

1893 ~~~~~ *Oct. 20. ~~~~~ 1894 ~~~~~ *Feb. 20. ~~~~~	THE QUEEN, ON THE INFORMATION OF THE ATTORNEY-GENERAL FOR THE DOMINION OF CANADA..... } APPELLANT; AND LUDGER O. DEMERS AND MIMA } DEMERS..... } RESPONDENTS.
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ON APPEAL FROM THE EXCHEQUER COURT OF CANADA.

Title to lands in railway belt in British Columbia—Unsurveyed lands held under pre-emption record prior to statutory conveyance to Dominion Government—Federal and provincial rights—British Columbia Lands Acts of 1873 and 1879—47 Vic., ch. 6 (D).

On 10th Sept., 1883, D. *et al.* obtained a certificate of pre-emption under the British Columbia Land Act, 1875, and Land Amendment Act, 1879, of 640 acres of unsurveyed lands within the 20 mile belt south of the C. P. R., reserved on the 29th Nov., 1883, under an agreement between the Governments of the Dominion and of the province of British Columbia, and which was ratified by 47 Vic., c. 14 (B.C.). On 29th Aug., 1885, this certificate was cancelled, and on the same day a like certificate was issued to respondents, and on the 31st July, 1889, letters-patent under the great seal of British Columbia were issued to respondents. By the agreement ratified by 47 Vic., c. 6 (D), it was also agreed that three and a half million additional acres in Peace River District should be conveyed to the Dominion Government in satisfaction of the right of the Dominion under the terms of union to have made good to it, from public lands contiguous to the railway belt, the quantity of land that might at the date of the conveyance be held under pre-emption right or by crown grant.

On an information by the Attorney General for Canada to recover possession of the 640 acres :

Held, affirming the judgment of the Exchequer Court, that the land in question was exempt from the statutory conveyance to the Dominion Government, and that upon the pre-emption right granted to D. *et al.* being subsequently abandoned or cancelled, the land became the property of the crown in right of the province, and not in right of the Dominion.

* PRESENT :—Sir Henry Strong C.J., and Fournier, Taschereau, Gwynne and King JJ.

APPEAL from the judgment of the Exchequer Court (1), rendered on March 13, 1893, in favour of the defendants, upon an information of intrusion filed by the Attorney General of the Dominion of Canada, to recover possession of a lot of land within the Railway Belt in the province of British Columbia.

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The statutes, agreements and facts bearing upon the case are as follows:—

By the 11th section of the terms of union, under which British Columbia was admitted into confederation, the Province agreed to convey to the Dominion, in aid of a transcontinental railway, a belt of land not exceeding 20 miles on either side of the railway; and any deficiency caused by lands situate within the belt being held crown grant or under pre-emption right was to be made up from contiguous public lands (2).

By 43 Vic. cap. 11 (B.C.) passed 8th May, 1880, the Province granted to the Dominion a belt along the line of railway as it was then proposed to be located through Yellowhead Pass.

By 46 Vic. cap. 14 (B.C.) passed 12th May, 1883, an agreement between the Dominion and Province was ratified, and in accordance with it, and by reason of a contemplated change of route, a grant was made of a 20 mile belt on either side of the railway, wherever finally located. A difficulty in respect to ascertaining the exact quantity of lands "held under pre-emption right or crown grant" was arranged by taking them roughly at 3,500,000 acres, and public lands to that extent in the Peace River district of British Columbia were granted to and accepted by the Dominion "in satisfaction of all claims for additional lands under the terms of union.

(1) 3 Ex. C. R. 293.

(2) Statutes of Canada, 1872, p. xcvi.

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On September 10th, 1883, the lands now in dispute were pre-empted by Messrs. Dunbar, Wilson and Pillmore.

On November 5th, 1883, the Dominion Government agent notified the Provincial Government of the final adoption of practically the present line of railway, and requested the placing of a reserve on the lands within 20 miles on either side of such lines.

On November 29th, 1883, a notice, reserving such belt, was published in the *B. C. Gazette*.

By 47 Vic. cap. 14 (B.C.), passed 19th December, 1883, the "First Settlement Act" was repealed, and the Province, among other things, granted to the Dominion the lands along the line of railway, "whenever it may be finally located, to a width of 20 miles on either side of the said line, as provided in the Order in Council, section 11, admitting the Province of British Columbia into Confederation." The same arrangement was made as in the "First Settlement Act," respecting lands in the belt theretofore alienated.

By 45 Vic., cap. 6 (D), the Dominion Parliament, on the 19th April, 1884, ratified the above settlement.

On 16th January, 1885, the line or the portion thereof which affected these lands was finally located and the lands which passed by the "Second Settlement Act," would be capable of being ascertained.

On August 29th, 1885, Dunbar and associates abandoned their pre-emption in favour of the respondents, who on the same date received a pre-emption record from the Provincial Government land agent.

On July 31st, 1889, a grant under the great seal of the province was issued to respondents.

Hogg Q.C. for appellant contended:—

(1.) That the Dominion, upon the abandonment or cancellation of a pre-emption of land within the railway belt, is entitled to the lands, although the same

were held under pre-emption right at the time of the statutory conveyance of the belt by the province.

(2.) That Dunbar and his associates did not hold these lands under pre-emption right within the meaning of the terms of union, and cited and referred to *Queen v. Farwell* (1); 11th paragraph terms of union, 1871 (2).

Dalton McCarthy Q.C. for the respondent. The lands which were held under pre-emption right at the time of the statutory conveyance, were as much excepted from its operation as if they had been described by metes and bounds. The same argument, which would establish the right of the Dominion to these lands upon the abandonment of the pre-emption, would also give to the Dominion the right to the ultimate reversion of lands within the belt, which were at the same time "held by crown grant," and this is not tenable. *Mercer v. The Attorney General of Ontario* (3).

Moreover, the province has given for every acre held under pre-emption right at the time of the statutory conveyance a corresponding acre in the Peace River country, and the Dominion has no more interest in the subsequent dealings with such land than the province has in the disposal of the equivalent parcel in the Peace River district.

These lands were not included in the reserve of the 29th November, 1883, for the authority for making such reserve was section 60 of the Land Act, 1875 (1875, cap. 5), which authorizes the reserve of "any lands not lawfully held by record, pre-emption, purchase, lease or crown grant, for the purpose of conveying the same to the Dominion Government in trust, * * for railway purposes, as mentioned in article 11 of the terms of union."

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

(2) 47 Vic. ch. 14, sec. 7 (B.C.)

(3) 8 App. Cas. 767.

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The second contention of appellants, viz., that the Dunbar pre-emption was not a valid method of holding lands under pre-emption right, within the meaning of the terms of union, seems to be founded on a change in the terminology of the land laws. It is attempted to construe the words "held under pre-emption right," in the light of the amended land law existing in 1885, instead of in the light of "The Land Act, 1870," which alone was in existence when the terms of union were drawn up. At that time almost all the province was unsurveyed, it was sold by public auction with an upset price—Land Act, 1870, sec. 44; Revised Laws, 1871, cap. 144.

By the "Land Act, 1875" (1875, cap. 5), this policy was changed, and both surveyed and unsurveyed lands were open to pre-emption, and the only material difference in the provisions was the necessary regulations provided for survey. For distinction's sake the proceedings relating to acquiring unsurveyed land were called "recording," and surveyed lands "pre-empting."

The settler had the privilege in the case of either class of land, upon performance of the statutory conditions, to acquire the title to his lot and this is the essence of pre-emption.

The following were cited and relied on:—

Anderson's Law Dictionary (1); *Dillingham v. Fisher* (2); *Hosmer v. Wallace* (3); *Sioux City Land Co. v. Griffey* (4); *Hastings and Dakota Railroad Co. v. Whitney* (5); *Kansas Pacific Railroad Co. v. Dunmeyer* (6).

THE CHIEF JUSTICE.—I am of opinion that this appeal should be dismissed with costs for the reasons given in the judgment of Mr. Justice Gwynne.

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| (1) P. 800, title "Pre-emption" | (3) 97 U.S.R. 575. |
| and "Pre-emption Claimant." | (4) 143 U.S.R. 32. |
| (2) 5 Wis. 475. | (5) 132 U.S. R. 357. |
| (6) 113 U.S. R. 629. | |

FOURNIER and TASCHEREAU JJ.--Were also of the same opinion.

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GWYNNE J.—This appeal must be dismissed with costs. It cannot I think be doubted that the lands covered by the pre-emption certificate issued by the British Columbia Government to Dunbar, Wilson and Pillmore on the 10th Sept., 1883, did not form part of the lands within what is called the Railway Belt in British Columbia, which were granted by the Government and Legislature of British Columbia in virtue of the agreement between the Governments of British Columbia and of the Dominion of Canada affirmed and approved by the British Columbia statute 47 Vic. ch. 14, passed on the 19th December, 1883, and by the Dominion statute, 47 Vic. ch. 6, passed on the 19th April, 1884, but on the contrary that the land in question, consisting of 640 acres for which such pre-emption certificate had issued, constituted part of the lands within the said Railway Belt for which, because they were not included or intended to be included in the lands within the said belt so granted to the Dominion Government, they formed part of the lands for which the lands in the Peace River District were by the same acts granted and accepted by way of compensation. The land in question therefore never in law or fact passed or was intended to pass to the Dominion Government, and consequently, there is no place for the contention that upon the original pre-emption certificate being abandoned the land reverted to Her Majesty in right of the Dominion Government. The original pre-emption ticket remained beyond all question in full force until the 29th August, 1885, when what is relied upon as its abandonment took place as follows, and as would seem, although no evidence upon the point appears to have been asked for or given, for the

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purpose of substituting, with the consent of the British Columbia Government, the appellants in the place of Dunbar and the others named in the original pre-emption certificate with their consent. On the 29th August, 1885, Dunbar, Wilson and Pillmore appeared to have attended at the Government Land Commissioners Office and expressed their willingness to abandon and abandoned their certificate, the respondents at the same time attended at the same place and applied for and received a certificate of pre-emption record issued by the Government to them in the place and stead of the certificate so abandoned by Dunbar and his associates, which was filed away in the Government office and indorsed "abandoned."

Upon the 28th September, 1892, the Government of British Columbia having been duly satisfied as required by law that the respondents had made improvements upon the land exceeding \$2.50 per acre, amounting in the whole to \$1,860, issued letters patent under the great seal of the province of British Columbia granting the land to them.

The verbal distinction, if any there be, between the terms "pre-empting" and "recording" the rights of actual settlers apparently indifferently used in the British Columbia statutes, has no bearing whatever in my opinion upon the question under consideration. The claim made on behalf of the Dominion Government to the land in question appears to me to be utterly devoid of foundation.

KING J.—Concurred.

*Appeal dismissed with costs.*

Solicitors for appellant: O'Connor & Hogg.

Solicitor for respondents: A. G. Smith.

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