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

1893
Mar. 13.

AND

ARTHUR STANHOPE FARWELL.....DEFENDANT.

Information of intrusion—Appropriate relief to be prayed for therein—Order to reconvey—Practice—Subsequent action between same parties—Res judicata.

Where, in a former action by information of intrusion to recover possession of land, the title to such land was directly in issue and determined, the judgment therein was held to be conclusive of the issue of title sought to be raised by the defendant in a subsequent action between the same parties.

2. An order directing the defendant to reconvey the land is not an appropriate part of the remedy to be given upon an information of intrusion.

Semble: That letters-patent for public lands situated within the railway belt in British Columbia should issue under the Great Seal of Canada and not under the Great Seal of British Columbia.

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

The facts of the case are stated in the judgment.

The case was tried at Victoria, B. C., on the 30th of September and 1st of October, 1892.

Bodwell, (with whom was *Hunter*) for the defendant:

This action might have been brought with more propriety against the Government of British Columbia by the Government of the Dominion. The defendant is not an aggressor in any way. He is not asserting any right to the prejudice of the Dominion Government. He has simply obtained from the Registrar-

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General the registration of his title and the certificate of that registry, and there the matter stands.

Now the plaintiff is already in possession of a judgment decisive of the only issues that can properly be raised here, and what more can your lordship give Her? On this branch of the case I will refer your lordship to the dictum of a very celebrated judge of the Supreme Court of the United States, Mr. Justice Grier, as laying down the principle that ought to govern your lordship in this case. (Cites *Orton* v. *Smith*) (1). This action is not for the purpose of obtaining a title but for the purpose of quieting the title.

The plaintiff, who has a writ of possession whereof execution has been had, will, it seems to me, have to rest content with that. What power has the court now to pronounce on that judgment? The action which was first brought was to compel possession of lands and, upon the judgment rendered, the writ of possession has been issued and returned by the sheriff. What more has this court to do with the judgment? With regard to the second paragraph of the prayer of the information, "to order the removal of clouds, liens, etc., from the title," this difficulty meets my learned friend. This court under the statute, has directly no power over provincial officers. It is true that by section 17 of the Act 50-51 Vic. c. 16 a very wide measure of concurrent jurisdiction with the provincial courts is given to the Exchequer Court, but that concession will not help my learned friends because an application has been made, similar in character to the prayer of this petition, to the Supreme Court of British Columbia, and it has been refused. Whatever the grounds for such refusal are, surely the Exchequer Court ought to leave the Crown to pursue its remedy to the utmost in the forum where it began proceedings.

(1) 18 How. 265.

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Again, this is a case where an order is asked to be made against an officer who is in no way represented in the suit. He has no counsel here, and is not directly or indirectly affected by the proceedings. What order could your lordship make against him? He has merely registered the deed back from Prevost to Farwell. Now so long as that deed remained uncancelled and unimpeached, he could not be compelled by mandamus to cancel the registration. It is not for him to say that it should be delivered up to be cancelled. Upon production of the deed to Farwell, there is *primâ facie* title in Farwell, and he was only obeying the positive directions of the law in registering it. This court was organized to try actions of a peculiar character, actions in which the Crown, in right of the Dominion, is interested. Then when the parties come before the court it is necessary, first, to show that the relief asked for, pertains to the Crown, and secondly, that it pertains to the Crown in the right of the Dominion. Now in the first paragraph of the information it is averred that Her Majesty, in right of the Dominion of Canada, is now Lady Paramount and the absolute owner of the land in question, and in the prayer an order is asked for the removal of all conveyances from the title. I say that it appears to go to the very nature of this action, that these two propositions should be established. Now the right of possession does not mean the right of possession of the fee simple. Where is the residence of the ultimate fee in the railway lands in British Columbia? We have that answered in the opinion of our very highest court, in the judgment of the Privy Council pronounced in the *Precious Metals Case*. (Cites opinion of Lord Watson in *Attorney-General of British Columbia* v. *Attorney-General of Canada*) (1).

(1) 14 App. Cas. 301.

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I think it is clear from this, that the Privy Council has, in effect, decided that the paper title must still proceed as it always proceeded from the Provincial Government. If the Dominion were the owner in fee Lord Watson would be wrong in saying that the land, after sale, would revert to the same position as ordinary land granted by the Provincial Government, because then there would be the right of escheat to the owner of the fee. It seems to me that it is not altogether clear that the question of title was under discussion in the Supreme Court of Canada. It seems to me that the judgment of the Chief Justice is not altogether inconsistent with Lord Watson's views. (See *The Queen* v. *Farwell*) (1). The opinion of the Privy Council just amounts to this, that the Dominion has the right to appropriate the revenues of these lands, but that the ultimate fee is in the Crown in the right of the province. The province, therefore, is the proper authority to take such steps as would pertain to the cancellation of the grant. What status has the Attorney-General of Canada to bring an action in this court, to interfere with an estate which Her Majesty, in right of Canada, does not hold and could not grant? Of course, the opinion of the Privy Council does not go so far as to say that the right of possession and the right to the title must be in the same person; but, merely, that the right to receive the revenues of these lands and the right to control them is in the Dominion, while the ultimate fee is in the Crown in the right of the province. I submit that in the opinion of the Privy Council there are two Crowns in respect of these railway lands, and if that view is correct the Attorney-General of Canada cannot bring an action to repeal these letters-patent and this court has no jurisdiction to entertain this action. (Cites *Wells on Res Adjudicata.*) (2).

(1) 14 Can. S. C. R. 392. (2) P. 2, sec. 1.

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It is said that the Crown is not bound by estoppel, but Mr. Justice Gwynne, in the *Fonseca Case* (1), thinks the Crown is bound by estoppel. So much for the use of the word "estoppel" generally. Now there is a very important distinction with reference to estoppels by judgment, *i.e.* between cases where the parties to the action are the same and the cause of action the same, and where the parties are the same and the cause of action different. In the case of *Castrique* v. *Imrie* (2), it was in effect held, that where the parties are the same and the cause of action the same, everything that was decided in the action is binding between the parties; but that where the parties are the same but the cause of action different, only those matters are *res judicata* that were necessary to the judgment of the court. In *Brandlyn* v. *Ord* (3) it was decided that where the defendants pleaded a former suit and alleged that the court implied there was no title when they dismissed the bill, it was not sufficient, they should have shown it was *res judicata*, an absolute determination in the court that the plaintiff had no title. (Cites *Cromwell* v. *The County of Sac.* (4); *Philadelphia* v. *Ridge Avenue Ry. Co.* (5); *Russell* v. *Place* (6); *Packet Company* v. *Sickles* (7); *Barrs* v. *Jackson* (8); *Bigelow on Estoppel* (9); *Bell* v. *Merrifield* (10); *Read* v. *Brown* (11); *King* v. *Chase* (12), and *Carver* v. *Jackson*) (13).

Again, I submit, it was not absolutely necessary to decide the question of title in the former suit, it was only necessary to decide the question of possession. If your lordship will look at the two informations you

(1) 17 Can. S. C. R. 612.
(2) 4 E. & I App. 434.
(3) 1 Atk. 571.
(4) 94 U. S. 352.
(5) 24 Am. St. Rep. at 515.
(6) 94 U. S. 608.
(7) 5 Wall 592.
(8) 1 Y. & Col. 596.
(9) P. 98.
(10) 109 N.Y. 202.
(11) 22 Q. B. D. 131.
(12) 41 Am. Decisions 678.
(13) 4 Pet. 87.

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will see that the first was essentially and actually an action for obtaining the possession of the land. There was no allegation in the first information that Her Majesty was Lady Paramount and absolute owner of the lands, it was simply an allegation that such lands "were and still ought to be" in her possession. And the judgment in the former suit was for the removal of the defendant from possession of the lands, and nothing more. The very form of the action brought goes to show that the question of possession was the only one decided. (He reads from *Sweet's Law Dictionary* on "Information of Intrusion") (1). It is not necessary to establish the question of title in such actions, it is sufficient against an intruder to show possession. It is thus laid down in *Reg.* v. *Stanley* (2):

"An information of intrusion is in fact an action of "trespass at the suit of the Crown, not brought to gain "possession or establish title, except incidentally. The "judgment is not in the nature of a seizin or possession, but only that the defendant be convicted and "committed for the fine; and it includes judgment for "any damages that may have been given for the trespass, and includes also an *amoveas manus*—that is, "upon the judgment for the intrusion, an injunction "issues for the possession against the defendants and "all claiming under them."

The fact that the remedy was not taken—that the repeal of the letters-patent was not asked for in the former action,—must be taken to mean that the Crown assented to be estopped from raising it again. It appears upon the pleadings that the question of possession was the basis of the judgment. The Crown claimed possession only. You must look at the pleadings to determine what matters were necessary for the judgment of the court. (Cites *Elphin-*

(1) P. 429.

(2) 9 U. C. Q. B. 86.

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stone on Deeds (1). What I say is, that however necessary it may have been to consider the question as to Farwell's position, what the Crown asked the court to decide, and what the court did decide, was the question of possession only,—"that these lands ought to be in the hands or possession of the Crown in the right of Canada." That is the essence of the judgment, and if the Supreme Court of Canada went beyond that, they were pronouncing on what was not the cause of action upon which the pleadings proceeded. In looking at the defence in the former action you must read it with reference to the claim that was made. The issue was, who was entitled to possession? and the court held that Farwell was not entitled to possession by reason of the Crown grant.

[BURBIDGE, J.—The real question at issue then was the question of title.]

I submit, with all deference to your lordship, that it was simply an issue of possession. Such a judgment would not only satisfy the pleadings in the action but would be quite consistent with the opinion of the Privy Council. To say that the Crown grant gave Farwell no right to the possession of land whereof the right of possession was in the Dominion, is a very different thing from saying that the Crown grant gave him no title. That would not be correct. I submit that the record is the only thing that can be looked to, to determine what is *res judicata*. You cannot go behind the record to find what the judgment was. (Cites *Abbott's Law Dictionary, verbo*, Judgment; *Freeman on Judgments* (2); *Am. Ency. Law* (3); *Hunter* v. *Stewart* (4).

(1) P. 572.
(2) P. 1, *et seq.*
(3) Vol. 12 pp. 59-60.
(4) 4 Deg. F. & J. 179.

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It is perfectly clear that in the former action the plaintiff could have obtained all the relief which the Crown was entitled to, and is estopped from maintaining the present action; and if your lordship decides that the relief could have been given before, the plaintiff is out of court in the present action. In *Nelson* v. *Couch* (1), it was held that "to constitute a good plea of *res judicata* it must be shown that the former suit was one in which the plaintiff might have recovered precisely that which he seeks to recover in the second." (He cites also *Hatch* v. *Coddington* (2); *Henderson* v. *Henderson* (3); *Everest and Strode on Estoppel*) (4). Where a cause of action is not shown in the pleadings it is a pretty strong argument to show that it was not litigated or decided.

Again, we contend that the former judgment in this case if it did decide that the fee simple was in the Crown in right of the Dominion, is not in accordance with the decision of the Privy Council in the *Precious Metals Case* (5). If that judgment does not go the length we contend it does, then it is nugatory and useless. We cannot imagine that the Privy Council would go through the solemn farce of delivering an opinion if that very opinion would make no difference in the administration of affairs. The Privy Council has decided that the ultimate fee is in the province, and the decision in the *Farwell Case* in the Supreme Court is founded on a principle of law which is overruled by the highest court in the land. Therefore, I submit that this court will not lend its aid to enforce a judgment that is erroneous. (Cites *Commercial Bank* v. *Graham* (6); *Hamilton* v. *Houghton*) (7). In the latter case it was sought to obtain an order to carry into effect

(1) 15 C.B.N.S. 99.
(2) 32 Minn. 92.
(3) 3 Hare 113.
(4) P. 60.
(5) 14 App. Cas. 295.
(6) 4 Grant 429.
(7) 2 Bligh 169.

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a decree made some forty years before and which was acquiesced in by one of the parties during his whole life time. The court refused its aid to perpetuate an erroneous decree. This case is cited by Chancellor Blake in the *Commercial Bank Case (ubi sup.)* The decree was only wrong in respect of calculation of interest; how much more then should a court refuse its aid to perpetuate a judgment wholly wrong on a question of law ? (Cites from *Lawrence Manufacturing Co.* v. *Janesville Mills*) (2).

Richards, Q. C., *Pooley*, Q.C., and *Helmcken* for the plaintiff.

Richards, Q. C.: As to the first contention of my learned friend, that this action should have been brought with more propriety against the Government of British Columbia, he has cited no authorities in support of that proposition, and indeed if that Government had any interest in the property, it passed out of them on the issuing of the patent to Farwell.

Now, as to his second contention, with reference to the question of jurisdiction, I presume that the Supreme Court of British Columbia could have entertained this action, and I presume that the Exchequer Court was constituted for purposes of this kind, besides others. (Cites clauses 15, 16 and 17 of 50-51 Vic. c. 16.) I submit that under section 17 of the Act the Exchequer Court has concurrent original jurisdiction with the Supreme Courts in the provinces. Now I have this to say, that we would be perfectly satisfied if your lordship were to direct the defendant here to reconvey the property to the Crown. If that were done —if your lordship sees your way clear to doing that— it would be satisfactory to us.

Then, thirdly, with reference to my learned friend's contention that we ought to have exhausted all our

(1) 138 U. S. 561.

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remedy in the first action, I suppose there is no doubt, from the dates of these documents, that they were registered at that time, but possibly the Crown was not aware of it. But, however that may be, I deny the doctrine urged by my learned friend, that acts of the Crown's officers are binding on the Crown. My learned friend has no authority for this proposition. I cannot imagine how it can be held that because an officer of the Crown did not ask more than he did, in the first action, although the Crown was entitled to ask it, that the Crown would be afterwards estopped from asking the further remedy. The Crown is not bound by estoppel. And, I think, it is a very proper doctrine, because the Crown's business is conducted by her officers, and the Sovereign has no personal interest in a case like this.

The action of intrusion is not in the nature of an action of trespass, and the question of title does come up in an action of intrusion. Why, your lordship, the defendant pleaded his title, and that was all that was tried after he set out his patent. My learned friend can find no authority for the position that he has taken, that we cannot go further and ask now for a cancellation of the registration of the deed to Farwell, or even ask the court to direct that the defendant make a reconveyance of the property to the Crown. Just see the position we are in if we cannot get the remedy we ask for. The Crown, in right of the Dominion, is the owner of these lands and yet the Crown cannot utilize them because it is impossible to give a good title by reason of there being certain documents on record in the provincial registry, and the Dominion's vendees are unable to record the letters-patent made by the Crown in right of the Dominion. There is no use of selling these lands when the title cannot be made good. Nobody wishes to buy land when

he cannot get his deed recorded. I contend, in view of this fact, that it is absurd to say the Crown cannot go further than it did in the former action and get the blemish of Farwell's deed removed from the title. I know of no authority to show that because one did not ask for some remedy that they were entitled to, in an action which took place some years ago, the remedy cannot be asked for at a later date. No authority is cited for this proposition.

Fourthly, with regard to my learned friend's contention, that the court here has no power over the Registrar-General of Titles to compel him to do what we ask, we saw no use in making him a party.

[BURBIDGE, J.—Why did you not register the judgment you obtained in the Supreme Court of Canada?]

We have no means of doing that. The deed from Farwell to Prevost, and back from Prevost to Farwell, gives a good title.

Fifthly, as to the question of estoppel, there should be no doubt about it. It was more than a question of possession in the first action. It was a question of title and nothing more or less. Mr. Farwell pleaded his patent as he had a perfect right to do. He pleaded his title in the first action and the court decided against him. The court decided that he had no title, and is that matter to be litigated over again?

The Crown has a prerogative right to compel a defendant to show his title, and the defendant could not in an action rely merely on his possession of the land. (Cites *Friend* v. *The Duke of Richmond* (1) and *Chitty on Prerogatives*) (2). The judgment would not bind a stranger, but it would be an estoppel against the defendant and every one claiming under him. (Cites *Outram* v. *Morewood*) (3).

(1) Hardres' Ex. R. 460. (2) P. 332.
(3) 3 East 345.

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The *Precious Metals Case* (1) only goes so far as to decide which Government—the Provincial or the Dominion—owns the precious metals in the railway lands. Now, my learned friend goes so far as to say that the Dominion does not own the fee. I do not see anything in the cases to support that view. He argued that the effect of the decision in the *Precious Metals Case* is that the Crown has no fee in the lands in the right of the Dominion. He says they can control the lands and take the revenues of the land, and still they cannot grant the patent for the land. Now I maintain the Dominion has the fee simple.

With reference to the Registry Act, I think ours was based upon the report of a Royal Commission upon the registration of titles appointed by the British House of Commons in 1854. (Reads from a speech of the Attorney-General in 57 L. T. 190.)

There is a case of *Doe Spafford* v. *Breakenridge* (2), in which it was held that the prior registration of a deed from a person having no good title had no effect upon a prior deed not registered and that the common law prevailed. There is also another case of *Dynes* v. *Bales* (3) in point, and I refer to the case of *Harkin* v. *Rabidon* (4) to show that this court may direct the defendant to execute a conveyance to the Crown. I also refer to *Robinson and Joseph's Digest* at column 3408, where all the authorities are collected together, and also to *Smith and Joseph's Digest*, column 1891.

In the case of *Keefer* v. *McKay* (5), it was held that a party has a right to have removed from the registry books a cloud on his title. The court will order it to be removed. In one of the cases I have cited—*Harkin* v. *Rabidon* (3),—the court ordered a conveyance from the defendant to the plaintiff.

(1) 14 App. Cas. 295.
(2) 1 U. C. C. P. 492.
(3) 25 Grant 593.
(4) 7 Grant 243.
(5) 10 Pr. R. 345.

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Pooley, Q. C. followed on the same side, and cited *Alison's Case* (1).

Bodwell replied.

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

The information in this case was exhibited on the 16th of March, 1892, to obtain an order of the court directing the defendant to execute a deed of conveyance to Her Majesty the Queen, in the right of Canada, of the unsold portions of a certain parcel of land known as lot number six in group one, of the district of Kootenay, in the province of British Columbia, and in that way to remove the cloud upon Her Majesty's title created by the registration in the records of absolute fees in the office of the Registrar-General of Titles for the province of British Columbia of the following instruments affecting such lot, that is to say: 1st, a grant to the defendant under the Great Seal of British Columbia, dated the 13th of January, 1885; 2ndly, a conveyance in fee, dated the 16th of January, 1885, from the defendant to James Charles Prevost; and 3rdly, a conveyance in fee dated the 28th of February, 1885, from the said Prevost to the defendant.

The lands in question are situated at Revelstoke on the Columbia River at or near the place where it is crossed by the Canadian Pacific Railway, to which fact is due in a large measure the value of such lands and the importance of the controversy between the parties.

To an information of intrusion exhibited in this court on the 29th day of October, 1885, against the defendant praying judgment for possession of the said lands, the defendant in his statement of defence alleged that on and prior to the 13th day of January, 1885, the

(1) 9 Ch. App. 6.

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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 and his heirs for ever, wherefore the defendant entered upon and took possession of the said lands, and has since enjoyed possession, use and occupation of the same, which was the intrusion and trespass complained of. To the defence so set up the Attorney-General replied that the lands and premises in the information and statement of defence mentioned were on the 13th of January, 1885, in the 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. Issue having been joined upon the replication, the matter came on for trial in the Exchequer Court where there was judgment for the defendant. On appeal to the Supreme Court of Canada the judgment of the Exchequer Court was, on the 14th December, 1887, reversed, and it was ordered and adjudged that the defendant should be removed from the possession of the said lands and premises. A writ of possession was issued on the 24th of November, 1891, addressed to the sheriff of the county of Kootenay, who, on the 6th of January, 1892, put the agent for Dominion lands at Revelstoke in possession for the Crown.

By the 63rd section of the *Land Registry Act* of British Columbia (1) it is in substance provided that the owner in fee of any land, the title to which shall have been registered for the space of seven years, may, upon an affidavit that all deeds and papers relating

(1) Consol. Acts B.C., Vol. 1, c. 67.

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to the title have been produced to the Registrar-General, apply for a certificate of indefeasible title. Attempting to avail himself of this provision of the *Land Registry Act* the defendant, on the 17th of March, 1892, applied to the Registrar-General of Titles for a certificate of indefeasible title to the lands in question. In the list of instruments annexed to his affidavit are mentioned the grant under the Great Seal of British Columbia, the deed to Prevost, and that from Prevost to the defendant, to which reference has already been made, "also a sub-division map of part of the lot," and then follows a note "that in an action *The Attorney-General of Canada* v. *Arthur Stanhope Farwell* the Supreme Court of Canada has issued a writ of possession to the said lot." On the same day (the 17th of March) the Registrar-General caused to be published in *The British Columbia Gazette* a notice that a certificate of indefeasible title to the unsold portions of the said lot would, on the 24th of June, 1892, be issued to the defendant unless in the meantime a valid objection thereto were made to the Registrar-General in writing by some person claiming an estate or interest in said property or some part thereof. On the 9th of June following, the solicitors, at Victoria, for the Attorney-General of Canada, filed objections to the issue of the certificate on the ground, among others, that the land in question was the property of the Crown in the right of the Dominion, that the Supreme Court had ordered the defendant to be removed from the possession thereof, and that the present information was pending. On the 17th of June the Registrar-General gave the solicitors notice that, in his opinion, the objections were not valid objections within the meaning of the Act, and that unless a valid objection were made he would proceed to issue the certificate. Thereupon Mr. Helmcken, for

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the Attorney-General of Canada, obtained from Mr. Justice Crease an order *nisi* directing the Registrar-General to show cause why he should not omit to issue the certificate, and on the return of the order it was, with the consent of the learned judge, agreed that the hearing thereof should be enlarged until the final determination of this action, the Registrar-General undertaking in the meantime not to issue the certificate.

The jurisdiction of this court to entertain the information and to give the relief prayed for depends upon clause (d) of the 17th section of *The Exchequer Court Act* (1) by which it is provided that the court shall have and possess concurrent original jurisdiction in Canada in all actions and suits of a civil nature at common law or equity in which the Crown is plaintiff or petitioner; that is, as I understand it, concurrent original jurisdiction in such matters with the provincial courts of law and equity. It is not disputed that the Supreme Court of British Columbia would have jurisdiction to entertain this information and to give relief such as that prayed for. In fact the objection to the jurisdiction of the court is directed principally to the point that in this case the plaintiff seeks, in substance, to compel the Registrar-General of Titles for British Columbia to make certain entries in his books of registry. But it will be seen that the Registrar-General has not been made a party, and that no order is asked against him, and I am relieved from the necessity of considering the force of the objection by the fact that counsel for the Attorney-General on the hearing limited the relief asked for to an order against the defendant Farwell only.

The defendant also contends that the question of title between the Crown in the right of the Dominion

(1) 50-51 Vic. c. 16.

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and the defendant is not, so far as this action is concerned, concluded by the decision in the previous case between the same parties. There was, I think, no difference or dispute as to the rule or principle of law deducible from the authorities cited and which should be applied to the determination of this contention. But it was said that in the former action the right of possession and not the title to the land was in issue, and that, consequently, the action was conclusive only of the right of possession at the time. It is, however, unnecessary to do more than to advert to the facts I have already stated to see that such a view cannot be maintained. To the information of intrusion the defendant did not plead not guilty or *non intrusit*, but he admitted his intrusion and justified by claiming title under a patent issued under the Great Seal of the province of British Columbia. To the defence so set up the Attorney-General replied that the lands in the information and statement of defence mentioned were, on the day on which the letters-patent under the Great Seal of British Columbia were issued, 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 issue of such letters-patent under the Great Seal of the province of British Columbia conveyed no interest in such lands to the defendant. On that replication issue was taken, and upon such issue, on appeal to the Supreme Court of Canada, there was judgment for the Crown which established two propositions: 1st, that the defendant had no title to the lands in question; 2ndly, that the Crown in right of the Dominion had title to the lands in question. The first proposition, under the circumstances of the case, could not be decided without deciding the second. It seems perfectly clear therefore, and I have no doubt that the allegation in

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the first paragraph of the information in this case that Her Majesty, in the right of the Dominion of Canada, is Lady Paramount and absolute owner of the land in question, is, between the parties hereto, concluded by the decision pronounced on the information in the former action to which I have referred.

But it is said that the judgment of the Judicial Committee of the Privy Council, in the case of *The Attorney-General of British Columbia* v. *The Attorney-General of Canada* (1), shows that the decision of the Supreme Court of Canada in the case of *The Queen* v. *Farwell* (2) was erroneous; and it is contended that this court should not in this action enforce or give further relief in regard to such erroneous decision. It is argued that the result of the views expressed by their lordships in the former case is that the lands in the railway belt in British Columbia are still vested in the Crown in the right of the province, subject only to the right of the Government of Canada to administer such lands and to take the revenues therefrom; but that all grants thereof must issue under the Great Seal of the province of British Columbia. That, it is said, is a fair inference from the following expression of their lordships' opinion (3):—

> The title to the public lands of British Columbia has all along been, and still is, vested in the Crown; but the right to administer and dispose of these lands to settlers, together with all royal and territorial revenues arising therefrom, had been transferred to the province before its admission into the federal union. Leaving the precious metals out of view for the present, it seems clear that the only "conveyance" contemplated was the transfer to the Dominion of the provincial right to manage and settle the lands, and to appropriate their revenues. It was neither intended that the lands should be taken out of the province nor that the Dominion Government should occupy the position of a free-holder within the province. The object of the Dominion Government was to recoup the cost of constructing the railway by selling the land to

(1) 14 App. Cas. 295. (2) 14 Can. S. C. R. 392.
(3) 14 App. Cas. 301.

settlers. Whenever land is so disposed of, the interest of the Dominion comes to an end. The land then ceases to be public land, and reverts to the same position as if it had been settled by the provincial Government in the ordinary course of its administration.

I do not, however, think that the language of their lordships taken as a whole bears out the construction sought to be placed upon it. The case decides, 1st, that the public lands in British Columbia are in the Crown ; 2ndly, that prior to the Union the right to administer and dispose of these lands to settlers, and all royal and territorial revenues arising therefrom, had been transferred to the province ; 3rdly, that by the transactions in question in that case the province had transferred to the Dominion the provincial right to manage and settle the lands and to appropriate their revenues ; and 4thly, that the right to administer the precious metals in such lands and to take the revenues therefrom remain in the province. But in each case, in the right to manage, settle, sell and take the revenues arising from such lands or precious metals that may exist therein, is involved the power and authority to make conveyances of and give title to the land or right sold. The language which their lordships use in regard to the rights of the province and of the Dominion is substantially the same in both cases. With reference to the right of the province they say that (1) :—

> the right to administer and to dispose of these lands to settlers, together with all royal and territorial revenues arising therefrom, had been transferred to the province before its admission into the federal union ;

and of the right acquired by the Dominion they say :

> leaving the precious metals out of view for the present, it seems clear that the only "conveyance" contemplated was a transfer to the Dominion of the provincial right to manage and settle the lands, and to appropriate their revenues.

(1) 14 App. Cas. 301.

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There is no greater reason for inferring from the language used that their lordships were of opinion that if the Dominion Government sold a piece of land in the railway belt it would be obliged to procure the issue of the patent by the Lieutenant-Governor at Victoria, than to infer that if the provincial Government sold any public land in the province, or any interest therein, the letters-patent should come from London. It is unnecessary to dwell upon the very great inconvenience of such a course of procedure as that last suggested, contrary as it would be to the well established practice in all the provinces; but to compel the Dominion Government in administering the lands in the railway belt to secure the issue, under the Great Seal of the Province of British Columbia, of the grant for every lot of such land that might be sold would be almost equally inconvenient, and would involve great confusion, difficulty and delay. That, of course, would be no answer if their lordships had really said that such was the result of the compact made between the two Governments; but in my view they have not said so, nor do I think that such a meaning is fairly deducible from the language used by them. There can, I think, be no doubt that letters-patent for any lands in the railway belt sold by the Dominion Government may be issued under the Great Seal of Canada in accordance with the statutes passed by its Parliament in the exercise of a clear and undoubted authority to make laws in respect of the public property of the Dominion (1).

There is only one other objection to the granting of the relief prayed for which it is necessary to consider, and that is that such relief might have been obtained in the former action between the same parties, and that, for

(1) *The British North America Act*, 1867, sec. 91 clause 1; R. S. C. c. 56.

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this reason, the Crown is not now entitled to succeed It is true that when the information in the former case was exhibited the grant under the Great Seal of British Columbia to the defendant, the deed from defendant to Prevost and the deed back from Prevost to defendant, which have been mentioned, had been registered with the Registrar-General of Titles for British Columbia; but it is clear, I think, that an order directing the defendant to reconvey to the Crown would not have been an appropriate part of the relief which might have been given on an information of intrusion. In *Chitty on Prerogatives* (1) it is laid down (and to the same effect is *Manning's Exchequer Court Practice*) (2) that

> judgment for the King in an information for intrusion is that the defendant be amoved from the possession, and for damages in case damages be found for any particular trespasses committed by the defendant, as cutting trees, &c., and after judgment in an information for intrusion, execution shall be sometimes by injunction, or it may be by *amoveas manum*, and thereupon every party to the information, or claiming under him, shall be removed from the possession.

By the practice of this court (Rule 169) a judgment for the recovery of, or the delivery of possession of, land may be enforced by writ of possession.

That, then, was the relief to which the Crown was, on the information of intrusion, entitled, although having regard to the issues raised and decided the case involved more than a question of possession. It should, I think, have been accepted by the defendant as conclusive against his title, and there is no justification for the attempt he has made since the information was filed to further cloud the Crown's title by procuring and registering a certificate of indefeasible title.

There will be an order that the defendant execute to Her Majesty the Queen, in the right of Canada, a surrender or conveyance of the unsold portions of lot

(1) Pp. 334, 335. (2) P. 200.

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No. 6 in group 1, of the District of Kootenay, in the Province of British Columbia, containing 1,175 acres, more or less; and I shall, under the circumstances, reserve to the Crown the right to apply for an order restraining the defendant from further prosecuting his proceedings before the Registrar-General of Titles and to make all amendments that may be necessary for the purpose of obtaining such additional relief.

Judgment for plaintiff, with costs.

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

Solicitors for defendant: *Bodwell & Irving.*