Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of The Burrard Power Company, Limited, and another v. *The King, from the Supreme Court of Canada; delivered the* 1*st November* 1910.

PRESENT AT THE HEARING:

LORD MACNAGHTEN.
LORD ATKINSON.
LORD SHAW.
LORD MERSEY.

[DELIVERED BY LORD MERSEY.]

This is an appeal, by special leave, from the judgment of the Supreme Court of Canada, affirming a judgment of the Exchequer Court of Canada rendered on the 10th May 1909.

The only question raised upon the appeal is whether certain water rights in the Railway Belt of British Columbia are vested in the Dominion Government so as to preclude the Provincial Legislature from dealing with them. The circumstances in which the dispute has arisen are shortly as follows. The Province of British Columbia was admitted into the Dominion of Canada in the year 1871 under the provisions of the British North America Act, 1867. The admission was subject to the provisions of that Act and also to certain Articles of Union duly sanctioned by the Parliament of Canada and by the Legislature of British Columbia. The 11th of these Articles

stipulated that the Dominion Government should secure the construction of railway communication between the railway system of Canada and the seaboard of British Columbia, and that the Government of British Columbia should convey to the Dominion Government "in trust to be appropriated in "such manner as the Dominion Government "may deem advisable in the furtherance of the "construction of the said railway," certain public lands along the line of railway throughout its entire length in British Columbia. In consideration of the land to be so conveyed in aid of the construction of the said railway the Dominion Government agreed to pay to British Columbia from the date of the union the sum of $100,000 per annum. The conveyance contemplated by this part of the 11th Article was effected by subsequent statutes of the Legislature of the Province and the land so conveyed is known as the "Railway Belt." The railway has now been built.

By the Water Clauses Consolidation Act, 1897, 61 Vict., Chap. 190 (Revised Statutes of British Columbia), Section 4, the right to the use of the unrecorded water in any river, lake, or stream was declared to be vested in the Crown in the right of the Province, and it was enacted that save in the exercise of any legal right existing at the time of such diversions or appropriation no person should divert or appropriate any water from any river, watercourse, lake, or stream, excepting under the provisions of the Act. By Section 5 it was provided that no right to the exclusive use of such water should be acquired by any person by length of use or otherwise than as might be acquired or conferred under the provisions of the Act or of some existing or future Act. By Section 2 "water" was declared to mean all rivers and

water power not being waters under the exclusive jurisdiction of the Parliament of Canada and "unrecorded water" was declared to mean all water not held under a record under the Act or under certain repealed Acts or under special grant by public or private Act and should include all water for the time being unappropriated or unoccupied or not used for a beneficial purpose.

On the 7th April 1906 the Water Commissioners for the district of New Westminster, British Columbia, purporting to act under the provisions of this Act, granted to the Appellants, the Burrard Power Company, Limited, at an annual rental of $566, a water record for 25,000 inches of waters out of the Lillooet Lakes and the Lillooet River to be used for generating electricity. These waters are within the Railway Belt.

On the 26th December 1906 the Attorney-General for the Dominion of Canada filed an information in the Exchequer Court of Canada against the Power Company, claiming a declaration that the record was invalid and conveyed no interest to the Defendant Company, and asking that the same should be cancelled. The information (which will be found set out on pages 717, 718, and 719 of the Record) alleged that the works of the Power Company if carried out would have the effect of diverting the water of the river thereby interfering with its navigation, and would otherwise materially diminish the value of the lands of the Dominion Government in the Railway Belt. In support of the claim reliance was placed on the agreement contained in the Terms of Union, and on the provisions of the Acts of the Provincial Legislature passed for the purpose of giving effect to that agreement. Reliance was also placed on the provisions of

Section 91 of the British North America Act, 1867, which declares that the exclusive legislative authority of the Parliament of Canada shall extend to all matters coming within certain classes of subjects, including the Public Debt and Property and Navigation. It was further submitted that, having regard to Sub-section 2 of Section 131 of the Water Clauses Consolidation Act, 1897, the grant of the record by the Commissioners was not authorised by the Water Clauses Act.

After the filing of the information the Attorney-General of British Columbia was added as a party to represent the interests of the Province.

On the 23rd December 1907 the determination of the issue of fact was referred for enquiry and report to Mr. Justice Archer Martin, who found the facts to be in accordance with the allegations of the Dominion Government, and reported accordingly. Thereupon the Attorney-General of Canada prayed judgment as asked by the information. On the 13th April 1909 the case came on for argument before Mr. Justice Cassels, and on the 10th May 1909 that learned Judge declared that the grant of the record of water in question was invalid and conveyed no interest to the Defendant Company. The judgment proceeded on three grounds: first, that the grant was an interference with property subject to the exclusive authority of the Dominion of Canada; secondly, that the diversion of water intended to be authorised thereunder would be a very serious interference with the navigability of the river; and thirdly, that the record was not authorised by the provisions of the Water Clauses Act under which it had been granted. The judgment as drawn up will be found at page 715 of the Record. From this judgment an appeal

was brought to the Supreme Court of Canada. The appeal was dismissed on the 15th February 1910.

Their Lordships are of opinion that the judgments of the Courts below are right. The grant by the Province of British Columbia of "public lands" to the Dominion Government undoubtedly passed the water rights incidental to those lands. In the argument addressed to their Lordships this was not really questioned. But it was said that though the proprietary rights of the Province in the land and in the waters belonging thereto were transferred to the Dominion Government, the legislative powers of the Province over the same, neither were nor could be parted with, and that therefore it was competent for the Provincial Legislature to enact the Water Clauses Act of 1897 under which the record was granted. In support of this contention a passage was cited from the judgment of Lord Watson in *the Attorney-General of British Columbia* v. *the Attorney-General of Canada* (1889), 14 Appeal Cases, p. 301. Their Lordships are of opinion that the contention is wrong, and that the passage in Lord Watson's judgment affords no kind of support for it. The object of Article 11 of the Terms of Union was on the one hand to secure the construction of the railway for the benefit of the Province and on the other hand to afford the Dominion a means of recouping itself in respect of the liabilities which it might incur in connection with the construction by sales to settlers of the land transferred. To hold that the Province after the making of such an agreement remained at liberty to legislate in the sense contended for would be to defeat the whole object of the agreement, for if the Province could by legislation take away the water from the land it could also by legislation resume possession of the land

itself; and thereby so derogate from its own grant as to wholly destroy it. Lord Watson's reference in the Precious Metals Case to the 11th Article so far from supporting the Appellant's contention is against it. He says, "the con- "veyance contemplated was a transfer to the "Dominion of the provincial right to manage "and settle the lands and to appropriate their "revenues." The grant of the water record in the case now under consideration is an attempt on the part of the Province to appropriate the revenues to itself, and would if carried into effect violate the terms of the contract as interpreted by Lord Watson. It is true that Lord Watson adds that the land is not by the transfer taken out of the Province, and that once it is "settled" by the Dominion it ceases to be public land, and "reverts to the same position as if it "had been settled by the Provincial Govern- "in the ordinary course of its administration." But this also is against the Appellants' contention, for it implies that until settled by the Dominion it remains public land under the Dominion's control.

Their Lordships are of opinion that the lands in question, so long as they remain unsettled are "public property" within the meaning of Section 91 of the British North America Act. 1867, and as such are under the exclusive legislative authority of the Parliament of Canada by virtue of the Act of Parliament. Before the transfer they were public lands, the proprietary rights in which were held by the Crown in right of the Province. After the transfer they were still public lands, but the proprietary rights were held by the Crown in right of the Dominion, and for a public purpose, namely, the construction of the railway. This being so no Act of the Provincial Legislature could affect the waters upon the lands. Nor, in their Lordships'

opinion, does the Water Clauses Act of 1897 purport or intend to affect them; for, by Clause 2, the Act expressly excludes from its operation waters under the exclusive jurisdiction of the Dominion Parliament.

Their Lordships will humbly advise His Majesty that the appeal should be dismissed with costs.

In the Privy Council.

THE BURRARD POWER COMPANY, LIMITED, AND ANOTHER

v.

THE KING.

LONDON:
PRINTED BY EYRE AND SPOTTISWOODE, LTD.,
PRINTERS TO THE KING'S MOST EXCELLENT MAJESTY.

1910.