "pre-empting" surveyed lands. The same apparent distinction was preserved in the *Land Act*, 1875. By the fourth section of the *Land Amendment Act*, 1879 (3), it was provided that every person who thereafter "recorded" or "pre-empted," as a "settler" or "homestead settler," surveyed or unsurveyed land, should pay one dollar per acre for the same. The procedure by which the "settler" or "homestead settler" secured his homestead did not differ greatly in the two cases, and the "settler" who recorded a tract of unsurveyed land and performed the prescribed conditions, did in substance obtain the right to pre-empt the land recorded. So little difference was there between "recording" and "pre-empting" land, under the system of laws in force in the province, that when we come to the *Land Act*, 1884 (4), we find that the person who desires to

(1) R. S. B. C. No. 144.
(2) 37 Vic. No. 2.
(3) 42 Vic. c. 21.
(4) 47 Vic. c. 16.

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"pre-empt" either surveyed or unsurveyed land, "records" such land.

The expression "pre-emption right," used in the Terms of Union, had reference no doubt to the right to pre-empt lands for which provision was made by the third section of the *Land Ordinance*, 1870, to which reference has been made.

The right which Dunbar and his fellow settlers obtained in the lands described in their certificate was a right of that character, and it matters little, it seems to me, whether the certificate was called a certificate or record of unsurveyed land, as it is contended that it should have been, or a certificate of pre-emption record, as it purported to be. In either case the lands were, I think, within the description of lands held under pre-emption right, and which by the Terms of the Union were excepted out of the grant from the province to the Dominion.

If that be the true view to take of the matter, it is clear that when the certificate was cancelled the lands described therein became the property of the province, and not of the Dominion. If at the time of the statutory conveyance the lands were held under pre-emption right, they were not affected by the conveyance, and when that right was abandoned they became public lands of the province, which its Government was free to deal with as they saw fit. That would follow from the fact that there was never any transfer of such lands to the Dominion. But there is another consideration which appears to me to be conclusive of the question. The province has made good to the Dominion any loss the latter may have sustained by the exception from the grant of these lands and others in the railway belt which at the time were held under like title or by Crown grant. In lieu thereof it has conveyed to the Dominion, and the latter has agreed to accept in satis-

faction of its claim, three and one-half million acres of land in the Peace River District. The contention that, notwithstanding such conveyance and agreement, the Dominion is entitled to the lands in the railway belt which at the date of the conveyance were held under pre-emption right or Crown grant and which have since reverted to the Crown, is clearly untenable.

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Judgment for defendants, with costs.

Solicitors for plaintiff: *O'Connor, Hogg & Balderson.*

Solicitor for defendants: *A. G. Smith.*