HIS MAJESTY THE KING ON THE INFORMATION OF THE ATTORNEY-GENERAL FOR THE DOMINION OF CANADA.. ..... } PLAINTIFF;

1909
May. 10.

AND

THE BURRARD POWER COMPANY (LIMITED) AND THE ATTORNEY-GENERAL OF BRITISH COLUMBIA ..... } DEFENDANTS.

Constitutional law—Dominion lands—Railway belt in British Columbia—Provincial legislation respecting the same—Water record—Invalidity—Interference with navigation.

No rights adverse to the Dominion Government can be acquired under the British Columbia Water Clauses Consolidation Act (R. S. B. C., cap. 190) in any waters within the territory known as the Railway Belt, granted to the Dominion Government by the Act 43 Vict. (B. C.) c. 11, as amended by 47 Vic. (B. C.) c. 14.

2. In view of the exclusive legislative authority of the Parliament of Canada under sub-sec. 10 of sec. 91, *British North America Act*, 1867, it is not within the power of a Provincial legislature to authorize any diversion or other use of water in the upper reaches of a river which would have the effect of interfering with the navigation of a lower portion of such river.

THIS was an Information filed by the Attorney-General of Canada to have it declared *inter alia* that a certain grant of water rights to the defendant company made by the Government of British Columbia was invalid.

The facts are fully stated in the reasons for judgment.

April 13th, 1909.

The case now came on by way of a motion for judgment by the Crown on the report of the learned referee. On the application of counsel for the defendant company, the said defendant was allowed to appeal from the report on the grounds set out in the reasons for judgment. (See *post* p. 308).

E. L. Newcombe, K.C., appeared for the plaintiff.

E. Lafleur, K.C., appeared for the defendant company.

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The Attorney-General of British Columbia, appeared for that province.

Mr. *Lafleur*, contended that the finding of the learned referee with respect to the diversion of the waters having a tendency to interfere with navigation was wrong. The Lillooet river is admittedly navigable up to what is called the town line bridge, and beyond that point a certain class of boats could, as the learned referee finds, be laboriously taken up for a short distance, i. e., to the point where the Burrard Power Company contemplate carrying on their operations. From a point about a mile above the town line bridge up to the Lillooet lake it is not navigable in law. The only reason the river here is used at all is that there is no road, and a good test of its practical navigability lies in the fact proved that it took two men twelve hours to get a small boat five miles up the stream, for which they were paid $18. Such feats are far from establishing the navigability of that part of the stream. But it is submitted that these proceedings are quite premature because we have no right to do one thing or the other until the Government of British Columbia has given its sanction to the scheme. All that we have done so far is to get a water record, so as to prevent any other person from acquiring that quantity of water at about the place where we propose to operate; but, as to the details of the scheme, they are at large. But in any event the water used will be returned to the Lillooet river. If there is to be any interference with the water it will take place in the part of the stream that is not navigable; there will be no detriment to existing navigation. As to any possible disturbance to the fisheries, that is settled by putting in an ordinary fish-ladder. A river in this country is not a royal river unless it is tidal to its source. It may be a royal river in part, where navigable, and a private river for the rest. (Cites *The*

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Queen v. *Robertson* (1); *Keewatin Power Company* v. *Town of Kenora* (2).

Mr. *Newcombe* argued that inasmuch as the river in question was clearly within the "Railway Belt" granted by British Columbia to the Dominion Government by 43 Vic. c. 15, there was no possible doubt that the Dominion's ownership of the water and bed of the stream could not be interfered with by the provincial legislature or the provincial government. It is a part of the public property of Canada under sec. 91 of *The British North America Act.* It is the property of the Crown. There is only one Crown. The right of administration of public property may be in the Dominion or it may be in the provinces, but the property is the property of the Crown. So when this transfer was made by British Columbia to the Dominion, the title remained where it had always been, in the Crown, but by way of convenient analogy, as between individuals, we speak of British Columbia transferring its property to the Dominion. What British Columbia did was to transfer all the rights of administration of the beneficial interest of the lands to the Dominion, and the Dominion became the administrator, became the authority to administer the lands to the same extent as British Columbia could have done before the transfer was made. The provisions of the British Columbia Water Clauses Act, therefore, do not apply to the *locus in quo*; and no rights could be created by that Act adverse to the interests of the Dominion. (Cites *Attorney-General* v. *Mercer* (3); *Attorney-General of British Columbia* v. *Attorney-General of Canada* (4). The Dominion Government does not stand in relation to these lands as a freeholder within the province, but the administrative interest was vested in the Dominion by the statute. When the Dominion disposes of any of such

(1) 6 S.C.R. 52.
(2) 16 O.L.R. 184.
(3) 8 App. Cas. 767.
(4) 14 App. Cas. 295.

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lands to settlers, then the province would have the same jurisdiction over the lands in the hands of the Dominion's grantees as if the province had never parted with the same. But no question of that sort arises here.

I submit that the findings of the learned referee are amply justified by the evidence; and that there is no jurisdiction in the provincial authorities to authorize the defendant company to assume any rights in the waters of the river in question.

Mr. *Lafleur*, in reply, contended that under the decision of their Lordships of the Privy Council in the case of *The Attorney-General of British Columbia* v. *Attorney-General of Canada* (1), the Dominion secured nothing more in respect to the lands in the "Railway Belt" than the territorial revenues. None of the prerogative rights of the Crown in the right of British Columbia were transferred to Canada, but at most it was a conveyance in trust to enable the Dominion government to sell the lands and recoup itself the subsidy it granted to the railway. He submitted that the conveyance of the "Railway Belt" was never intended to enable the Dominion Government to give to its grantees a higher title than would be given by the province itself to settlers; and as the law stood at the date of the statutory grant to the Dominion, under a grant from the Government of British Columbia the settler's title would be subject to the superior rights of the persons who might hold water records. British Columbia never parted with its right to legislate over these lands; and no presumption would be drawn by the courts to exclude the sovereign right of legislation. (Cites *McGregor* v. *Esquimalt and Nanaimo Railway* (2)

My argument, in short, on this point is that while the property referred to in sec. 91 of *The British North America Act* means property with which the Dominion Government can deal with absolutely, the lands in the

(1) 14 App. Cas. 295. (2) (1907) A. C. 462.

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"Railway Belt" are granted in trust, and when the Dominion grants it to settlers they take it subject to provincial legislation. The trustee cannot appropriate the lands to himself, he must appropriate to the purposes of the trust, which was to sell and recoup the Dominion Government for the subsidy granted to the railway. (Cites *Martley* v. *Carson* (1); *Klondyke Government Concession* v. *McDonald* (2); *Esquimalt Waterworks Company* v. *City of Victoria* (3).

The water privileges under the British Columbia Water Clauses Act are grants by way of expropriation in the exercise of the right of eminent domain by the province, and are paramount to any ordinary title in fee. They could not be excluded by a conveyance to a trustee, who is merely the conduit through which the titles to settlers are to be granted.

Upon the question of navigability, the test is laid down in *Bell* v. *Corporation of Quebec.* (4) . A river is navigable in law when it is navigable for commercial purposes, not merely when it might, by some feats of strength or ingenuity, be made navigable by overcoming all kinds of obstacles, as is the case with the river here.

[BY THE COURT: If the diversion of water in the upper reaches interfered with the navigability of the stream below, would its authorization be competent to the provincial legislature?]

That is not shown by the facts; and can the Dominion Government take action here to prevent something that might never happen?

As to the possible interference with the fisheries in the river, the fact is that with respect to this river there are no regulations made by the Dominion Government affecting the fisheries, and, consequently, there is no clashing of Dominion and provincial authority.

(1) 20 S. C. R. at p. 653.
(2) 38 S. C. R. 79.
(3) [1907] A. C. at p. 509.
(4) 5 App. Cas. 84.

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CASSELS, J. now (May 10th, 1909) delivered judgment.

The information was filed on behalf of His Majesty on the information of the Attorney-General for the Dominion of Canada against the defendant, the Burrard Power Company, Ltd. For convenience it is better to set out in full the words of the information :—

"1. That pursuant to the agreement of the Government of British Columbia contained in article 11 of the terms of union upon which the colony of British Columbia was admitted into the Dominion of Canada, the legislature of British Columbia by an 'An Act to grant public lands on the mainland to the Dominion in aid of the Canadian Pacific Railway, 1880,' 43 Vict. Chap. 11, as amended by 47 Vict. Chap. 14, 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 might deem advisable, the public lands along the line of the railway before mentioned, as therein particularly mentioned, and which lands are hereinafter called the Railway Belt.

"2. That both the Lillooet River, which is a tributary of the Pitt River, and the Lillooet Lakes, from which it rises, are wholly situate within the limits of the said Railway Belt. The Lillooet River is about twelve miles long, and is a public and navigable stream.

"3. That the defendant is an incorporated company, having its head office in the City of Vancouver, B.C.

"4. That on the 7th day of April, 1906, upon the application of the defendant company, the Water Commissioners for the District of New Westminster, assuming to act under the Water Clauses Consolidation Act, 1897, Chapter 190, of the Revised Statutes of British Columbia, 1897, purported to grant the said company, at the annual rent and for the consideration therein men-

tioned, a record for 25,000 inches of water (subject to certain reservations) out of the said Lillooet Lakes and tributaries, and Lillooet River and its tributaries, such water to be used for generating electricity for light, heat and power and for milling, manufacturing, industrial and mechanical purposes, at or near lot 404, New Westminster District, and to be diverted from its source at a point at or near the outlet of the Lower Lillooet Lake and to be returned at a point at or near Lot 404, Group 1, New Westminster District, and to be stored or diverted by means of dams, pipes, flumes and ditches.

" 5. That on the public lands forming part of the Railway Belt and adjoining the said Lillooet Lakes and Lillooet River, is a large quantity of valuable timber, which is entitled of right to be floated down the said river, and the said alleged grant and the diversion thereby authorized will materially interfere with the said right.

" 6. That the said alleged grant and the rights under the Water Clauses Consolidation Act thereto attached will materially interfere with the rights of the Dominion Government in the Railway Belt.

" 7. That the capacity of the Lillooet River is about 25,000 inches, and the alleged grant and the proposed diversion thereby authorized will greatly diminish the quantity of water in the said river and materially interfere with the rights of the Dominion Government.

" 8. That the alleged grant and the proposed diversion thereby authorized will materially interfere with the public right of navigation in the said river.

" 9. That section 91 of the *British North America Act*, 1867, provides that the exclusive legislative authority of the Parliament of Canada extends to all matters coming within the following (amongst other) classes of subjects :—

(1). The Public Debt and Property.

(10). Navigation and Shipping.

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"10. That sub-section (2) of section 131 of the Water Clauses Consolidation Act, 1897, provides that the power conferred by the 1st sub-section, of entering and taking Crown Lands, shall not extend to lands which shall be expressly reserved by the Crown for any purpose whatever.

CLAIM.

The Attorney-General for the Dominion of Canada, on behalf of His Majesty the King, claims as follows:—

(*a*) A declaration that the alleged grant of the 7th April, 1906, is invalid and conveyed no interest to the defendant company and that the same be cancelled;

(*b*) A declaration that the said record is invalid as being an interference with property subject to the exclusive authority of the Dominion of Canada;

(*c*) A declaration that the said record is invalid as being an interference with the public right of navigation and the right of floating timber down the said river;

(*d*) A declaration that the said record is invalid and unauthorized by or under the provisions of the Statute of British Columbia, 'The Water Clauses Consolidation Act, 1897';

(*e*) An injunction to restrain the defendant company from applying under the provisions of the Water Clauses Consolidation Act, 1897, for approval of its undertaking and from taking any further steps in regard thereto;

(*f*) Such further and other relief as to this Honourable Court shall seem meet."

The defendant, The Burrard Power Company, in its defence, deny all the allegations of the information. Paragraph 11 of the defence is as follows:—

"(11). The defendant will object on the trial that the information herein discloses no cause of action, and that in any event the water record or grant in question cannot be declared invalid or cancelled except upon petition of

the Attorney-General or other proper representative of the Province of British Columbia."

Subsequently, by the consent of the plaintiff, the Attorney-General of British Columbia was added as a party defendant as representing the interests of British Columbia, and appeared before the Referee and took part in the proceedings.

On the 23rd day of December, 1907, an order was pronounced as follows :—

"IN THE EXCHEQUER COURT OF CANADA.

THE KING on the Information of the Attorney-General of Canada.

Plaintiff;

and

THE BURRARD POWER COMPANY, LIMITED,

Defendant.

Upon the application of the Attorney General of Canada on behalf of the plaintiff, and upon hearing the solicitors for the plaintiff and the defendant, I DO ORDER that the determination of the issues of fact in this cause be referred for inquiry and report to the Honourable Mr. Justice Archer Martin, Judge of the Supreme Court of British Columbia, pursuant to the Revised Statutes of Canada, 1906, chapter 140, section 42, and to the Rules of the Exchequer Court of Canada regulating the proceedings on a Reference.

Dated at Ottawa, this 23rd day of December, 1907.

(Sgd.) GEO. W. BURBIDGE,
J. E. C."

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Mr. Justice Martin proceeded with the reference. A large mass of evidence was adduced before him, and on the 16th day of December, 1908, he made his report as follows :—

" *To the Honourable Walter Cassels, Judge of the Exchequer Court of Canada :*

" Pursuant to the order of reference herein, dated the 23rd day of December, 1907, I have the honour to inform you that I have inquired into the issues of fact in this cause and beg to report as follows :—

" 1. The allegations, founded upon certain statutes, contained in the first, ninth and tenth paragraphs of the Information were not considered proper subjects of discussion before me under said order of reference.

" 2. The allegations of fact contained in the third paragraph of said Information were admitted.

" 3. The allegations of fact contained in paragraph four of said Information have been proved. It is to be explained that the given point of return of the water diverted from said lakes and river, *i. e.* ' at or near Lot 404, Group 1, New Westminster District,' is not on the Lillooet River, but on Kanaka Creek, which creek at its nearest point is distant from said river about two miles to the south, and said creek discharges into the Fraser River.

" 4. The allegations of fact contained in the fifth paragraph of said Information have been proved.

" 5. The allegations of fact contained in the sixth and seventh paragraphs of said Information have been proved, and the rights of the Dominion, which have been materially interfered with, include navigation, timber, and fisheries ; the result of defendant's proposed undertaking upon the salmon (Sockeye) spawning beds in the lake would be specifically detrimental, not to speak of the harmful effect upon that fish and other kinds of salmon and trout caused by the reduction of the ordinary volume

of water in the river, thereby curtailing the spawning area and probably entirely preventing fish from ascending to the upper reaches of the river at the proper season of the year.

" 6. The allegations of fact contained in the eighth paragraph of said Information have been proved.

" 7. With respect to the second paragraph of said Information the allegations of fact therein contained that ' both the Lillooet River, which is a tributary of the Pitt River, and the Lillooet Lakes, from which it rises, are wholly situate within the limits of the said Railway Belt,' have been proved. Counsel for the defence, and for the Attorney-General of British Columbia, adduced a considerable body of evidence to show that the sources of supply of said lakes were to a large extent outside the said Railway Belt, but I have not entered upon the consideration of the matter because in my opinion it is an immaterial issue which it would not be profitable to pursue.

" With respect to the allegation in the same paragraph that ' the Lillooet River is about twelve miles long and is a public and navigable stream,' the evidence establishes the fact that the river is a tidal one for between five and six miles and a navigable one for a distance of upwards of nine miles from its mouth (at Pitt River). Of said nine miles, nearly six miles, up to what is called the town line bridge, are navigable for power craft of various sizes. Said bridge has prevented any evidence, based on actual experiment, being offered of the capacity of the stream above it for power craft, but the evidence points to the belief that a little and inexpensive work would enable such craft to go up another mile or so. Above the said bridge loggers' and other boats can go up for two or three miles, say about nine miles in all, nearly any time of the year. The balance of the river (which, as a whole, is probably nearer thirteen miles long than twelve, though

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there is no exact measurement) is for the most part of a different character, the stream becoming much swifter and narrower, and its use is made more difficult by riffles and rapids of varying depth and strength, and shallow and rocky places through which the channel makes its way with less or more facility according to the height of water. There are no falls in the river, and the rapids or shoals are not of a size or nature to prevent prospectors', fishermen's and loggers' loaded boats, of about twenty feet in length being laboriously poled, or 'tracked' by line, following the more or less contracted channel, up to the lake during any part of the year, except at the top of freshets, which are of uncertain occurrence owing to their being largely caused by the varying rain or snow fall in the mountains surrounding the lakes. The river is not obstructed by ice, and is capable of being used to drive logs in a commercial sense for between eight or nine months in the year, the time for so doing depending upon the freshets, which do not as a rule occur in the latter part of June, or in July or August, or till the latter part of September. The river, as a whole, is not of so turbulent a nature as streams which are generally met with in the mountainous section of British Columbia, and it has more than the average natural facilities for driving logs.

"It is contended for the defence that the stream has no higher claim to be considered navigable than that portion of the Miramichi River above Price's Bend, which is described in the *Queen v. Robertson* (1) and which was held not to be navigable, but in my opinion it is impossible to really compare the two streams in view of the somewhat meagre description given of the Miramichi. The fact that boats can only utilize a portion of a stream in the ascent thereof by resorting to more or less slow or laborious methods does not of itself determine its navigability any more than does the fact that the descent may be corres-

(1) 1882. 6 S. C. R. 52, at p. 129.

pondingly swift and easy. In my opinion it comes to a question of degree, and regard must be had to the custom and nature of the country and the manner in which such streams are utilized by those experienced in their nature and peculiarities. The well-known navigation by steamboats of certain turbulent rivers in this Province might well be regarded as an impossibility by those who had not the local knowledge and experience. I feel that the question is not an easy one to decide, but after giving due effect to the evidence and argument, I have been unable to reach any other conclusion than that this river is a navigable one.

"Submitting respectfully the foregoing for your Lordship's consideration,

"I have the honour to be, Sir,
Your obedient servant,
"(Sgd.) ARCHER MARTIN.

"VICTORIA, BRITISH COLUMBIA, December 16th, 1908."

The report was duly filed on the 22nd December, 1908, and notice of the filing thereof duly given to the defendants shortly thereafter.

No appeal was taken against the report, and by the Rules of the Exchequer Court the report became absolute. (See Rule 214).

Thereupon the Plaintiff set the case down for hearing, praying for judgment as asked by the information; and the case came on for argument before me on the 13th April, 1909.

Mr. *Newcombe*, *K.C.*, appeared for the Plaintiff; the Attorney-General of British Columbia (the Honourable Mr. *Bowser*, *K.C.*, and Mr. *Lafleur*, *K.C.*, appeared for the respective defendants.

On the opening of the case an application was made on behalf of the defendants for leave to appeal from the

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report on two grounds, and after considerable discussion, the defendants were allowed to appeal.

The grounds of the appeal are as follows:

"1. The finding of fact contained in the fifth paragraph of the said report, and contained in the following words of the said paragraph:—

"The result of defendants' proposed undertaking upon the salmon (Sockeye) spawning beds in the lake would be specially detrimental, not to speak of the harmful effect upon that fish and other kinds of salmon and trout caused by the reduction of the ordinary volume of water in the river, thereby curtailing the spawning area and probably entirely preventing fish from ascending to the upper reaches of the river at the proper season of the year.

"2. The finding of fact contained in the seventh paragraph of the said report, to the effect that the Lillooet River is a navigable river."

It was considered by counsel for the plaintiff and defendants that it would be in the interest of the parties that the appeal should be argued at the same time as the motion for judgment, and that I should pronounce judgment on the findings of the report as given by the learned Referee, or as subsequently varied by me, if varied.

I will deal with the grounds of appeal later, although in my judgment the legal rights of the plaintiff will not be affected even if the report be varied as contended for by the defendants.

The two main questions argued on the part of the plaintiff were:—

1st. That the Water Clauses Consolidation Act, 1897, cap. 190 of the Revised Statutes of British Columbia, does not confer powers as against the property of the Dominion, and that if this legislation purported to so enact, the enactment would be *ultra vires* and of no effect.

2nd. That the proposed grant referred to in paragraph four of the Information would be an interference with

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the public right of navigation, and that therefore the plaintiff is entitled to an injunction to restrain such diversion of the water.

On behalf of the defendants, Mr. *Lafleur* argued very forcibly and succinctly the case from the standpoint of British Columbia. His contention is: 1st. that the property which passed from British Columbia to the Dominion, pursuant to the agreement referred to in paragraph 1 of the information, is not property within the meaning of section 91 of the Confederation Act, and that the property in question still forms part of the Province of British Columbia, with respect to which the Legislature of British Columbia had full power to legislate, and that the property in question was affected by the provisions of the Water Clauses Consolidation Act, 1897, cap. 190, referred to.

2nd. That prior to the agreement and statutes referred to in the first paragraph of the Information certain statutes had been enacted by the Legislature of British Columbia which interfered with riparian rights as they existed theretofore, and the Dominion took subject to these rights and the power of the Legislature of British Columbia to amend such prior statutes.

3rd. That the litigation was premature, as the grant to the defendants, The Burrard Power Company, Limited, had not yet been approved by the Lieutenant-Governor in Council.

Subsequently this contention was modified into a contention that it was premature in so far as the right to an injunction is concerned.

If the property in question is properly included in the division of property covered by section 91, then if not affected by prior legislation of British Columbia, the case for the defence fails.

The argument for the defence rested mainly on the language of the Judges of the Board of the Judicial Com-

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mittee of the Privy Council in the precious metals case—*Attorney-General of British Columbia* v. *Attorney-General of Canada* (1). This case was duly considered by the Supreme Court in the case of *Farwell* v. *The Queen* (2).

In the case of *The Queen* v. *Farwell* (3) the agreements with British Columbia and the effect of the statute of British Columbia, 47 Vict. Cap. 14, were considered by the learned judges.

Sir W. J. Ritchie, C.J., states as follows :—

"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." (P. 423).

Strong, J.—

"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 as 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

(1) 14 App. Cas. 295. (2) 22 S.C.R. 553.
(3) 14 S.C.R. 392.

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." (P. 425).

Fournier, J.—

"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." (P. 428).

The judgment of the Supreme Court in *Attorney-General of British Columbia* v. *Attorney-General of Canada* having been reversed by the Board of the Privy Council so far as the right to the precious metals are concerned, the question again arose in the Supreme Court in the case referred to of *Farwell* v. *The Queen* (2).

King, J., in pronouncing the judgment of the Court, said,—

"These lands are within what is known as the Railway Belt, a tract of land transferred to the Dominion by Act of British Columbia, 47 Vic. Ch. 14 (1883). In October, 1885, an information of intrusion was filed against Farwell in respect of the lands in question. He then set up as a defence that his possession was under a grant issued to him by the Queen under the great seal of British Columbia in January, 1885, and that prior thereto the lands were in the hands and possession of the Queen.

(1) 14 S.C.R. 345. (2) 22 S.C.R. 553.

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To this the Attorney-General of Canada replied that, at the date referred to, the lands were in the hands and possession of the Queen, in right of the Dominion, and not in right of the province. It was so held by the Supreme Court of Canada (14 S.C.R. 392), and the defendant was put out of possession on 6th January, 1892." (P. 557).

* * * *

"But, secondly, there is no inconsistency between *Queen* v. *Farwell* (1) and *Attorney-General of British Columbia* v. *Attorney-General of Canada* (2). The former case held that the Act of British Columbia transferred to the Dominion the rights in the lands which had been formerly enjoyed by the province. The latter held that the Act transferred to the Dominion those rights only and did not transfer the *jura regalia*, including therein the precious metals then in question. These were held to be in the Crown, subject to the control and disposal of the Government of British Columbia." (P. 558).

The opinion of Mr. Justice Burbidge is reported in 3 Ex. C. R. 271.

Quoting at page 559 from *St. Catharines Milling Co.* v. *The Queen* (3) Mr. Justice King said:—

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

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

And again, at page 560:—

(1) 14 S.C.R. 392. (2) 14 App. Cas. 295.
(3) 14 App. Cas. 46.

"It is thus abundantly (and perhaps unnecessarily) shown that the beneficial interest in the Crown's territorial rights, as distinguished from the *jura regalia*, are appropriated to and held by the Dominion as fully and effectually, and by the same tenure, as the same had been previously appropriated to and held by the province. The title is in the Sovereign in right of the Dominion, in the same sense (as to territorial rights) as it was in the Sovereign in the right of British Columbia before the Act of 1883. Mr. Justice Burbidge has effectually disposed of the suggestion that, upon a sale of the lands by the Dominion, the grant is to be passed under the great seal of British Columbia on application of the Dominion. The rights of the Crown, territorial or prerogative, are to be passed under the great seal of the Dominion or province (as the case may be) in which is vested the beneficial interest therein, otherwise they cannot be said to be enjoyed by it, or under its control." (pp. 560,1).

The *British North America Act*, Sec. 91, enacts "The exclusive legislative authority of the Province of Canada extends to all matters coming within the classes of subjects next hereinafter enumerated, that is to say:—

"1. The Public Debt and Property, &c."

The 11th section of the Union agreement provided for the payment of $100,000 per annum by the Dominion to British Columbia. It also provided:—

"And the Goverment 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 the furtherance of the construction of the said railway, a similar extent of railway throughout its entire length in British Columbia, not to exceed however twenty (20) miles on each side of the said line, as may be appropriated for the same purpose by the Dominion Government from the public lands in the North West Territories and the Province of Manitoba."

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The lands in the Province of Manitoba were vested in the Crown for the benefit of the Dominion. They formed part of the Province of Manitoba just as the present lands formed part of the Province of British Columbia. Can it be contended that because the Dominion Government agreed to appropriate a certain portion of these lands for the same purposes as the appropriation of the lands in British Columbia, therefore the Legislature of Manitoba could pass enactments interfering with Dominion rights?

The late Sir John Thompson, as Minister of Justice, had occasion to express an opinion upon this question. In 1887 the Legislature of Manitoba passed two Acts, intituled respectively, "An Act respecting the construction of the Red River Valley Railway," and "An Act to amend the Public Works Act of Manitoba." By the former Act the Government of Manitoba was given authority, amongst other things, to construct a line of railway from a point within the City of Winnipeg to a point in or near the Town of West Lynne. By the latter Act the Minister of Public Works for Manitoba was authorized to construct any public work at the expense of the province, of which the construction might be assigned to him by the Lieutenant-Governor in Council, and whether such work was authorized by the statutes then in force or not. It was also provided that sums needed for the construction of such public works might be raised by loan upon the credit of the province, bearing interest at a rate not exceeding five per centum. Both these Acts were disallowed by the Governor-General in Council on the recommendation of Sir John Thompson. The following observations are taken from his report:—

"It is evident that under such an Act a railway such as the Red River Valley Railway could be constructed by the Minister of Public Works as a public work of the Province of Manitoba. It is evident, also that each of the Acts referred to is in conflict with that policy of the Par-

liament and of the Government of Canada, reconfirmed at the last session of Parliament, by which it is sought to prevent the diversion of trade from the railway system of Canada to the railways of the United States

"In addition to this fundamental objection, the Act respecting the construction of The Red River Valley Railway is, the undersigned thinks, open to the following objections:—

(1). By section 8, sub-sections 2, 4, 6 and 7, and sections 12 and 22, authority is given, among other things, to enter upon lands and take possession thereof, and to appropriate so much of such public lands as is deemed necessary for the purposes of the railway, and also to take therefrom earth, trees and other materials.

"The public lands of Manitoba are for the most part, with the exception of those especially transferred to the province, vested in Her Majesty in the right of the Dominion of Canada, and it is not competent, the undersigned thinks, for the legislature of that province to authorize any one to enter upon, and to appropriate to any purpose, the lands so vested in Her Majesty in the right of the Dominion of Canada.

"They are part of the public property of Canada, which, by the 91st section of the *British North America Act*, 1867, is exclusively within the legislative authority of the Parliament of Canada, and in respect of which therefore, the Legislature of the Province of Manitoba has no legislative authority.

(2). By section 8, sub-section 9, authority is given to connect the Red River Valley Railway with any other railway at any point on its route; and provision made for determination by arbitrators, of any difference that may arise in respect of such connection.

"This power if attempted to be exercised in respect of any railway constructed under the authority of an Act of the Parliament of Canada would lead to a conflict of

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law and authority, as the Parliament of Canada has made provision with reference to the same subject. (See R.S. C. c. 109, s. 6. s.s. 13 and 14). Again, this power if attempted to be exercised in respect to the connection with any railway at the boundary of the province, or with a railway extending beyond the limits of the province, would be in excess of any authority which the Legislature of Manitoba could grant, as may be clearly seen by reference to the *British North America Act*, 1867, sec. 9, clause 10 (a).

"It is obvious that the objection pointed out in reference to the Legislature of Manitoba purporting to give power to enter upon and appropriate public lands vested in Her Majesty in the right of the Dominion of Canada, applies equally to the Act to amend the Public Works Act of Manitoba, especially if an attempt were made to use that Act for the construction of railways within that province, as indeed it must apply to every Act by which the legislature of that province purports to give authority to enter upon such lands."

Mr. Lafleur laid considerable stress on the recent decision of *McGregor* v. *Esquimalt Railway Co.* (1). The reasoning upon which that decision was based was that the land in question ceased to be Dominion property. The Dominion had granted the lands, and therefore the grantee became subject to the enactments of the Legislature of British Columbia.

So, in the present case, if the Dominion granted any portion of the lands to settlers, the settlers would become subject to the enactments of British Columbia, but so long as the property remained in the Crown for the benefit of the Dominion the Legislature of British Columbia could not legislate so as to affect Dominion property.

The attempted expropriation of the unrecorded waters vested in the Dominion as found by the Referee would be

(1) (1907) A.C. 462.

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a serious interference with property vested in the Crown for the benefit of the Dominion.

The Referee finds the facts in paragraph 2 of the Information to be proved. There is no appeal from the first part of this finding that "both the Lillooet River, which "is a tributary of the Pitt River, and the Lillooet Lakes, "from which it rises, are wholly situate within the limits "of the said Railway Belt."

There is no appeal from the finding of the Referee that the allegation of paragraph 5 of the Information is proved.

It is manifest that the rights of the Dominion as riparian owners are seriously affected by the construction placed on the British Columbia statute by the defendants and the grant of the waters, and in my opinion if the effect of the British Columbia legislation is as contended for, the statute would be *ultra vires*, so far as the questions involved in this case are concerned, and void. In any event, I am bound to decide in accordance with the decisions of the Supreme Court above referred to.

Mr. Lafleur referred me to the British Columbia Land Ordinance of 1865. It is referred to in *Martley* v. *Carson* (1). This Ordinance conferred rights upon "every person lawfully occupying and *bonâ fide* cultivating lands." Even if it were in force it has no application to the case before me. It was cited as showing the policy of British Columbia (owing to the nature of the country) to depart from the strict rules of the common law in favour of riparian owners.

The next statute referred to was No. 144—33 Vict. B.C., in the revised laws of British Columbia. Section 2 of this statute repealed the Land Ordinance of 1865 before referred to. Section 32 provided :—

"Every person lawfully entitled to hold a pre-emption under this ordinance and lawfully occupying and *bonâ fide* cultivating lands may divert any unrecorded and

(1) 20 S.C.R. 634.

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unappropriated water from the natural channel of any stream, lake or river adjacent to or passing through such land," etc.

This statute was amended by the Statute 35 Vict. No. 31, but without making any material alteration. Neither of these statutes, if they were in force, have any application to the case before me.

Bearing in mind that by the terms of the Union agreement, and the various statutes confirmatory of this agreement, the property in question was vested in the Crown for the benefit of the Dominion, I proceed to consider the subsequent legislation.

The statute 55 Vict. Cap. 57 (1892) is "An Act to "confirm to the Crown all unrecorded and unappropriated "water and water power in the province and for other "purposes."

The second section of this statute is as follows :—

"2. The right to the use of all water at any time in river, water course, lake, or stream, not being a navigable river or otherwise under the exclusive jurisdiction of the Parliament of Canada, is hereby declared to be vested in the Crown in the right of the province, and, save in the exercise of any legal right existing at the time of such diversion or appropriation, no person shall divert or appropriate any water from any river, water course, lake, or stream, excepting under the provisions of this Act, or of some other Act already or hereafter to be passed, or except in the exercise of the general right of all persons to use water for domestic and stock supply from any river, water course, lake or stream vested in the Crown and to which there is access by a public road or reserve."

It will be noticed that this section expressly excepts from its operation "any navigable river, or (water) "otherwise under the exclusive jurisdiction of the "Parliament of Canada."

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Cap. 190 of the Revised Statutes of British Columbia, 1897, is the statute under the provisions of which the grant of the water power in question was made. The title of the Act is as follows :—

" An Act to confirm to the Crown all unrecorded and unappropriated water and water power in the Province, and to consolidate and amend the law relating to the acquiring of water rights and privileges for ordinary domestic, mining and agricultural purposes, and for making adequate provision for municipal water supply, and for the application of water power to industrial and mechanical purposes."

It recites the Water Privileges Act of 1892 :—

" Whereas, by the ' Water Privileges Act, 1892,' all water and water power in the province, not under the exclusive jurisdiction of the Parliament of Canada, remaining unrecorded and unappropriated on the 23rd day of April, 1892, were declared to be vested in the Crown in right of the province, and it was by the said Act enacted that no right to the permanent diversion or exclusive use of any water power so vested in the Crown should after the said date be acquired or conferred save under privilege or power in that behalf granted or conferred by Act of the Legislative Assembly theretofore passed, or thereafter to be passed."

It also recites :—

" And whereas, it is necessary and expedient at the present session to provide for due conservation of all water and water power so vested in the Crown as aforesaid, and to provide means whereby such water and water power may be available to the fullest possible extent in aid of the industrial development, and of the agricultural and mineral resources of the province."

This recital deals with water so vested in the Crown by virtue of the Water Privileges Act of 1892, namely,

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all water and water power "not under the exclusive jurisdiction of the Parliament of Canada."

The Interpretation clause states :—

"'Water' or 'stream' shall include all natural water-courses, whether usually containing water or not, and all rivers, creeks, and gulches, and all water power, not being waters under the exclusive jurisdiction of the Parliament of Canada."

If I am correct in my view that the property in question is property of the Dominion embraced within the meaning of section 91 of the *British North America Act*, this British Columbia legislation does not cover the water in question. If it did, it would be so far *ultra vires*. On the other hand, if the contention of the defendants is correct and that the Dominion have no higher rights than any other grantee, so far as ownership of the lands and riparian rights are concerned, and are subject to local legislation, then the Legislature of British Columbia would be supreme, and unless the plaintiff can make a case on the other branch, namely, as interfering with navigation, the Information must be dismissed.

It is conceded that the waters in question are wholly within the limits of the Railway Belt transferred to the Dominion, and consequently the ownership of the lands would carry with it the bed of the lake and of the river and of the waters in any event where it is non-tidal. See (Fisheries Case), *Attorney-General of Canada* v. *Attorney General of Ontario* (1); *Corporation of Kenora* v. *Keewatin* (2).

A question not pressed before me is the defence raised by the 11th paragraph of the defence that the proper forum is elsewhere. *Esquimalt Water Works Co.* v. *Corporation of City of Victoria* (3), page 510 of the report of which may be referred to as bearing on this defence.

(1) [1898] A. C. 700.
(2) 16 O. L. R. 184.
(3) [1907] A. C. 499.

I proceed now to deal with the appeal of the defendants from the report of the Referee. As I have stated if my opinion on the main questions is correct, then the questions raised by the appeal are immaterial.

The first objection, is to the finding of fact in the 5th paragraph of the report relating to the injury to the fishing rights, the property of the Dominion as owners of the lands, including the beds of the river and lakes.

The plaintiff does not base his claim on any interference with any general law relating to the protection of fish. The claim is made as owners of the lands and waters. If the Legislature of British Columbia have the right to pass the enactments in question, then the question of injury is immaterial.

I agree with the finding of the Referee. The case is not one which can be remedied, as argued by Mr. *Lafleur*, by a fish-ladder in the dam. This might be a remedy if the waters were dammed up and overflowing the dam into the natural channel of the river, but here it is proposed to divert the waters away from the channel practically leaving the river below the dam with very little water.

The next ground of appeal is from the finding of fact in the 7th paragraph of the report to the effect that the Lillooet River is a navigable river.

It is admitted that the river as far up as the town line bridge, and possibly a mile or two beyond, is both tidal and navigable in fact.

Mr. *Lafleur* confines his contention to that part of the river above the point up to which it is conceded to be a navigable river. I agree with the contention of the appellants. I do not think the river is navigable in fact in that portion of its course. Loose logs can be floated down during portions of the year, and small boats partially poled and lined up, but in my judgment this does not constitute that part of the river a navigable river. Were the law

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of the Province of Quebec applicable it could not be considered even a flotable river. *Tanguay* v. *Canadian Electric Light Co.* (1)

In 1871 it was enacted that "the civil and criminal "laws of England as the same existed on the 19th "November, 1858, and so far as the same are not from "local circumstances inapplicable, are and shall be in "force in all parts of the colony of British Columbia."

In *Attorney-General* v. *Harrison* (2) Chancellor Spragge deals fully with the facts that should be taken into account in applying the test of navigability. *Queen* v. *Robertson* (3) is applicable; also *Bell* v. *Corporation of Quebec* (4).

In the judgment of Mr. Justice Anglin in the *Keewatin Power Co.* v. *Town of Kenora* (5) there is a full discussion of the authorities. See also *Attorney-General of Quebec* v. *Fraser* (6) applicable to the Province of Quebec.

I do not discuss the question further for the reason that if the first point is decided in favour of the plaintiff, it is immaterial whether the upper reaches are navigable or not. If the first question is decided adversely to the plaintiff, then if my view, which I will discuss later as to the interference with navigation, is sustained, it is equally immaterial.

If it be held that the Legislature of British Columbia have power to enact as they have done, and that there is no right in the plaintiff to have redress for interference with navigation, then it is equally immaterial.

I have dealt with the questions raised by the appeal, as the defendants are entitled, if thought advisable to appeal, to have the findings as they should in my opinion be. The report should be varied in accordance with my finding.

(1) 40 S. C. R. 1.
(2) 12 Gr. 466.
(3) 6 S. C. R. at p. 129.
(4) 5 App. Cas. 84.
(5) 13 O. L. R. 237.
(6) 37 S. C. R. 577.

The contention of the plaintiff is that the diversion of the waters of the Lillooet River will seriously interfere with the navigation of the river. The Referee so finds, but whether as to the upper stretches, which I find non-navigable, or the whole river is not quite clear.

Taking the evidence, which is voluminous, there does not seem to be much doubt but that the river below is navigable even without the flow of the tide. I think it equally clear that if the proposed diversion takes place there will be a very serious interference with the navigability of the river below. Can it be that because at the point of diversion the river is non-navigable nearly all the water can be diverted and practically ruin the navigation below?

This is not basing the case upon any interference with riparian rights, but testing it solely in respect to an interference with navigation.

Most of the cases reported are cases in which the interference has occurred in the navigable portions of the river.

Section 4 of Cap. 115 of the Revised Statutes of Canada is as follows:—

"4. No bridge, boom, dam or aboiteau shall be constructed so as to interfere with navigation, unless the site thereof has been approved by the Governor in Council, nor unless such bridge, boom, dam or aboiteau is built and maintained in accordance with plans approved by the Governor in Council."

It is argued that this section only applies to dams erected in the navigable part of the river. This may be, but the section does not so read.

Section 19 of the same statute is as follows:—

"19. No owner or tenant of any saw-mill, or any workman therein or other person shall throw or cause to be thrown, or suffer or permit to be thrown any sawdust, edgings, slabs, bark or rubbish of any description what-

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soever into any river, stream or other water, any part of which is navigable or which flows into any navigable water."

This section is evidently to prevent the acts therein referred to being done on the unnavigable parts of a river so as to interfere with the navigable portion.

In any event, in my opinion, the navigability of a river cannot be destroyed by a diversion of the waters above.

At the opening of the reference counsel for the defendants, The Burrard Power Company, Ltd., admitted the truth of the allegations made in the 4th paragraph of the Information.

The Referee also finds the facts proved with the addition of pointing out that the point of return "at or near Lot 404" is not on the Lillooet River, but on Kanaka Creek. There is no appeal from this finding.

I think the plaintiff is entitled to the declaration claimed in paragraphs (a), (b) and (d) of the Information, also to an injunction if desired.

The defendants must pay the costs of the plaintiff, including the costs of the reference.

Judgment accordingly.

Solicitor for plaintiff: *E. L. Newcombe.*

Solicitors for defendants: *Bowser & Wallbridge.*