Privy Council Appeal No. 72 *of* 1922.

The King - - - - - - - - - *Appellant*

v.

The Attorney-General of British Columbia - - - - *Respondent*

FROM

THE SUPREME COURT OF CANADA.

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 18TH OCTOBER, 1923.

Present at the Hearing :

VISCOUNT HALDANE.
LORD BUCKMASTER.
LORD ATKINSON.
LORD SHAW.
LORD SUMNER.

[*Delivered by* LORD SUMNER.]

The issue in this appeal is whether, under the British North America Act, 1867, Sections 102 and 109, *bona vacantia*, found in the Province of British Columbia, belong to the Crown in right of the Province or in right of the Dominion. The facts are as follows—

An English Company, incorporated in 1871 under the English Limited Liability Acts to trade in British Columbia, was obliged to go into liquidation, and in 1879 the Company and its then liquidator authorised a gentleman in British Columbia, named Rithet, to get in its property and assets in the Province, which he proceeded from time to time to do.

The Company was finally dissolved in 1907 and the liquidator died. In 1911 Mr. Rithet, having then in his hands a balance of $7,215.04 on account of the Company in liquidation and finding that there remained no person and no company to whom he could pay this sum, placed the facts before the

Governments both of the Dominion and of the Province, and having thus done his duty passes out of the story, leaving the disposition of this sum to the law. These facts are admitted, as is also the conclusion that the sum of $7,215.04 is *bona vacantia* falling to the Crown in one right or the other. On this footing their Lordships are finally to determine the question, which in Canada was decided in the Supreme Court of Canada by reversing the judgment of the Exchequer Court of Canada given in favour of the Dominion. All that need be noted about the actual subject-matter of the dispute is that, as the parties have admitted it to be in itself *bona vacantia*, their Lordships have proceeded on the footing of this admission *inter partes* to consider the right to it.

The appeal really depends on the true construction of the words " all lands, mines, minerals and royalties belonging to the several provinces of . . . " in Section 109 of the British North America Act, words which have already repeatedly come before their Lordships' Board for decision. In these cases their Lordships' predecessors were careful to confine the actual determination to the subject-matter in hand, which was not in any of the cases either *bona vacantia* or any prerogative right of a precisely analogous character, but the reasoning on which one at least of those decisions is rested is so closely applicable to the present appeal, that the first question must now be how far, if at all, this appeal is not already covered by authority.

In *The Attorney-General of Ontario* v. *Mercer*, lands in Ontario, which had escheated to the Crown after 1867, were the subject-matter of a contest of rights similar to that which now arises, and on the construction of Section 109 the Judicial Committee decided that the Province was entitled to the lands as against the Dominion. In so doing they expressly negatived the contentions now raised for the Dominion in two respects. It has been argued, firstly, that royalties in this section ought to be confined to mining royalties owing to the collocation of the words " mines, minerals and royalties," and, secondly, that if it has a more extended sense it must not be taken as extending to all *jura regalia* in general and in particular not to *bona vacantia*. On the first point Lord Selborne observes in delivering the opinion of the Board (8 A.C., at p. 778) :—

> " It appears to their Lordships to be a fallacy to assume that because the word royalties in this context would not be inofficious or insensible if it were regarded as having reference to mines and minerals, it ought therefore to be limited to those subjects. They see no reason why it should not have its primary and appropriate sense as to (at all events) all the subjects with which it is here found associated, lands as well as mines and minerals, even as to mines and minerals it here necessarily signifies rights belonging to the Crown *jure coronæ* . . . Every word ought *prima facie* to be construed in its primary and natural sense unless a secondary or more limited sense is required by the subject or the context. In its primary and natural sense royalties is merely the English translation or equivalent of '*regalitates*', '*jura regalia*', '*jura regia*' . . . . "

Accordingly the conclusion of the Board was that the word " royalties " and not the word " lands," covered the right of escheat

of lands. Lord Selborne proceeded in the same passage as follows :—

> "The subject was discussed with much fullness of learning in *Dyke* v. *Walford* (5 Moore P.C. 434), where a Crown grant of *jura regalia* belonging to the County Palatine of Lancaster was held to pass the right to *bona vacantia*. 'That it is a *jus* (said Mr. Ellis in his able argument, *ibid.* p. 780) is indisputable; it must also be *regale*; for the Crown holds it generally through England by royal prerogative, and it goes to the successor of the Crown, not to the heir or personal representative of the Sovereign. It stands on the same footing as the right to escheats, to the land between high- and low-water mark, to felons' goods, to treasure-trove and other analogous rights.' With this statement of the law their Lordships agree, and they consider it to have been in substance affirmed by the judgment of Her Majesty in Council in that case."

On examining the opinion delivered in *Dyke* v. *Walford* by Mr. Pemberton Leigh, their Lordships think that Lord Selborne's expression above quoted, "in substance affirmed," is exact if it be not an understatement. The words under construction were "*quaecumque alia libertates et Jura Regalia ad Comitem Palatinum pertinentia*," and of them the opinion observes (p. 498) : "We cannot doubt that the right in question passed to the Duke of Lancaster amongst other *jura regalia*, unless there be something in the grant restricting its effect "—a possibility which Mr. Pemberton Leigh then proceeded to examine and dismiss.

Lord Selborne, however, finally left the door, if not exactly open, still slightly ajar to the present appellant's argument by cautiously concluding thus :—

> "Their Lordships are not now called upon to decide whether the word 'royalties' in Section 109 of the British North America Act of 1867 extends to other Royal rights besides those connected with 'lands,' 'mines' and 'minerals.' The question is whether it ought to be restrained to rights connected with mines and minerals only, to the exclusion of royalties, such as escheats in respect of lands."

In subsequent cases, in which it has been necessary to consider the construction of Section 109, their Lordships' Board has adopted the exposition above quoted from *Mercer's* case, and has followed its example in applying the section only so far as was necessary to dispose of the question in issue. In the *Attorney-General of British Columbia* v. *the Attorney-General of Canada* (14 A.C, at p. 305), their Lordships held that Section 109 had the effect of reserving to the Province of British Columbia any deposits of the precious metals, not as being "mines and minerals," but as "royalties" connected with them, and this decision has a bearing on the present appeal. To the actual nuggets in the quartz and the particles of fine gold in the auriferous sand the word "royalties" gives the Province a title because of the Crown's prerogative right to mines of precious metals. If a prospector under licence picked out the nuggets with a jack knife or washed the gold out with a pannikin and then was found dead and unknown in the wilderness with the

gold on his person, is there any presentable reason in the substance of the thing why the same gold, though severed and reduced legitimately into possession, should not equally fall to the Province or rather to the Crown in right of the Province, under the royalty, which entitles the Crown to *bona vacantia*? Again, if the same prospector had fashioned the gold into a ring, a necklace or an armlet, and, having hidden it, had disappeared, would not these ornaments have received the same destination as being treasure-trove? It is not easy to see where the line is to be drawn between precious metals, which it is now decided fall to the Crown in right of the Province as being "royalties" when in the ground, and the same metals when no longer in the ground, whether worked up or not, which in any other collocation of words would be royalties, that is *jura regalia*, also. It should also be noted how closely analogous to *bona vacantia* is the case of escheats, which also pass under Section 109 as royalties. Except for the difference between a right to lands, the title to which is ultimately in the Crown, and a right to personalty, which is complete in a private person, if there be a private person entitled, the principle on which *bona vacantia* and escheats fall to the Crown is the same, that is that there being no private person entitled, the Crown takes.

Upon the construction of Section 109 the argument for the Dominion dwells on two points: (1) That the collocation of "all lands, mines, minerals and royalties" involves that rule of construction, which is called the *ejusdem generis* rule, or, alternatively, that indicated by saying *noscitur a sociis*, so that the word "royalties" must by construction be limited to royalties of a territorial character; and (2) that all these things thus named must further "belong to" the Province at the time of the Union as a condition of falling to it under the Act. It is true that a common genus may be devised, which would comprehend all four nouns substantive, just because they all possess the quality of belonging to the Crown in right of one of the Provinces at the date of the Union, but they are not brought together as genus and species by any such words as give rise to the niceties of the *ejusdem generis* rule, nor would their possession of this common quality advance the argument on either side in the least degree. The truth is, that they constitute a simple enumeration, that the word "all" applies equally to all four, and that it is in no case limited, except by the words "belonging" to the several Provinces, and the words might equally well have been "all royalties, lands, mines and minerals" or "all royalties, all lands, all mines and all minerals." It is true that the word "territorial" is (in other contexts) employed in the opinions of the Judicial Committee in several of the earlier cases, but not, as it seems to their Lordships, in a sense which would support the present argument. The other argument, that the word "royalties" here means royalties—*jura regalia*—having something to do with lands or minerals, and so *noscitur a sociis*, appears to beg the

question. It was held that precious metals, though not minerals, fall to the Crown in right of the Province, not because they are like minerals, for, except in a legal sense, they are minerals already, but because they are covered by *jura regalia*. If the Legislature, in giving effect to a division between Dominion and Provinces of that complex of rights, which before the Union belonged to the Crown in the right of the various Provinces existing in British North America, chose to enumerate a catalogue of particular rights, which were reserved to the Provinces then included or subsequently to be included under the Dominion, out of the total of the "duties or revenues" which were to form the one consolidated revenue fund to be appropriated for the public service of Canada, it is not for any Court of construction to speculate as to the reasons for this policy so far as to attribute to that, which is expressed as a catalogue, limiting attributes which would convert it into a classification by genus and species. Their Lordships must take the words of Section 109 as they stand, and, as they stand, they enumerate certain Crown rights the benefit of which is to be enjoyed by the Provinces, then existing or under appropriate legislation thereafter brought within the ambit of that benefit, as British Columbia has been. By that enumeration their Lordships, like other Courts, are bound.

A very learned argument upon the words "belonging to" in Section 109 appears to have been addressed to the Courts in Canada, the gist of which was that, in order that British Columbia should be entitled to claim *bona vacantia* under Section 109, it was necessary to show on behalf of the Province that the casual revenues arising from that head of *jura regalia* had prior to 1867 in fact been appropriated by the Government of that Province. On this head considerable research appears to have been made into the despatches passing between the Governors of the Provinces and the Colonial Office. The point became of minor importance in the Supreme Court of Canada, and was not relied upon at their Lordships' bar. Accordingly, without expressing any opinion on the question whether the words "belonging to" mean "already in fact appropriated," or only "such as the Province was entitled to appropriate," their Lordships think it sufficient to observe that this question, which is substantially one of fact, has not been established in favour of the Dominion in the sense of the argument advanced on its behalf, and that the point must be taken to have failed for the purpose of the present appeal.

It was further submitted that if an extended construction be given to the word "royalties" in Section 109, the result would be that "lands, mines, minerals and royalties" would be co-extensive with "revenues and duties" in Section 102, and thus the exception would be as wide as the grant. Formally this is an objection of some weight. Their Lordships may, however, observe that as soon as it is clear that Crown lands and minerals, forests and precious metals, in the Province are to be held by the

Crown in right of the Province, any beneficial interest in casual revenue derivable from *jura regalia* must be of relatively slight importance. They do not, however, propose to decide on this occasion that the words of the reservation in Section 109 are exhaustive of the grant in Section 102. Mindful of the words of Lord Selborne in *Mercer's* case that " the general subject of the whole section is of a high political nature," and fully conscious of the fact that, as between the Dominion and the Provinces, the partition of venerable rights, such as the *jura regalia* of the Crown must always be, are necessarily important far beyond their current pecuniary value, their Lordships propose to follow the guarded course of their predecessors, and to confine the expression of their opinion to *bona vacantia*, the case in hand. Accordingly, other *jura regalia*, such as flotsam and jetsam, deodands, swans and sturgeons, *bona et catella felonum* and many others must await decision till the case arises, and till then no opinion can be expressed upon the argument that a content is being attributed in the present appeal to the word " royalties " in Section 109, which has the effect of eviscerating the words " duties and revenues " in Section 102.

For these reasons their Lordships will humbly advise His Majesty that this appeal should be dismissed.

In the Privy Council.

THE KING

v.

THE ATTORNEY-GENERAL OF BRITISH COLUMBIA.

DELIVERED BY LORD SUMNER.

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