HIS MAJESTY THE KING, ON THE INFORMATION OF THE ATTORNEY-GENERAL OF CANADA,

PLAINTIFF,

AND

ROBERT PATERSON RITHET AND THE ATTORNEY-GENERAL OF THE PROVINCE OF BRITISH COLUMBIA,

DEFENDANTS.

1918
Jan. 22.

Constitutional law—Companies—Bona vacantia—Rights of Province and Dominion—B. N. A. Act.

The right of *bona vacantia*, as regards the assets of a defunct English corporation, formerly carrying on business in British Columbia, is vested in the Dominion and does not pass to the province as "revenues" or "royalties" under secs. 102 and 109 of the *British North America Act*.

INFORMATION for the recovery of assets of a defunct corporation.

Case argued at Ottawa, March 28, 1917, before the Honourable Mr. Justice Cassels.

E. L. Newcombe, K.C., and *C. P. Plaxton*, for plaintiff.

J. A. Ritchie, for defendant.

CASSELS, J. (January 22, 1918) delivered judgment.

An information exhibited by His Majesty the King, on the information of the Attorney-General of

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Canada, against Robert Paterson Rithet and the Attorney-General of the Province of British Columbia. The facts are not in dispute.

It appears that a company called the Colonial Trust Corporation, Limited, was incorporated in England in the year 1871, empowered to carry on business in the Province of British Columbia. The company went into liquidation, and by an order of the English court, one Charles Fitch Kemp became the sole liquidator of the said corporation.

By an order of the English court, Charles Fitch Kemp, who was then the sole liquidator of the corporation, was authorized to appoint the defendant Rithet as his attorney, and a power of attorney dated December 24th, 1879, was executed in his favour by the Colonial Trust Corporation, Limited, and Charles Fitch Kemp, the sole liquidator, empowering Rithet to get in and take possession of all the property, assets and effects of the corporation in the Province of British Columbia.

It appears that the defendant Rithet acting in pursuance of his powers from time to time recovered and dealt with the assets of the corporation and accounted for the proceeds realized therefrom to the said Kemp as liquidator of the corporation.

The Colonial Trust Corporation was finally dissolved on October 7th, 1904.

The statutes relating to the dissolution of companies are: 43 Vict., Cap. 19 (1880), and 53-54 Vict., Cap. 62 (1890). These statutes are to be found in *Lindley's Law of Companies* (1).

The exhibits filed show compliance with the provisions of the statutes.

(1) 6th ed., Vol. 2, at pp. 1360 and 1370.

It appears that Kemp, the sole liquidator, died; and on January 4th, 1911, the company having been dissolved, and Kemp being dead, Rithet held in his hands the proceeds of assets realized by him, amounting to the sum of $7,215.04. The information alleges that these moneys are still in the hands of Rithet.

By his defence, Rithet brings into court the sum of $7,131.44, claiming to have paid a certain small amount for legal expenses and advice; and Rithet, by his defence, asked to be paid the costs incurred by him.

The claim of the plaintiff is thus stated in the information:

"4 The Attorney-General of Canada, on behalf "of His Majesty the King, claims that from the "time of the final dissolution of the said corpora- "tion, the said moneys in the hands of the defend- "ant Rithet became and were *bona vacantia,* and "under and by virtue of the provisions of the "*British North America Act,* vested in His Maj- "esty in the right of the Dominion of Canada, or "to which His Majesty in the right aforesaid was "and is entitled, and that the said moneys are "held by the defendant Rithet as money had and "received by him to the use of His Majesty in the "right of the Dominion aforesaid."

The defendant, the Attorney-General of the Province of British Columbia, sets out in his defence, as follows:

"2. As to the allegations set out in paragraph "4 of said information the defendant, while ad- "mitting that the moneys in the hands of the de- "fendant Robert Paterson Rithet became and

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"were *bona vacantia,* as therein alleged, denies "that the same vested in His Majesty in right of "the Dominion of Canada, or are moneys to which "His Majesty in such right was or is entitled, or "that said moneys are held by the defendant "Rithet as money had and received by him to the "use of His Majesty in said right, or are moneys "held by the said defendant in trust for His "Majesty in said right, as therein alleged."

"3. The defendant, the Attorney-General of the "Province of British Columbia, admits the alle- "gations set out in paragraph 5 of said informa- "tion and says, as the fact is, that upon the final "dissolution of the Colonial Trust Corporation, "Limited, the said moneys in the hands of the "defendant Rithet became *bona vacantia,* and as "such vested in the Crown in right of the "Province of British Columbia, and the defend- "ant asks that upon the trial of this action it may "be so adjudged and declared."

The case was argued before me, the facts being admitted. Formal proofs of the incorporation of the company, the appointment of a liquidator, the winding-up of the company, the dissolution of the company, and the formal compliance with the various statutes in force relating to the company were adduced.

The case was very ably argued by counsel on both sides. Subsequently to the hearing, able arguments in writing were handed in for my consideration covering every point that counsel could possibly raise in regard to the question.

At the hearing it was again conceded by counsel for both parties that the moneys in question should

be treated as *bona vacantia,* and I am relieved from any necessity of considering the question whether or not there is any doubt as to this proposition. I assume in dealing with the case that the moneys in question are *bona vacantia,* the only question arising being whether these moneys belong to the Crown as represented by the Dominion, or whether the moneys belong to the Crown, as represented by the Province of British Columbia.

The question practically resolves itself into the proper construction to be placed upon the *British North America Act,* and mainly turns upon the construction to be placed upon sections 102 and 109. I think there is no doubt but that British Columbia is under the provisions of this statute. In what is called the *Precious Metals* case (1) Lord Watson refers to the admission of British Columbia into and forming part of the Dominion of Canada.

In the brief furnished me by the counsel for the plaintiff there is an account of the constitutional history of the colony of British Columbia, which as it is of interest I insert in full.

"1821.—By an Imperial Act of this year the Hud-"son's Bay Company was given a monopoly of "trade in the territory east and west of the Rocky "Mountains not included in the charter granted in "1670 to Prince Rupert and his associates. Under "this Act civil and criminal matters came under the "jurisdiction of the courts of judicature of Upper "and Lower Canada (2).

(1) *Attorney-General of British Columbia v. Attorney-General of Canada,* 14 *App. Cas.* 295 at 299.
(2) Short & Doughty's Canada and its Provinces, Vol. 21, pp. 62. 68.

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"1838.—The license of the Hudson's Bay Com-"pany was extended this year for a further period "of 20 years (1).

"1849.—By an Imperial Act of this year Van-"couver Island was constituted a colony. Richard "Blanshard was appointed Governor with the usual "power to appoint a Council to aid him in his ad-"ministration. This Act repealed the previous Act "extending the jurisdiction of the courts of justice in "the provinces of Upper and Lower Canada in civil "and criminal matters, and also a subsequent Act "regulating the fur trade and establishing crim-"inal and civil jurisdiction within certain parts of "North America, so far as these Acts related to the "Island of Vancouver; and made it lawful for His "Majesty to provide in that colony for the adminis-"tration of justice, for the constitution of courts, "and appointment of judges. Governor Blanshard "found the affairs of the Island so inconsiderable "that he declined to give effect to his instructions "to establish a representative government. He "tendered his resignation in 1850, but before the "acceptance of the same reached him, he, in August, "1851, nominated a Legislative Assembly to assist "him in administering the affairs of the colony (2).

"1856.—By a proclamation issued this year by "Governor Douglas (who succeeded Governor Blan-"shard), in pursurance of his instructions, the Gov-"ernment of the Island was changed, provision be-"ing made for administering the affairs of the "Island by a Governor by and with the advice of an "elective Legislative Council.

(1) Short & Doughty's Canada and its Provinces, Vol. 21, pp. 79, 80.
(2) Short & Doughty's Canada and its Provinces, Vol. 21, p. 89.

"1858.—The license of the Hudson's Bay Com-
"pany over the mainland was revoked, and by Im-
"perial Act, 21 and 22 Vict., c. 99, it was organized
"as a Crown colony (1).

"Her Majesty by Order-in-Council appointed Sir
"James Douglas, who was Governor of the Colony
"of Vancouver Island, also Governor of the Colony
"of British Columbia. By his commission he was
"authorized to make laws, institutions and ordi-
"nances for the peace, order and good government
"of British Columbia by proclamation issued under
"the public seal of the colony. Her Majesty was
"authorized to empower, by Order-in-Council, the
"Governor to institute a Legislature consisting of
"a Governor and Council, or a Council and Assem-
"bly, to be composed of such and so many persons,
"to be appointed or elected in such manner and for
"such periods and subject to such regulations as to
"Her Majesty might seem expedient. Power was
"given to annex Vancouver Island on receiving an
"address from the two Houses of the Island Legis-
"lature. By a proclamation issued by the Governor
"on the 19th of November, 1858, the English civil
"and criminal law as it existed at that date was de-
"clared to be in force in the colony.

"1863.—By an Order-in-Council this year a
"change was made in the constitution of the colony
"of British Columbia, it being provided that the
"legislative authority of the colony should be vested
"in the Governor with the advice and consent of the
"Legislative Council (2).

(1) Short & Doughty's Canada and its Provinces, Vol. 21, pp. 126, 127.
(2) Short and Doughty's Canada and its Provinces, Vol. 21, p. 164 et seq.

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"1866.—By a proclamation of the Governor dated "17th November, 1866, an Imperial Act, 29 and 30 "Vict., c. 67, providing for the union of the Colony "of Vancouver Island and the Colony of British "Columbia, was declared to be in force, the two "colonies being united under the single title of Bri- "tish Columbia. On the union taking effect, the form "of government existing in Vancouver Island as a "separate colony ceased, and the power and author- "ity of the executive government and of the legis- "lature existing in British Columbia extended to "and over Vancouver Island.

"1867.—The effect of the proclamation declaring "the English civil and criminal law as it existed on "19th November, 1858, to be in force in British Co- "lumbia was modified by an ordinance of March "6th, 1867, which enacted that the English law as it "existed on November 19th, 1858, should apply, 'so "far as the same are not from local circumstances "inapplicable.' See R.S. B.C. 1871, No. 70.

"1870.—By Article 14 of the proposed terms of "union of the Colony of British Columbia with the "Dominion of Canada, dated July 7th, 1870, it was "declared that the constitution of the executive au- "thority of the Legislature of British Columbia "should, subject to the provisions of the *British "North America Act,* continue until altered; but "this article stated an intention of the Governor of "British Columbia to amend the existing constitu- "tion so that the majority of the members of the "Legislative Council should be elective. By an Or- "der-in-Council passed on August 9th, 1870, it was "provided that the Legislative Council should "thereafter consist of nine elective and six appoint-

"ed members. The election of these nine popular "members took place in November, 1870, and the "first meeting of this quasi-representative body was "held on January 5th, 1871.

"1871.—By an Act entitled the *Civil List Act*, "1871, enacted by the Governor of British Colum- "bia with the advice and consent of the Legislative "Council on March 27th, 1871, after reciting that "it is desirable that a permanent Civil List should "be established by law, provision was made for "an annual appropriation of $78,346.25 out of the "general *revenue* of the colony to Her Majesty, her "heirs and successors, for the purpose of defraying "the expenses of various public services enumerat- "ed in the schedule to the Act. It was provided, "however, that the Act should not come into opera- "tion until it had received Her Majesty's assent "and such assent had been proclaimed in the colony. "This Act was repealed by an Act of the Provincial "Legislative Assembly in 1872.

"1871.—By an Act passed on 14th February of "this year a Legislative Assembly of twenty-five "members, thirteen elected by the mainland and "twelve by the Island constituencies, was substi- "tuted for the Legislative Council. The operation "of the Act was suspended until Her Majesty should "assent thereto and fix a date for its coming into "force. By a proclamation of June 26th, 1871, Gov- "ernor Musgrave declared that the Act should come "into operation on July 19th, 1871, the day prior to "the entry of British Columbia into the Dominion.

"For the purpose of the *Colonial Laws Validity* "*Act*, 1865, 28 and 29 Vict., c. 63, which regulates "the powers of colonial representative legislatures,

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"the term 'representative legislature' signifies any "colonial legislature which shall comprise a legis- "lative body of which one-half are elected by the in- "habitants of the colony (sec. 1).

In the *Mercer* case (1) the late Sir William Rit- "chie, C.J., elaborately explained the laws as af- "fecting escheats in the Province of New Bruns- "wick.

By the statute reuniting the Provinces of Upper and Lower Canada, sec. 50 provided:

> "And be it enacted, that upon the union of the "Provinces of Upper and Lower Canada all du- "ties and *revenues* over which the respective leg- "islatures of the said provinces before and at the "time of the passing of this Act had and have "power of appropriation, shall form one consoli- "dated revenue fund, to be appropriated for the "public service of the Province of Canada."

The words of this statute are similar to the language used in sec. 102 of the *British North America Act,* the language being:

> "All . . . revenues over which the respective "legislatures of Canada, Nova Scotia and New "Brunswick, before and at the union had and "have the power of appropriation."

This statute, 3 and 4 Vict., cap 35 (Imp.) was amended by 10 and 11 Vict., cap 71 (Imp.). It is a statute to authorize Her Majesty to assent to a certain Bill of the Legislative Council and Assembly of the Province of Canada for granting a civil list to Her Majesty and to repeal certain parts of an

(1) (1881) 5 Can. S.C.R. 538.

Act for reuniting the provinces of Upper and Lower Canada.

It became necessary in this case that an Imperial statute should be enacted, as the statute passed by the Canadian Parliament differed from the previous statute as to the apportionment of the civil list. Sections 50 to 57, inclusive, had to be repealed before the Canadian Parliament could enact the statute in question. By this statute, which was sanctioned by the Imperial Parliament, it was provided in part:

"And be it enacted that during the time for "which the said several sums mentioned in the "said schedules are severally payable, the same "shall be accepted and taken by Her Majesty, by "way of Civil List, instead of all territorial and "*other revenues* now at the disposal of the Crown "arising in this province."

The Imperial statute, 15 & 16 Vict., cap. 39, referred to in the arguments in the various reasons for judgment in the *Mercer* case, is styled "An Act "to remove *Doubts as to the Lands and Casual Rev-"enues* of the Crown in the Colonies and Foreign "Possessions of Her Majesty," and recites certain previous Statutes, namely, 1st William the Fourth, cap. 25, and 1 Victoria—and it enacts as follows:

"1. The provisions of the said recited Acts in "relation to the Hereditary *Casual Revenues* of "the Crown shall not extend or be deemed to have "extended to the moneys arising *from the sale or "other disposition of the lands of the Crown* in "any of Her Majesty's Colonies or Foreign Pos-"sessions, nor in anywise invalidate or affect any "sale or other disposition already made or here-"after to be made of such lands, or any appro-

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"priation of the moneys arising from any such "sale or other disposition which might have been "lawfully made if such Acts or either of them "had not been passed."

This section applies to lands or moneys arising from lands. The section of the statute which is important in this case reads as follows:

"Nothing in the said recited Acts contained "shall extend or be deemed to have extended to "prevent any appropriation which, if the said "Acts had not been passed, might have been law- "fully made, by or with the assent of the Crown, "*of any Casual Revenues* arising within the Col- "onies or Foreign Possessions of the Crown (other "than Droits of the Crown and Droits of Admir- "alty) for or towards any public purposes within "the Colonies or Possessions in which the same "respectively may have arisen: *Provided always, "that the surplus not applied to such public pur- "poses of such Hereditary Casual Revenues shall "be carried to and form part of the said Consoli- "dated Fund."*

In the elaborate judgment of Mr. Justice Gwynne, in the *Mercer* case (1) there is a history of the earlier statutes, and of the effect of this statute, 15 & 16 Vict. It is needless for me to repeat what has been so fully gone into in the reasons of the learned Judge.

Counsel for the plaintiff and also counsel for the defendant claim that the Province of British Columbia prior to that colony entering into the union, had the power of appropriation over the moneys in question. In view of the provisions of sec. 2 of the *Imp. Act,* 15 and 16 Vict., c. 39, I am of the opinion that

(1) 5 Can. S.C.R. 538.

the view entertained by counsel is correct. I have set out *in extenso* this section. It would seem to me that this section sanctions the appropriation. The proviso as to the surplus would be useless if it were not so.

In dealing with the provisions of sec. 102, in the *Mercer* case (1) the Lord Chancellor (the Earl of Selborne) refers to sec. 102:

> "All duties and revenues, etc., before and at "the union, had and have the power of appropria- "tion," as follows:
>
> "The words of exception in sec. 102 refer to "revenues of two kinds:
>
> "(1) Such portions of the pre-existing 'duties "and revenues' as were by the Act 'reserved to "the respective legislatures of the provinces'; "and, (2) such duties and revenues as might be "raised by them, in accordance with the special "powers conferred on them by the Act."

And he goes on to state:

> "It is with the former only of these two kinds "of revenues that their Lordships are now con- "cerned; the latter being the produce of that "power of 'direct taxation within the provinces, "in order to the raising of a revenue for provin- "cial purposes,' which is conferred upon Pro- "vincial Legislatures by sec. 92 of the Act."

The *Mercer* case was one relating to escheats for lands. It has been fully considered in the judgment of the Supreme Court in the case of *Trusts and Guarantee Co. v. The King* (2) on appeal from the judgment rendered by me (3).

(1) 8 App. Cas. 767 at 775.
(2) 54 Can. S.C.R. 107, 32 D.L.R. 469.
(3) 15 Can. Ex. 403, 26 D.L.R. 129.

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In the *Mercer* case the court carefully guarded itself from dealing with anything more than lands or the proceeds of lands. But, it is important to bear in mind that the Lord Chancellor construed sec. 102—and at page 774 uses these words:

"If there had been nothing in the Act leading "to a contrary conclusion, their Lordships might "have found it difficult to hold that the word "revenues in this section did not include *terri-* "*torial as well as other revenues,* or that a title in "the Dominion to the revenues arising from pub- "lic lands did not carry with it a right of disposal "and appropriation over the lands themselves. "Unless, therefore, the casual revenue, arising "from lands escheated to the Crown after the "Union, *is excepted and reserved to the Provin-* "*cial Legislatures,* within the meaning of this sec- "tion, it would seem to follow that *it belongs to* "*the Consolidated Revenue Fund of the Dominion.* "If it is so excepted and reserved, it falls within "sec. 126 of the Act, which provides that 'such "portions of the duties and revenues, over which "the respective Legislatures of Canada, Nova "Scotia, and New Brunswick had before the "Union power of appropriation, as are by this "Act reserved to the respective governments or "legislatures of the provinces' * * *"

In *St. Catherine's Milling & Lumber Co. v. The Queen* (1), Lord Watson states, as follows:

"The only other clause in the Act by which a "share of what previously constituted provincial "revenues and assets is directly assigned to the "Dominion is sec. 102. It enacts that all 'duties "and revenues' over which the respective legis-

(1) 14 App. Cas. 46 at 56.

"latures of the United Provinces had and have "power of appropriation, 'except such portions "thereof as are by this Act reserved to the re- "spective legislatures of the provinces, or are "raised by them in accordance with the special "powers conferred upon them by this Act,' shall "form one consolidated fund, to be appropriated "for the public service of Canada. The extent to "which duties and revenues arising within the "limits of Ontario, and over which the legislature "of the old Province of Canada possessed the "power of appropriation before the passing of "the Act, have been transferred to the Dominion "by this clause, can only be ascertained by refer- "ence to the two exceptions which it makes in "favour of the new provincial legislatures."

At page 57 Lord Watson states, as follows:

"The enactments of sec. 109 are, in the opinion "of their Lordships, sufficient to give to each "province, subject to the administration and con- "trol of its own Legislature, the entire beneficial "interest of the Crown *in all lands within* its boun- "daries, which at the time of the Union were vest- "ed in the Crown, with the exception of such "lands as the Dominion acquired right to under "sec. 108, or might assume for the purposes speci- "fied in sec. 117. Its legal effect is to exclude from "the 'duties and revenues' appropriated to the "Dominion, all the ordinary *territorial revenues* "of the Crown arising within the provinces. That "construction of the statute was accepted by this "Board in deciding *Attorney-General of Ontario* "*v. Mercer* (1).

(1) 8 App. Cas. 767.

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It is obvious from a consideration of the *British North America Act* that certain revenues which, but for the statute, would have belonged to the provinces, were transferred to the Dominion. The Dominion by the statute granted to the provinces large sums of money for the purposes of their civil lists. Having regard to the provisions of sec. 102, which refers to certain revenues over which the provinces at the date of the Union had and have power of appropriation passing to the Dominion except such portions as are reserved to the provinces under sec. 109, it is apparent that all royalties of every kind were not intended to belong to the provinces under the wording of sec. 109. The royalties in that section must have a limited meaning.

I think the meaning of sec. 109 was to pass to the provinces royalties arising from lands, mines, minerals, and royalties limited to escheats, or something arising out of lands, as referred to in sec. 1 of the Statute 15 & 16 Vict. I do not think it ever was in contemplation that under that term royalties, all royalties of every kind, including *bona vacantia,* were left to the provinces under the provisions of this statute.

Mr. Ritchie, in his able argument, referred to the precious metals, which he says belonged to the Province of British Columbia. But on reference to the *Precious Metals* case (1) it is stated:

"The title to the public lands of British Columbia has all along been, and still is, vested in the "Crown; but the right to administer and to dispose of these lands to settlers, together with all "*royal* and *territorial* revenues arising therefrom,

(1) 14 App. Cas. 295 at 301.

"had been transferred to the province, before its "admission into the Federal Union."

After the best consideration I can give to the case I am of the opinion that the claim put forward by the Attorney-General of the Province of British Columbia, to have the moneys in question paid over for the use and for the benefit of the Crown as represented by the province, fails.

In regard to costs, it is conceded by counsel for all parties that the defendant Rithet acted in an honourable and upright manner, and that he should receive the costs of the action. There will be an order allowing Rithet his costs. It is stated that these costs are small, as Rithet did not appear at the trial of the action. I would suggest that counsel agree to an amount and avoid the necessity for a taxation. Failing agreement, the costs will have to be taxed before the Registrar in the ordinary way.

I think under the circumstances of the case there should be no costs for or against either the plaintiff or the other defendant, the Attorney-General of the Province of British Columbia.

Judgment for plaintiff.

Solicitor for plaintiff: *E. L. Newcombe.*

Solicitors for defendant Rithet: *Bodwell & Lawson.*

Solicitor for Attorney-General B. C.: *J. A. Ritchie.*