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*Feb. 1, 2.

*April 20.

IN THE MATTER OF A REFERENCE AS TO THE
POWER OF THE PARLIAMENT OF CANADA
AND OF THE GOVERNMENT OF CANADA WITH
RESPECT TO PRECIOUS METALS IN, UNDER OR
UPON CERTAIN LANDS OF THE HUDSON'S BAY
COMPANY, AND AS TO THE OWNERSHIP OF
SUCH PRECIOUS METALS.

Real property—Mines and minerals—Crown's prerogative right to precious metals—Law as to title to, and conveyance of, precious metals—Precious metals in lands formerly owned by Hudson's Bay Company under its Charter of 1670—Construction and effect of Deed of Surrender of 1869 from the Company to the Crown, and of subsequent proceedings and legislation—Precious metals in such lands as belong to the Company under the terms of its surrender, etc.

Titles to lands evidenced by grants from the Crown to subjects, and estates in fee simple, do not, in the absence of explicit words apt and precise to indicate them, carry the prerogative right to the precious metals.

Mines of gold and silver, while held by the Crown, are not to be regarded as *partes soli* or as incidents of the land in which they are found, and are not held (as are the lands of the Crown and the baser metals contained in them) by proprietary title; they may, however, by appropriate and precise words, be severed from the Crown and granted to another. (*The Mines Case*, 1 Plowd. 310; *Woolley v. Atty. Gen. of Victoria*, 2 App. Cas. 163; *Atty. Gen. of British Columbia v. Atty. Gen. of Canada*, 14 App. Cas. 295 at p. 302). But, while the precious metals and the lands are vested in the one owner other than the Crown, such metals are part of the land, and pass from such owner by a grant in absolute terms of the fee simple estate in the land.

Under the Royal Charter of 1670, the Hudson's Bay Company, prior to the acceptance on 23rd June, 1870, of its deed of surrender of 19th November, 1869, owned the precious metals in the territories granted to it. The source of its title, alike to the precious metals and to the lands in which they lay, was the grant from the Crown. The precious metals in the land were *partes soli* while owned by the com-

*PRESENT:—Anglin C.J.C. and Duff, Mignault, Rinfret and Maclean (*ad hoc*) JJ.

pany. It held land and precious metals alike by the same proprietary title.

The said deed of surrender from the company to the Crown should be construed, having regard to the nature and object of the agreement pursuant to which it was made, and to the operative words in the deed itself, as carrying, as *partes soli*, the precious metals in the lands surrendered.

After the execution and acceptance of the deed of surrender, the precious metals in Rupert's Land again belonged to the Crown by prerogative right, and under the Order in Council of 23rd June, 1870, the beneficial interest in, and the right of governmental control over, them was transferred to, and became vested in, the Dominion of Canada.

As to the posts or stations "retained" by the company, excepted from the deed of surrender, the precious metals in the subjacent lands passed under the general terms of the surrender to the Crown. An exception in a deed of grant should be taken most strongly against the party for whose benefit it is introduced, and should be allowed to control the instrument only in so far as its words extend; and, having regard to this ordinary rule of construction, and to the fact that it was an exception out of property being transferred to the Crown, and to the object of the exception, and to the nature and purpose of the instrument in which it occurred, it must be construed as not including the precious metals.

As to the blocks of land (adjacent to the posts or stations) to be "selected" by the company, and the areas in the fertile belt of which they might claim grants, the intent to be taken from the deed of surrender is that the lands were to pass under the general surrender, but on the term or condition that, after they had been transferred to the Dominion of Canada and surveys had been made and the right of "selection" or "claim" had matured, the Crown through the Dominion Government would re-grant or re-transfer to the company the blocks so to be "selected" and the parcels so to be "claimed." When the surrendered lands vested in the Crown and all effects of the earlier grant of them to the company had been extinguished (*Rupert's Land Act, 1868*, s. 4), the precious metals in such lands, which had been granted out of the prerogative, again belonged to the Crown by prerogative right (*Atty. Gen. v. Trustees of the British Museum*, [1903] 2 ch. 598, at pp. 612-3); whereas its title to the lands surrendered (exclusive of such metals) was proprietary. Upon such re-grants or re-transfers to the company, however effected, precious metals would not pass unless specifically mentioned and covered by apt and precise words. Accordingly, it must be held that the precious metals in all such lands have, since the execution and acceptance of the deed of surrender, belonged to the Crown.

(If the company's right to the precious metals subsisted as a franchise, its surrender of such, by the terms of the deed of 1869, was complete and without exception or qualification.)

The above construction accords with the nature and purpose of the agreement pursuant to which the deed of surrender was made. The purpose undoubtedly was to preserve intact the Crown's prerogative rights throughout the new territory acquired by the Dominion of Canada. The construction is also supported by the company's subsequent conduct in accepting grants from the Dominion of the

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"selected" blocks of land (including in the description of them the lands on which the "retained" posts and stations were actually erected) and in assenting to the provisions of the *Dominion Lands Act* of 1872 (ss. 17-21) and of the Canadian Order in Council of 6th December, 1872, being substituted for those of the deed of surrender of Rupert's Land in all matters pertaining to the company's one-twentieth of the lands within the Fertile Belt. The company must be taken to have implicitly recognized that its deed of surrender had operated to vest all these lands in the Crown, subject to the company's right to have them re-granted or re-transferred to it in its new capacity as a purely trading corporation.

S. 36 of the *Dominion Lands Act* of 1872, providing that "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" (repealed, 43 Vic., c. 26; and see declaratory legislation, 46 Vic., c. 17, s. 43) did not necessarily imply that the gold and silver in all Dominion lands (including those reserved for the company) to be granted should pass to the grantees (*The Mines Case*, 1 Plowd. 310; Maxwell on Interpretation of Statutes, 6th ed., pp. 244-5; 31 Vic., c. 1, s. 6 (23)); and it cannot be said that in accepting the provisions of the *Dominion Lands Act* of 1872 and of the Order in Council of 6th December, 1872, the company was under the impression that it would thereby become entitled to the precious metals underlying the lands for which it might subsequently obtain grants or titles by notification under s. 21 of the statute.

REFERENCE by His Excellency the Governor General in Council to the Supreme Court of Canada, under and pursuant to the *Supreme Court Act*, of certain questions for hearing and consideration as to the power of the Parliament of Canada and of the Government of Canada over the precious metals, gold and silver, in, under and upon, certain lands of The Governor and Company of Adventurers of England trading into Hudson's Bay, commonly called the Hudson's Bay Company, and as to the ownership of the said precious metals.

The Order in Council providing for the reference was dated 26th January, 1926 (P.C. 108), and was amended by Order in Council dated 12th October, 1926 (P.C. 1561).

The following is a statement of the case and questions submitted for decision, as agreed upon between the Minister of Justice, on behalf of the Government of Canada, and the Company:

"WHEREAS questions have arisen as to the power of the Parliament of Canada and of the Government of Canada over the precious metals, gold and silver, in, under or upon lands of The Governor and Company of Adventurers of

England trading into Hudson's Bay, hereinafter called the Company, and as to the ownership of the said precious metals:

AND WHEREAS it is deemed advisable to refer the said questions to The Supreme Court of Canada for hearing and consideration:

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AND WHEREAS the opinion of the said Supreme Court is desired upon the following case:—

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, a true copy whereof is annexed hereto as Schedule 'A.'

2. By Deed of Surrender bearing date the 19th day of 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 day of June, 1870, Rupert's Land and the North-West Territories were admitted into the Dominion of Canada. Schedule 'B' hereto contains a true copy of the said The Rupert's Land Act, 1868, Order in Council and Surrender.

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 land adjoining each of its posts or stations within any part of British North America, not comprised in Canada and British Columbia.

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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. Schedule 'C' hereto is a true copy of one of said patents bearing date the 27th of January, 1882, and the other patents were issued in the same form.

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, a true copy of which is annexed hereto as Schedule 'D,' and the Company on the 7th of January, 1873, adopted the Resolution a copy of which is annexed hereto as Schedule 'E.'

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 precious metals or to any minerals. Schedule 'F' hereto contains a copy of one of such notifications, bearing date the 30th of June, 1881, and Schedule 'G' hereto contains a copy of one of said patents issued to the Company for such lands in fractional townships, bearing

date the 7th of July, 1910. Schedule 'H' hereto contains a copy of one of said patents issued to the Company for land in lieu of land so settled upon, bearing date the 10th of May, 1913. These may be regarded as typical of such documents.

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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

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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."

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It was not intended by the reference to raise any issues as between the Dominion and any province, and it was provided that, so far as any lands in the province of Manitoba were concerned, questions numbers 1, 2 and 3 might 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 would be sufficient to state what were 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.

Pursuant to an order of the Court, notification of the hearing of the agreement was sent to the Attorneys General of Manitoba, Saskatchewan and Alberta, and was published in the *Canada Gazette*. The Attorneys General of the provinces of Manitoba and Saskatchewan were represented by counsel at the hearing. Their respective factums, after referring to the fact that the province was not a party to the reference, and after referring to the intention, as above indicated, that no issues were to be raised as between the Dominion and any province, etc., supported the position taken by the Dominion as to the rights of the Crown.

Aimé Geoffrion K.C. and *O. M. Biggar K.C.* for the Attorney General of Canada.

F. H. Chrysler K.C. for the Province of Manitoba.

H. Fisher K.C. for the Province of Saskatchewan.

D. H. Laird K.C. and *G. P. R. Tallin* for the Hudson's Bay Company.

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The judgment of the Court was delivered by
ANGLIN C. J. C.—Under the authority of s. 60 of the
Supreme Court Act His Excellency the Governor General
in Council has referred to the Court for hearing, considera-
tion and answer a series of questions relating to the
ownership of the precious metals in lands formerly “held
or claimed to be held” by the “Governor and Company
of Adventurers of England trading into Hudson’s Bay”
(31-2 Vic., (Imp.), c. 105, s. 2), and now included in the
Provinces of Manitoba, Saskatchewan and Alberta and the
North-West Territories of Canada.

That the Hudson’s Bay Company, prior to the 23rd of
June, 1870, owned the precious metals in the territories
granted to it in 1670 by Charter from King Charles II is
indisputable. That Royal Charter vested in the Company
not only all the lands and territories comprised in Rupert’s
Land as therein described, not already actually possessed
by or granted to any of the King’s subjects or possessed by
the subjects of any other Christian Prince or State, but also
in express terms

all mines Royal, as well discovered as not discovered, of Gold, Silver,
Gems, and precious Stones to be found or discovered within the Terri-
tories, Limits and Places aforesaid.

It was decided in 1568 in *The Mines Case* (1) that,
although all mines of gold and silver within the realm,
while held by the Crown, are not to be regarded as *partes
soli* or as incidents of the land in which they are found, and
are not held (as are the lands of the Crown and the baser
metals contained in them) by proprietary title, whether
they be in the lands of the Queen or of subjects (p. 336),
they may, nevertheless,

by grant of the King be severed from the Crown and be granted to
another, for it is not an incident inseparable to the Crown but may be
severed from it by appropriate and precise words (p. 336A).

The law of England in these particulars, as thus defined
in *The Mines Case*, persists to the present day (*Woolley
v. Attorney General of Victoria* (2); *Attorney General of
British Columbia v. Attorney General of Canada* (3); and
it is conceded that according to that law the questions
now before us must be answered. The title, therefore,

(1) 1 Plowd. 310.

(2) (1877), 2 App. Cas. 163.

(3) (1889), 14 App. Cas. 295, at
p. 302.

of the Governor and Company under the Royal Charter of 1670 to the precious metals in Rupert's Land was beyond cavil. They were "absolute lords and proprietors of the territory", saving the allegiance due to His Majesty.

Indeed this was common ground between counsel; and this aspect of the matter is now dwelt on only to give prominence to the fact that the source of the Company's title alike to the precious metals and to the lands in which they lie was the grant from the Crown. Both were granted to the Company by the same Royal Charter.

Consequent upon such grant, as is stated in the factum of the Company (p. 3), the precious metals in the land transferred to it "became part of the land the same as other metals", because (p. 6),

while the precious metals and the lands are vested in the one owner other than the Crown, such metals are part of the land and pass from such owner by a grant in absolute terms of the fee simple estate in the land;

and again (p. 7),

The ownership of precious metals by the owner of the land in which they are found is not a right, privilege, liberty, franchise, power or authority. In such a case it is part of his estate in the land. Even if it were a right while held by the Crown, or a person other than the owner of the land, once it is vested in the owner of the land it merges in the land and becomes extinguished.

In this view counsel for the Crown are also fully agreed; and, as will presently appear, it meets the chief difficulty suggested by counsel for the Company in regard to the scope and effect of the deed of surrender to the Crown in 1870, apart from those which it is argued arise upon the terms and conditions contained in that instrument and subject to which it was given.

Prior to Confederation the Hudson's Bay Company seems to have been quite ready, if not anxious, to part with its proprietary rights and franchises to the English Crown for a consideration. Indeed negotiations were being carried on, as appears from correspondence set out in the Company's factum, to achieve that purpose. In the Canadian Confederation scheme as formulated in the *British North America Act* of 1867 provision was made (s. 146) for the admission into the Union, on address from the Houses of Parliament of Canada, of

Rupert's Land and the North-Western Territory, or either of them * * * on such terms and conditions in each case as are in the Addresses ex-

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pressed and as the Queen thinks fit to approve, subject to the provisions of this Act;

and the statute proceeded to declare that

the provisions of any Order in Council in that behalf shall have the same effect as if they had been enacted by the Parliament of the United Kingdom of Great Britain and Ireland.

Negotiations ensued between representatives of the Company and of the Dominion Government, in which the Colonial Office also intervened. These culminated in an arrangement whereby, subject to certain terms and conditions, notably the payment to the Company of £300,000 stg. and the retention or reservation by it, or an undertaking for a re-grant to it, of certain of its holdings, the Company was to surrender and relinquish to the Crown all rights of government and proprietary rights and all other privileges, liberties, franchises, powers and authorities whatsoever granted or purported to be granted by the said Letters Patent (of 1670);

and upon such surrender all such rights, franchises, etc. were to be "absolutely extinguished" and the territory so surrendered was, by Order in Council, to be transferred to, and to become part of, the Dominion of Canada as contemplated by the *British North America Act*. The negotiations and their outcome are evidenced by various resolutions, letters and documents set out in the case before us, which, however, it does not seem necessary to quote in detail. To enable the arrangement above sketched to be carried out, the Imperial Parliament passed the *Rupert's Land Act, 1868*. This statute it may, perhaps, be advisable to set out in part:

After reciting the grant by the Company's Charter and the relevant provision of s. 146 of the *British North America Act*, the statute proceeds:

And whereas for the purpose of carrying into effect the Provisions of the said British North America Act, 1867, and of admitting Rupert's Land into the said Dominion as aforesaid upon such terms as Her Majesty thinks fit to approve, it is expedient that the said Lands, Territories, Rights, Privileges, Liberties, Franchises, Powers and Authorities so far as the same have been lawfully granted to the said Company shall be surrendered to Her Majesty, Her Heirs and Successors, upon such terms and conditions as may be agreed upon between Her Majesty, and the said Governor and Company as hereinafter mentioned:

Be it therefore enacted, etc., as follows:—

1. This Act may be cited as "*Rupert's Land Act, 1868*."

2. For the Purposes of this Act the Term "*Rupert's Land*" shall include the whole of the Lands and Territories held or claimed to be held by the said Governor and Company.

3. It shall be competent for the said Governor and Company to surrender to Her Majesty, and for Her Majesty by any Instrument under her Sign Manual and Signet, to accept, Surrender of all or any of the Lands, Territories, Rights, Privileges, Liberties, Franchises, Powers and Authorities, whatsoever granted or purported to be granted by the said Letters Patent to the said Governor and Company within Rupert's Land upon such terms and conditions as shall be agreed upon by and between Her Majesty and the said Governor and Company; provided, however, that such Surrender shall not be accepted by Her Majesty until the Terms and Conditions upon which Rupert's Land shall be admitted into the said Dominion of Canada shall have been approved of by Her Majesty, and embodied in an Address to Her Majesty from both the Houses of the Parliament of Canada in pursuances of the One Hundred and Forty-sixth Section of the British North America Act, 1867, and that the said Surrender and Acceptance thereof shall be null and void unless within a month from the date of such Acceptance Her Majesty does by Order in Council under the Provisions of the said last recited Act admit Rupert's Land into the said Dominion; provided further, that no charge shall be imposed by such terms upon the Consolidated Fund of the United Kingdom.

4. Upon the acceptance by Her Majesty of such surrender all Rights of Government and Proprietary Rights, and all other Privileges, Liberties, Franchises, Powers, and Authorities whatsoever, granted or purported to be granted by the said Letters Patent to the said Governor and Company within Rupert's Land, and which shall have been so surrendered, shall be absolutely extinguished; provided that nothing herein contained shall prevent the said Governor and Company from continuing to carry on in Rupert's Land or elsewhere Trade and Commerce.

5. It shall be competent to Her Majesty by any such Order or Orders in Council as aforesaid, on Address from the Houses of Parliament of Canada, to declare that Rupert's Land shall, from a date to be therein mentioned, be admitted into and become part of the Dominion of Canada; and thereupon it shall be lawful for the Parliament of Canada from the date aforesaid to make, ordain and establish within the Land and Territory so admitted as aforesaid all such Laws, Institutions and Ordinances, and to constitute such Courts and Officers, as may be necessary for the Peace, Order and Good Government of Her Majesty's Subjects and others therein: Provided that, until otherwise enacted by the said Parliament of Canada, all the Powers, Authorities, and Jurisdiction of the Several Courts of Justice now established in Rupert's Land, and of the several Officers thereof, and of all Magistrates and Justices now acting within the said Limits, shall continue in full force and effect therein.

A formal deed of surrender to the Crown was executed by the Company in 1869, and in June, 1870, matters had so far progressed that an Imperial Order in Council was passed accepting such surrender and admitting Rupert's Land and the North Western Territory into the Dominion of Canada. Thus the vast territory extending from the Lake of the Woods and Lake Winnipeg and Hudson's Bay

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in the East to the Rocky Mountains in the West became part of Canada "from and after the 15th of July, 1870."

It is chiefly concerning the scope and effect of the deed of surrender of 1869 that the controversy now before us has arisen. No question is presented as to the respective interests of the Crown in right of Canada and of the Crown in right of the several provinces; the only questions are whether the Hudson's Bay Company or the Crown is entitled to the precious metals, gold and silver, "in, under or upon" the lands which formed the subject of the deed of surrender or any of them, and, subject to what is to be said at a later stage as to the possible effect of subsequent legislation, the solution of these questions depends upon the construction of the terms of the deed of surrender itself.

In approaching this problem of construction the first feature of the deed which attracts our attention is the recital, immediately preceding the operative paragraph, that the surrender hereinafter contained is intended to be made in pursuance of the agreement * * * hereinbefore stated, i.e., the agreement above outlined. It is of vital moment that the purpose and object of that agreement should be well in mind in construing the surrender in order that, consistently with its terms, it may be given the scope and meaning that will best carry into effect the intent with which it was made. A company which had theretofore owned territories having the extent of a vast empire, which had throughout those territories enjoyed the widest powers of government and administration together with rights, faculties, franchises, privileges and prerogatives that usually appertain to a sovereign state, or, under the system now prevalent in the British Empire, to one of its self-governing constituent parts, and which, as incidental to the possession of such powers of government and administration, had been accorded the Royal prerogative of taking the Royal fish in the waters within and contiguous to its territories and also the Royal prerogative of owning and exploiting the Royal Mines within such territories, was surrendering to the Crown all these powers, rights and franchises as well as its proprietary rights, and this surrender was being made with the object that the rights, governmental and proprietary, and the franchises so surrendered should be extinguished in order to pave the

way for the transfer by Her Majesty of the fullest rights of government and administration over, and ownership of, the territory in question to the new Dominion of Canada. The Company as an instrument of government was to pass from the scene and was thereafter to carry on solely as a trading corporation, holding its trading posts and stations, with immediately adjacent parcels of land needed for their proper conduct, and receiving, as part consideration for the surrender it was making, a right to parcels of land in the so-called Fertile Belt (part of the surrendered territory) equal to one-twentieth of the portions thereof to be opened for settlement. The Company was to exercise and possess for the future no rights other than those of a private trading corporation owning property in Canada. Indeed so complete and all-embracing was the contemplated surrender of its rights, powers and franchises that it was deemed prudent, no doubt to preclude possible misapprehension, explicitly to provide in *The Rupert's Land Act, 1868* (s. 4) that nothing herein contained shall prevent the said Governor and Company from continuing to carry on in Rupert's Land or elsewhere Trade and Commerce.

Whatever reasons there may have been for the original grant to the Company of Royal prerogative rights ceased to exist on the acceptance of the surrender. Governmental control over and administration of, and all beneficial interest in, the territories which the Company was relinquishing were thereafter to be vested in the Dominion of Canada. These were the salient features of the arrangement pursuant to, and as a step towards the accomplishment of, which the deed of surrender was made.

What did the Company purport to surrender?

The operative clause of the deed is in these terms:

Now know ye, and these presents witness, that, in pursuance of the powers and provisions of the "Rupert's Land Act, 1868," and on the terms and conditions aforesaid, and also on condition of this surrender being accepted pursuant to the provisions of that Act, the said Governor and Company do hereby surrender to the Queen's Most Gracious 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 terri-

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teries 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.

Reading this clause, for the moment, as if it did not contain the words in brackets, the generality of its language is *ex facie* unrestricted. All the Company's lands and territories within Rupert's Land (and it had no title to any lands in the North-Western Territory except, perhaps, by occupation) granted or purported to be granted to it by its Royal Charter of 1670 were surrendered to the Crown. In those lands were undoubtedly then included the precious metals as well as other metals lying in, under or upon them. The precious metals therein were *partes soli* while owned by the Company. They had been "granted" to it by the same letters patent which "granted" the lands themselves. The Company held land and precious metals alike by the same proprietary title. The description in the deed of surrender "All the lands and territories within Rupert's Land * * * granted or purported to be granted to the said Governor and Company by the said Letters Patent" was, therefore, apt and sufficient to carry, and we have not the slightest doubt was meant to carry, as *partes soli* the precious metals in the lands surrendered. Such is the literal and legal meaning of the words of the surrender; and that such was the intent with which they were used, having regard to the nature and objects of the agreement pursuant to which the deed of surrender purports to have been made, does not, we think, admit of question.

But, while that may be so as to the surrendered lands in which the Company ceased to have any further interest, it is contended on its behalf that in the lands "retained" by it as posts, and in those to be "selected" as adjacent blocks, and also in the lands agreed to be granted to it as part consideration for the surrender to the Crown, its estate and interest (including the ownership of the precious metals therein) is still the same as that which it formerly held in all the territory of Rupert's Land under the Royal Charter of 1670. These particular lands, it was argued, did not pass from the Company by the surrender, but were either excepted or reserved from it; and much emphasis was placed by counsel on the word "except" in the interjected parenthetical phrase "(except and subject as in the

said terms and conditions mentioned)" in the operative clause of the surrender.

It may be noted *en passant* that the word "except" does not occur in s. 3 of the *Rupert's Land Act, 1868*. It is found, however, in the recital of the deed of surrender made in the Order in Council of the 23rd of June, 1870, and it certainly cannot be ignored. The real question is as to the purview and extent of the exception to which it refers.

The clauses in the terms and conditions set forth in the surrender dealing with the lands in which the Company did not finally relinquish all interest are as follows:

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 the 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 right 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.

6. For the purpose of the last article the fertile belt is to be bounded as follows: On the South by the United States boundary; on the West by the Rocky Mountains; on the North by the Northern Branch of the Saskatchewan River; on the East by Lake Winnipeg, the Lake of the Woods and the waters connecting them.

The posts or stations to be "retained", the blocks of adjacent land to be "selected" and the areas in the fertile belt of which the Company "might claim grants" seem to have been carefully distinguished each from the others, and apparently an attempt was made to apply to each a term deemed apt to express the legal process to which it was designed to be subjected.

The word "retain" no doubt signifies that the particular property to which it refers remained with the Company

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and did not form part of the property surrendered. To property so retained the word "except" in the parenthetical clause of the operative paragraph of the deed of surrender finds appropriate application.

We are, however, here dealing with an exception and it occurs in a transfer, by way of surrender, to the Crown. Because it is an exception it should be taken most strongly against the party for whose benefit it is introduced (*Sheppard's Touchstone*, 8th ed., p. 100; *Savill Brothers, Ltd. v. Bethell* (1)) and should be allowed to "control the instrument as far as the words of it extend and no further" —*Burnett v. Kensington* (2); and the circumstance that the exception occurs in a transfer of property to the Crown by no means weakens the case for the application of this ordinary rule of construction—*Willion v. Berkley* (3). The apparent purpose of the exception will be fully met if its operation be restricted to the buildings used as posts and stations (including out-houses, etc.) and, in the lands they occupy, to the fee simple, which the subject ordinarily holds. Ownership of the precious metals in such subjacent soil cannot be regarded from any point of view as necessary to the fullest use and enjoyment of these posts or stations for the trading purposes to which the future activities of the Company were to be confined. Having regard, therefore, to the object of the exception, to the nature and purpose of the instrument in which it occurs, and to the fact that it is an exception out of property being transferred to the Crown, we are satisfied that it should be held not to include the precious metals in the subjacent lands. These were left to pass under the general terms of the surrender to the Crown.

In the case of the lands to be "selected" and in that of the parcels of which the Company was to become entitled to "claim grants" the intent of the instrument would rather seem to be that these lands were to pass to Her Majesty under the general surrender of all the Company's lands, but on the term

(1) [1902], 2 Ch. 523, at pp. 537-8. (2) (1797), 7 T.R. 210 at p. 216, note (a).

(3) (1561) 1 Plowd, 222a, at p. 243.

or condition that, after they had been transferred to the Dominion of Canada and surveys had been made and the right of "selection" or "claim" had matured, the Crown through the Dominion Government would re-grant or re-transfer to the Company the blocks so to be "selected" and the parcels so to be "claimed". Upon such re-grants or re-transfers, however effected, precious metals in the lands so dealt with would not pass unless specifically mentioned and covered by apt and precise words. When the surrendered lands vested in the Crown and all effects of the earlier grant of them to the Company had been extinguished (the *Rupert's Land Act*, 1868, s. 4), the precious metals in such lands, which had been granted out of the prerogative, again belonged to the Crown by prerogative right (*Attorney General v. Trustees of the British Museum* (1)); whereas its title to the lands surrendered (exclusive of such metals) was proprietary.

It may be that upon the necessary surveys being completed, so that the lands which were to pass to the Company—whether as selected blocks or as part of the one-twentieth of the lands opened for settlement in the fertile belt which it was entitled to claim—were designated and definitely located, it immediately acquired title to such lands (*The Queen v. Farwell* (2); *Wright v. Roseberry* (3)) and that the subsequent grants when taken, and the notification of the surveys when given under s. 21 of the *Dominion Lands Act*, 1872, amounted to nothing more than evidence of titles already vested. Nevertheless, the facts that such grants were provided for and were taken, and that the title defined by s. 21 as being in fee simple was recognized by the Company as the complement of its rights under the "reservation" in the deed of surrender, lose none of their significance. Titles to lands evidenced by grants from the Crown to subjects and estates in fee simple do not, in the absence of explicit words apt and precise to indicate them, carry the prerogative right to the precious metals.

Having regard to the nature and purpose of the agreement between the Hudson's Bay Company, the Canadian

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(1) [1903], 2 Ch. 598, at pp. 612-3. (2) (1887) 14 Can. S.C.R. 392, at p. 425.

(3) (1886). 121 U.S. Reps. 488 at p. 503.

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Government and the Imperial Government (represented by the Colonial Secretary), as a step towards the carrying out of which the deed of surrender was executed, it is scarcely possible to conceive that it was intended that here and there throughout the great territory which it was acquiring the Dominion of Canada should find numerous sections of land in which the prerogative right of the Crown to precious metals had been relinquished in favour of a purely trading company. That it must have been the purpose of the high contracting parties to preserve intact the prerogative rights of the Crown throughout that new part of the Dominion seems to us reasonably certain; and it is satisfactory to find that upon a fair construction the provisions of the deed of surrender now under consideration give effect to that intent.

If, however, notwithstanding its ownership of the soil in which the precious metals in question lay, the right of the Company to them subsisted as a franchise, it is scarcely necessary to observe that the surrender to the Crown by the deed of 1869 of all franchises granted to the Company by the Royal Charter of 1670 is complete and without exception or qualification.

Subject to what is to be said as to the possible effect of subsequent Canadian legislation, we accordingly conclude that after the execution and acceptance of the deed of surrender in 1870 the precious metals in Rupert's Land again belonged to the Crown by prerogative right, as they always had in the North Western Territory, and that, under the Order in Council of the 23rd June, 1870, the beneficial interest in, and the right of governmental control over, them was transferred to and became vested in the Dominion of Canada. *The Trusts and Guarantee Co. v. The King* (1); *Attorney General of Canada v. Attorney General of Alberta* (2).

The subsequent conduct of the Company in accepting grants from the Dominion of Canada of the "selected" blocks of land (including in the description of them the lands on which the "retained" posts and stations were actually erected) and in assenting to the provisions of the *Dominion Lands Act* of 1872 (ss. 17-21) and of the Canadian Order in Council of the 6th of December, 1872,

(1) 1916) 54 Can. S.C.R. 107.

(2) (1927) S.C.R. 136.

being substituted for those of the deed of surrender of Rupert's Land in all matters pertaining to the Company's one-twentieth of the lands within the fertile belt, afford a strong indication, to say the least, that the construction which we have put upon the stipulations of the deed of surrender in regard to the so-called "reservations" in the Company's favour, was that which the Company itself understood them to bear. By taking Crown grants of the selected blocks and of its one-twentieth share in the fractional townships and of substituted lands, where the sections that would have fallen to it were already bona fide settled on, and by acceding to the provisions of s. 21 of the *Dominion Lands Act*, under which it took statutory titles in fee simple, the Company implicitly recognized that its deed of surrender had operated to vest all these lands in the Crown, subject to the Company's right to have them re-granted or re-transferred to it in its new capacity as a purely trading corporation.

Inasmuch as *The Manitoba Act* (33 Vic., c. 3, s. 30), *The Alberta Act*, (4-5 Edw. 7., c. 3, s. 23), and *The Saskatchewan Act* (4-5 Edw. 7, c. 42, s. 23) contain provisions which expressly save the rights and properties of the Hudson's Bay Company from prejudice, nothing in any of these statutes affects the question now before us.

There is, however, a provision of the *Dominion Lands Act* of 1872 which calls for special notice. Section 36 of that Act reads as follows:

36. 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.

In the Consolidation of 1879 (42 Vic. c. 31) that section was repeated verbatim as s. 37. By an amending Act of 1880 (43 Vic. c. 26 s. 6) it was repealed. In 1883 (46 Vic., c. 17) there was a new consolidation of the *Dominion Lands Act* which contains the following 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.

In the revision of 1886 (c. 54) we find this section substantially repeated, as s. 48, in the following terms:

No grant from the Crown of lands in freehold or for any less estate, shall be deemed to have conveyed or to convey the gold or silver mines therein, unless the same are expressly conveyed in such grant.

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The section of 1886 was carried verbatim into the subsequent revision of 1906 (c. 55) as s. 161. But in the *Dominion Lands Act*, when again consolidated in 1908 (7-8 Edw. 7, c. 20), no similar section appears. It was strongly pressed upon us that the necessary implication of s. 36 in the Act of 1872 (s. 37 of 1879) is that the gold and silver in all Dominion lands (including those reserved for the Hudson's Bay Company) to be granted should pass to the grantee and it was said that it was upon this basis that the Company had agreed in January, 1873, to substitute the *Dominion Lands Act* and the Order in Council of the 6th of December, 1872, for the provisions contained in the deed of surrender, relating to the Company's one-twentieth of lands set out for settlement within the Fertile Belt, and that it had never assented to any change in the rights thus assured to it.

Under the law of England, as settled in *The Mines Case* (1), and under the well-established rule for the construction of statutes, that it is presumed that the Legislature does not intend to deprive the Crown of any prerogative, right or property, unless it expresses its intention to do so in explicit terms or makes the inference irresistible (Maxwell on Interpretation of Statutes, 6th Ed. pp. 244-5; 31 Vic., c. 1, s. 6 (23)), we are of the opinion that s. 36 of the *Dominion Lands Act* of 1872 (s. 37 of the Act of 1879) had not the effect contended for. A direction for the omission of a reservation of gold and silver from grants of Dominion lands is not tantamount to an affirmative enactment that the Crown's right to gold and silver shall pass by every such grant. The Crown's prerogative right is not mentioned in the section and it is not a necessary implication from its language that that right was meant to be affected by it. The direction for the omission from the grants of Dominion lands of any reservation of gold and silver may have been inofficious. It is quite probable that it did not occur to anybody at the time when s. 36 was inserted in that statute that the presence in it of the words "gold, silver" might give rise to such a contention as that now put forward. It would appear that when the possibility of such an implication being asserted was brought to the notice of Parliament it passed legislation declaratory of

its contrary intent in the unmistakeable terms to which reference has been made (s. 43 of c. 17 of 46 Vic.).

There is nothing in this course of legislation which, in our opinion, supports the view that the precious metals (gold and silver) in Dominion lands ever passed to grantees of such lands under Crown grants thereof—unless, indeed, where such grants may have contained express words apt and precise to convey them. We cannot assent to the suggestion that in accepting the provisions of the *Dominion Lands Act* of 1872 and of the Order in Council of the 6th of December, 1872, the Hudson's Bay Company was under the mistaken impression that it would thereby become entitled to the precious metals underlying the lands for which it might subsequently obtain grants or titles by notification under s. 21 of the statute.

For the foregoing reasons we are of the opinion that the series of questions referred to the Court by His Excellency the Governor General in Council should be answered as follows:

Question No. 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 of the Company, its officers or agents, whether in the Crown represented by the Dominion of Canada, or in the Company?

Answer: In the Crown.

Question No. 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?

Answer: (a) In the Crown;

(b) In the Crown.

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Question No. 3.

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In whom were vested the precious metals, gold and silver, in, under, or upon, the sections of lands 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?

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Answer: In the Crown.

Question No. 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 the fractional townships, or in the townships broken by lakes;
- (b) In lieu of lands allotted to the Company but found to be settled upon?

Answer: (a) In the Crown;

(b) In the Crown.

Question No. 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?

Answer: In the Crown.

Question No. 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?

Answer: In the Crown.

Question No. 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?

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Answer: The hypothesis of this question does not arise.

Questions referred answered accordingly.

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