

The Governor and Company of Adventurers of England Trading
into Hudson's Bay - - - - - *Appellants*

v.

The Attorney-General of Canada and others - - - - - *Respondents*

FROM

THE SUPREME COURT OF CANADA.

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE
PRIVY COUNCIL, DELIVERED THE 9TH NOVEMBER, 1928.

Present at the Hearing :

THE LORD CHANCELLOR.

LORD BUCKMASTER.

VISCOUNT DUNEDIN.

VISCOUNT SUMNER.

LORD ATKIN.

[*Delivered by the LORD CHANCELLOR.*]

This is an appeal by special leave from the answers given by the Supreme Court of Canada to certain questions referred to them under the provisions of Section 60 of the Supreme Court Act of Canada.

The agreed statement of facts and the questions submitted for decision were as follows :—

“ 1. By letters patent granted by His late Majesty King Charles the Second, bearing date the 2nd day of May, 1670, the Company was granted the lands and territories as therein described, also the gold and silver to be found or discovered therein and other rights, etc., the whole as more fully described in said letters patent.

“ 2. By Deed of Surrender bearing date the 19th November, 1869, the Company did surrender to Her late Majesty on the terms and conditions of the said Surrender, and on condition of the said Surrender being accepted pursuant to the provisions of The Rupert's Land Act, 1868, all the rights of government and other rights, privileges, liberties, franchises, powers and authorities granted or purported to be granted to the Company by the said letters patent, and also all the lands and territories within Rupert's Land (except and subject as in the said terms and conditions mentioned) granted or purported to be granted to the Company by the said letters patent.

" 3. The said Surrender was duly accepted, and by Order of Her late Majesty in Council, bearing date the 23rd of June, 1870, Rupert's Land and the Northwest Territories were admitted into the Dominion of Canada.

" 4. The Company, pursuant to the said Deed of Surrender and Order in Council, retained all the posts or stations actually possessed and occupied by it or its officers or agents at the time of the said Surrender, and after the acceptance of said Surrender duly selected blocks of lands adjoining each of its posts or stations within any part of British North America, not comprised in Canada and British Columbia.

" 5. Since the said Surrender was so made and accepted, the Crown, represented by the Dominion of Canada, has issued patents of the lands so selected adjoining each of its said posts or stations, and the said patents also included the land actually possessed and occupied by the Company as posts or stations at the time of the said Surrender.

" 6. One of the terms and conditions of the said Surrender was that the Company might at any time within fifty years after the acceptance of the said Surrender claim in any township or district within the fertile belt as therein described in which land is set out for settlement grants of land not exceeding one-twentieth part of the land so set out, the same to be determined by lot.

" 7. The Dominion Lands Act, Chapter 23 of the Statutes of Canada, 1872, contains provisions relating to lands to which the Company became entitled under such conditions in the said Surrender. An Order in Council was passed by the Dominion Government on the 6th of December, 1872, and the Company on the 7th of January, 1873, adopted the Resolution, a copy of which is annexed.

" 8. The Company has from time to time received title by notification of the surveys of townships and confirmation thereof to certain sections and parts of sections within the territory described as the fertile belt, and has also from time to time received title by patent from the Crown, represented by the Dominion of Canada, to other sections and parts of sections of land within the fertile belt, for the Company's one-twentieth of the lands in fractional townships and in townships broken by lakes and in lieu of the sections or parts of sections allotted to the Company found to be settled upon. None of the said patents so issued expressly refer to the previous metals or to any minerals.

" 9. At the request of the Crown, the Company from time to time, before receiving title to sections or parts of sections of land to which it was entitled, relinquished and surrendered its rights thereto, and obtained patents for other lands in lieu thereof from the Crown. Neither the said surrenders nor the said patents contain any express mention of minerals.

" 10. The Company, after having received title to sections and parts of sections of land within the said fertile belt, has from time to time, at the request of the Crown, conveyed to the Crown the said lands, and obtained patents from the Crown for other lands in lieu thereof. Neither the said conveyances from the Company nor the said patents contain any express mention of minerals, and the lands so patented to the Company comprise lands both within and without the said fertile belt.

" 11. Therefore it is desired to refer for hearing and consideration to the Supreme Court of Canada certain questions which, for the sake only of convenience and not as intending to waive, release or affect any rights or claims of any party, are confined to lands in the area now included in the Northwest Territories and in the provinces of Alberta, Saskatchewan and Manitoba, the said questions being as follows:—

" 1. In whom, after the acceptance of the said Surrender and the passing of the said Order in Council of the 23rd day of June, 1870, were vested the precious metals, gold and silver, in, under or upon the lands in the said area possessed and occupied at the date of the said Surrender as posts or stations by the Company, its officers or agents, whether in the Crown, represented by the Dominion of Canada, or in the Company?

" 2. In whom were vested the precious metals, gold and silver, in, under or upon the blocks of land adjoining the said posts or stations of the Company and selected by the Company, whether in the Crown, represented by the Dominion of Canada, or in the Company :—

" (a) Upon the selection by the Company of the said blocks of land.

" (b) Upon the issue to the Company of the Crown patents for the said blocks of land ?

" 3. In whom were vested the precious metals, gold and silver, in, under or upon the sections of land or parts thereof in the said fertile belt which were vested in the Company by notification, upon such notification, whether in the Crown, represented by the Dominion of Canada, or in the Company ?

" 4. In whom were vested the precious metals, gold and silver, in, under or upon the land granted to the Company by letters patent from the Crown upon the issue thereof :—

" (a) In satisfaction of the Company's one-twentieth of the land in fractional townships, or in townships broken by lakes.

" (b) In lieu of lands allotted to the Company but found to be settled upon ?

" 5. In whom were vested the precious metals, gold and silver, in, under or upon the lands granted to the Company by letters patent in lieu of land in which the Company relinquished and surrendered its rights to the Crown upon the issue of such patents ?

" 6. In whom were vested the precious metals, gold and silver, in, under or upon the land granted to the Company by letters patent in lieu of land conveyed by the Company to the Crown upon the issue of such patents ?

" 7. If in any of such cases the precious metals, gold and silver, were vested in the Company, did the repeal of section 37 of the Dominion Lands Act, 1879, Chapter 31 of 42 Victoria, by section 6 of Chapter 26 of 43 Victoria, or the enactment of section 43 of Chapter 17 of 46 Victoria, or of the Dominion Lands Act, Chapter 20 of 7 and 8 Edward VII, or any other enactment affect the ownership of the said precious metals in such case ?

" 12. For the purpose of such hearing and consideration, the said Court may in addition to such other facts and matters as the Court may see fit, take into consideration the statements, facts and documents herein mentioned or set forth, and the statutes of the Parliament of the United Kingdom of Great Britain and Ireland, and of the Parliament of Canada, bearing upon such questions, and the fact that the Company was not requested to consent to and did not consent to the amendment or repeal of any of the provisions of the Dominion Lands Act of 1872, and such other statements, facts and documents as may be submitted to the Court by order of the Governor in Council."

[The documents referred to in the Statement were scheduled thereto.]

An Order in Council containing amendments, which are above incorporated, of the questions, declared as follows :—

" It is not intended by said reference to raise any issues as between the Dominion and any Province, and that so far as any lands in the Province of Manitoba are concerned questions numbers 1, 2 and 3 may be answered as if the words 'represented by the Dominion of Canada' where they occur after the word 'Crown' in each of said questions were struck out and that in answering any of the questions referred it will be sufficient to state what are the rights of the Crown and the Company, respectively, without indicating whether any of the rights of the Crown are vested in the Dominion or the Province."

The Supreme Court of Canada answered the first six questions in favour of the Crown, and replied to the seventh question that the hypothesis of this question did not arise.

From the statement of facts it is apparent that the answers to the questions must depend primarily upon the construction to be placed upon the deed of surrender of the 19th November, 1869, and it is convenient to turn at once to the terms of that document. The deed contained recitals that Her Majesty and the appellants had agreed

“ to terms and conditions upon which the said Governor and Company shall surrender to Her said Majesty, pursuant to the provisions in that behalf in the Rupert's Land Act, 1868, contained, all the rights of government and other rights, privileges, liberties, franchises, powers and authorities, and all the lands and territories (except and subject as in the said terms and conditions expressed or mentioned) granted or purported to be granted by the said letters patent, and also all similar rights which have been exercised or assumed by the said Governor and Company in any parts of British North America not forming part of Rupert's Land, or of Canada, or of British Columbia, in order and to the intent that, after such surrender has been effected and accepted under the provisions of the last-mentioned Act, the said Rupert's Land may be admitted into the Union of the Dominion of Canada, pursuant to the hereinbefore mentioned Acts or one of them.”

and that the terms and conditions

“ on which it has been agreed that the said surrender is to be made by the said Governor and Company (who are in the following articles designated as the Company) to Her said Majesty are as follows (that is to say) :—

“ 1. The Canadian Government shall pay to the Company the sum of £300,000 sterling when Rupert's Land is transferred to the Dominion of Canada.

“ 2. The Company to retain all the posts or stations now actually possessed and occupied by them or their officers or agents, whether in Rupert's Land or any other part of British North America, and may within twelve months after the acceptance of the said surrender select a block of land adjoining each of their posts or stations, within any part of British North America not comprised in Canada and British Columbia in conformity, except as regards the Red River Territory, with a list made out by the Company and communicated to the Canadian Ministers, being the list in the annexed schedule. The actual survey is to be proceeded with, with all convenient speed.

“ 5. The Company may, at any time within fifty years after such acceptance of the said surrender, claim in any township or district within the fertile belt in which land is set out for settlements, grants of land not exceeding one-twentieth part of the land so set out ; the blocks so granted to be determined by lot, and the Company to pay a rateable share of the survey expenses, not exceeding 8 cents Canadian an acre. The Company may defer the exercise of their rights of claiming their proportion of each township or district for not more than ten years after it is set out, but their claim must be limited to an allotment from the lands remaining unsold at the time they declare their intention to make it.”

By the operative part of the deed the appellants surrendered to Her Majesty

“ all the rights of government, and other rights, privileges, liberties, franchises, powers and authorities, granted or purported to be granted to the said Governor and Company by the said recited letters patent of His late

Majesty King Charles the Second, and also all similar rights which may have been exercised or assumed by the said Governor and Company in any parts of British North America, not forming part of Rupert's Land or of Canada, or of British Columbia, and all the lands and territories within Rupert's Land (except and subject as in the said terms and conditions mentioned) granted or purported to be granted to the said Governor and Company by the said letters patent."

The appellants' main argument was that since the precious metals had admittedly been conveyed to them by the original Charter of the 2nd May, 1670, and constituted part of the lands in their ownership, it followed, firstly, that the posts and stations retained by the appellants must necessarily include the precious metals therein contained, and, secondly, that the expression "land" (Articles 2 and 5 of the conditions of the surrender) must include the precious metals contained therein.

It is common ground that under the original Charter the appellants were granted not only the land, but also the precious metals therein contained; and it is plain that the language of the deed of surrender is wide enough to include not only the land given up, but also the precious metals therein. But, in their Lordships' opinion, it by no means follows that when in the deed of surrender the appellants are given a right to a grant of "land" it is intended that the land so granted shall include precious metals. Under the original Charter the appellants were constituted with the widest powers of government and administration throughout the territories which were handed over to them; they were in effect to possess the Royal Prerogative within these territories and to administer them with very much the same authority as is now conferred upon the self-governing parts of the Empire. This position was ended by the deed of surrender. The appellants were thereafter to cease to act as a governing authority and to become merely a trading corporation holding certain land for the purpose of carrying on trade or for sale. It is settled law that a grant by the Crown of "land" does not confer upon the grantee any right to the precious metals contained in the land granted; and in their Lordships' view the provisions in the articles under which the appellants were to have the right to the grant of certain lands confers on them nothing more than the right to receive a grant of such lands with the ordinary incidents of such a grant and without the royal franchises which they had surrendered. There is no doubt a difficulty created by the use of the word "retain" with regard to the land upon which the posts and stations in the actual possession and occupation of the appellants at the date of the deed of surrender were situated. It is, however, to be observed that the right to retain these posts and stations is an exception from the general surrender contained in the document as a whole, and ought therefore to be construed strictly against the appellants. It is extremely improbable that the parties can have intended that the precious metals contained in the land immediately under the posts and stations should remain vested in the Company whilst they lost all right to these metals in any

of the other lands to which they had a right by virtue of the deed of surrender. The deed does not in terms give the right to the Company to retain the lands upon which the posts and stations are situate, and in fact it appears from the agreed statement of facts that ever since the deed of surrender has been executed the method of carrying its provisions into effect has been for the Crown to make a grant to the appellants of the land upon which the posts and stations were situate as well as the adjoining ground selected under the provisions entitling the appellants to make such a selection. In their Lordships' view it would be unduly straining the importance to be attached to the use of the word "retain" in these circumstances to make the appellants' rights in the land under the posts and stations differ from their rights in the adjoining block granted by the same instrument. It follows that upon their main contention the appellants fail.

But the appellants had a subsidiary argument based upon the legislation of the Dominion. In 1872 the Canadian Parliament enacted the "Dominion Lands Act" of that year. The Act contains 108 sections, which are divided into separate groups with appropriate headings. Sections 17-21 inclusive are headed "Lands Reserved by the Hudson's Bay Company." Section 17 recites Article 5 of the terms and conditions of the deed of surrender, and recites an arrangement between the appellants and the Crown to simplify the selection of the lands to which the appellants are entitled under that article, and Sections 18, 19 and 20 contain provisos dealing with special cases arising under the agreement. By Section 21 it is provided :

"As townships are surveyed and the respective surveys thereof confirmed, or as townships or parts of townships are set apart and reserved from sale as timber lands, the Governor of the said Company shall be duly notified thereof by the Surveyor-General, and thereupon this Act shall operate to pass the title in fee simple in the sections or three-quarter parts of sections to which the Company will be entitled under clause seventeen, as aforesaid, and to vest the same in the said Company, without requiring a patent to issue for such lands; and as regards the lands set apart by lot, and those selected to satisfy the one-twentieth in townships other than the above, as provided in clauses eighteen and nineteen, returns thereof shall be made in due course by the local agent or agents to the Dominion Lands Office, and patents shall issue for the same accordingly."

Later on in the statute there come a series of sections headed "Mining Lands," and numbered 36-41 inclusive. Section 36 is as follows :—

"No reservation of gold, silver, iron, copper, or other mines or minerals shall be inserted in any patent from the Crown granting any portion of the Dominion lands."

It appears from the minutes of the appellants, dated the 7th January, 1873, that the Act of 1872 and certain provisions contained in an Order in Council of the 6th December, 1872, were accepted by the appellants in substitution of the provisions contained in Article 5 of the deed of surrender. The Act of 1872 was repealed and re-enacted so far as the relevant provisions are concerned in 1879 by the Dominion Lands Act of that year.

By the Dominion Lands Act of 1883 the Act of 1879 was repealed ; the clauses relating to the appellant company were re-enacted ; but Section 36 disappears and in lieu thereof it was enacted by Section 43 :

“ It is hereby declared that no grant from the Crown of lands in freehold or for any less estate has operated or will operate as a conveyance of the gold and silver mines therein unless the same are expressly conveyed in such grant.”

The legislation remains in substantially the same position until 1908, when there was a revision and consolidation, in which Section 43 disappears.

The appellants' argument, based upon this legislation, was to the effect that by the Act of 1872 the appellants' right to receive a title in fee simple was expressly recognised in Section 21, and that by virtue of Section 36 the grant of the fee simple of land at that date operated to pass the precious metals contained therein, and that therefore the statute in effect recognised and enacted the appellants' right to receive grants of land carrying the right to the precious metals contained therein. This, it was argued, was a statutory bargain made between the appellants and the Crown, and no subsequent legislation could take away the rights thereby conferred upon the appellants, or, alternatively, the subsequent statutes must be construed as reserving these rights. Further, it was said that the Act of 1883, having been repealed in 1908, Section 43 of that Act had disappeared and created no obstacle to the appellants' arguments. In their Lordships' view this reasoning breaks down in its initial stage. Whatever may be the effect of Section 36 of the Act of 1872, it certainly does not amount to a provision that a grant of Dominion lands operates as a grant of the precious metals contained therein ; and it is not possible to hold that because Section 21 confirms the appellants' right to a title in fee simple to the land therein referred to, that therefore that title must be taken to include the title to the precious metals which had not been granted to the appellants.

This view renders it unnecessary to consider the effect of subsequent legislation to which attention has been called.

For these reasons, which are substantially the same as those which appear in the judgment of the Supreme Court of Canada, their Lordships are of opinion that the answers given by the Supreme Court were correct in every case, and that this appeal fails and must be dismissed with costs.

The Province of Manitoba was separately represented at the hearing before their Lordships' Board, but the interests of the Provinces and the Dominion were substantially the same in the appeal, and their Lordships think that the appellants ought only to be ordered to pay one set of costs to the respondents.

Their Lordships will humbly advise His Majesty in accordance with this judgment.

In the Privy Council.

THE GOVERNOR AND COMPANY OF ADVENTURERS OF ENGLAND TRADING INTO HUDSON'S BAY

v.

THE ATTORNEY-GENERAL OF CANADA AND OTHERS.

DELIVERED BY THE LORD CHANCELLOR.

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