Judgement of the Lords of the Judicial Committee of the Privy Council on the Appeal of the Attorney General of Ontario v. *Mercer, from the Supreme Court of Canada, delivered* 18*th July* 1883.

Present:

THE LORD CHANCELLOR.
SIR BARNES PEACOCK.
SIR MONTAGUE E. SMITH.
SIR ROBERT P. COLLIER.
SIR RICHARD COUCH.
SIR ARTHUR HOBHOUSE.

The question to be determined in this case is, whether lands in the Province of Ontario, escheated to the Crown for defect of heirs, "belong" (in the sense in which the verb is used in the "British North America Act, 1867") to the Province of Ontario or to the Dominion of Canada.

By the Imperial Statute 31 Geo. III., cap. 31, Sect. 43, it was provided that all lands which should be thereafter granted, within the Province of Upper Canada (now Ontario), should be granted in free and common soccage, in like manner as lands were then holden in free and common soccage in England. The argument before their Lordships, on both sides, proceeded upon the assumption that the lands now in question were so holden.

All land in England, in the hands of any subject, was holden of some lord by some kind

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of service, and was deemed in law to have been originally derived from the Crown, "and there-"fore the King was Sovereign Lord, or Lord "paramount, either mediate or immediate, of "all and every parcel of land within the realm" (Co. Litt., 65A). The King had "*dominium directum*," the subject "*dominium utile*" (*ibid.*, 1A). The word "tenure" signified this relation of tenant to lord. Free or common soccage was one of the ancient modes of tenure, ("A man "may hold of his lord by fealty only, and such "tenure is tenure in soccage," Litt., Sect. 118), which, by the Statute 12 Ch. II., cap. 24, was substituted throughout England for the former tenures by knight-service and by soccage *in capite* of the King, and relieved from various feudal burdens. Some, however, of the former incidents were expressly preserved by that statute, and others (escheat being one of them), though not expressly mentioned, were not taken away.

"Escheat is a word of art, and signifieth "properly when by accident the lands fall to "the lord of whom they are holden, in which "case we say the fee is escheated" (Co., Litt., 13A). Elsewhere (*ibid.*, 92B) it is called "a casual profit," as happening to the lord "by chance and unlooked for." The writ of escheat, when the tenant died without heirs, was in this form:—"The King to the Sheriff, &c. Com-"mand A, &c., that he render to B ten acres of "land, with the appurtenances, in N, which C "held of him, and which ought to revert to him "the said B as his escheat, for that the said C "died without heirs" (F. N. B., 144 F.). If there was a mesne lord, the escheat was to him; if not, to the King.

From the use of the word "revert," in the writ of escheat, is manifestly derived the language of some authorities which speak of escheat

as a species of "reversion." There cannot, in the usual and proper sense of the term, be a reversion expectant upon an estate in fee simple. What is meant is that, when there is no longer any tenant, the land returns, by reason of tenure, to the lord by whom, or by whose predecessors in title, the tenure was created. Other writers speak of the lord as taking it by way of succession or inheritance, as if from the tenant, which is certainly not accurate. The tenant's estate (subject to any charges upon it which he may have created) has come to an end, and the lord is in by his own right.

The profits, and the proceeds of sales, of lands escheated to the Crown, were in England part of the casual hereditary revenues of the Crown, and (subject to those powers of disposition which were reserved to the Sovereign by the Restraining and Civil List Acts) they were among the hereditary revenues placed at the disposal of Parliament by the Civil List Acts passed at the beginning of the present and the last preceding reign. Those Acts extended, expressly, to all such casual revenues, arising in any of the Colonies or foreign possessions of the Crown. But the right of the several Colonial Legislatures to appropriate and deal with them, within their respective territorial limits, was recognized by the Imperial Statute 15 & 16 Vict., cap. 39, and by an earlier Imperial Statute (10 & 11 Vict., cap. 71), confirming the Canada Civil List Act, passed in 1846 after the Union of Upper and Lower Canada, by which Act the provision made by the Colonial Legislature for the charges of the Royal Government in Canada was accepted and taken, instead of "all territorial and other re-"venues," then at the disposal of the Crown, arising in that Province; over which (as to three fifths permanently, and as to two fifths during the life of the Queen, and for five years after-

wards) the Legislature of the Province was to have full power of appropriation. It may be remarked, that the Civil List Acts of the Province of Canada contained no reservation of escheats, similar to Section 12 of each of the Imperial Civil List Acts above referred to. It must have been purposely omitted, in order that escheats might be dealt with by the Government or Legislature of Canada, and not by the Crown, in whose disposition they must have remained if they had not been in that of the United Province of Canada.

When, therefore, the "British North America Act" of 1867 passed, the revenue arising from all escheats to the Crown, within the then province of Canada, was subject to the disposal and appropriation of the Canadian Legislature.

That Act united into one "Dominion," under the name of "Canada," the former provinces of Canada (which it subdivided into the two new provinces of Ontario and Quebec, corresponding with what had been been before 1840 Upper and Lower Canada), Nova Scotia, and New Brunswick. It established a Dominion Government and Legislature, and Provincial Governments and Legislatures, making such a division and apportionment between them of powers, responsibilities, and rights as was thought expedient. In particular, it imposed upon the Dominion the charge of the general public debts of the several pre-existing Provinces, and vested in the Dominion (subject to exceptions, on which the present question mainly turns) the general public revenues, as then existing, of those Provinces. This was done by Section 102 of the Act, which is in these words :—"All "duties and revenues, over which the respective "Legislatures of Canada, Nova Scotia, and New "Brunswick, before and at the Union, had and "have power of appropriation, except such por-

" tions thereof as are by this Act reserved to the " respective 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 Revenue Fund, to be " appropriated for the public service of Canada, " in the manner, and subject to the charges, in " this Act provided."

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 territorial as well as other revenues; or that a title in the Dominion to the revenues arising from public 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 Provincial Legislatures, within the meaning of this section, 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 Section 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, " and all duties and revenues raised by them in " accordance with the special powers conferred " upon them by this Act, shall, in each Province, " form one Consolidated Revenue Fund, to be " appropriated for the public service of the " Province."

Their Lordships, for the reasons above stated, assume the burden of proving that escheats, subsequent to the Union, are within the sources of revenue excepted and reserved to the Pro-

vinces, to rest upon the Provinces. But, if all ordinary territorial revenues arising within the Provinces are so excepted and reserved, it is not *à priori* probable that this particular kind of casual territorial revenue (not being expressly provided for) would have been, unless by accident and oversight, transferred to the Dominion. The words of the statute must receive their proper construction, whatever that may be; but, if this is doubtful, the more consistent and probable construction ought, in their Lordships' opinion, to be preferred. And it is a circumstance not without weight in the same direction, that, while "duties and revenues" only are appropriated to the Dominion, the public property itself, by which territorial revenues are produced (as distinct from the revenues arising from it), is found to be appropriated to the Provinces.

The words of exception in Section 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 ac- "cordance with the special powers conferred on "them by the Act." It is with the former only of these two kinds of revenues that their Lordships are now concerned; the latter being the produce of that power of "direct taxation within "the Provinces, in order to the raising of a "revenue for Provincial purposes," which is conferred upon the Provincial Legislatures by Section 92 of the Act.

There is only one clause in the Act by which any sources of revenue appear to be distinctly reserved to the Provinces, viz., the 109th section:— "All lands, mines, minerals, and royalties "belonging to the several Provinces of Canada, "Nova Scotia, and New Brunswick, at the "Union, and all sums then due or payable for

" such lands, mines, minerals, or royalties, shall " belong to the several Provinces of Ontario, " Quebec, Nova Scotia, and New Brunswick, in " which the same are situate or arise, subject to " any trusts existing in respect thereof, and to " any interest other than that of the Province in " the same." The Provincial Legislatures are not, in terms, here mentioned; but the words, " shall belong to the several Provinces," are obviously equivalent to those used in Section 126, " are by this Act reserved to the respective Go- " vernments or Legislatures of the Provinces." That they do not apply to all lands held as private property at the time of the Union seems clear from the corresponding language of Section 125, "No lands or property *belonging to* " Canada, or any Province, shall be liable to " taxation:" where public property only must be intended. They evidently mean lands, &c., which were, at the time of the Union, in some sense, and to some extent, *publici juris;* and, in this respect, they receive illustration from another section, the 117th (which their Lordships do not regard as otherwise very material), "The several " Provinces shall retain all their respective *public* " property, not otherwise disposed of by this Act, " subject to the right of Canada to assume any " *lands or public property* required for forti- " fications, or for the defence of the country."

Their Lordships are not satisfied that Section 102, when it speaks of certain portions of the then existing duties and revenues as " reserved to the respective " Legislatures of the Provinces," ought to be understood as referring to the powers of provincial legislation conferred by Section 92. Even, however, if this were so held, the fact that exclusive powers of legislation were given to the Provinces as to "the management and sale of " the public lands *belonging to* the Province," would still leave it necessary to resort to Sec-

tion 109 in order to determine what those public lands were. The extent of the Provincial power of legislation over "property and civil rights in "the Province" cannot be ascertained without at the same time ascertaining the power and rights of the Dominion under Sections 91 and 102, and therefore cannot throw much light upon the extent of the exceptions and reservations now in question.

It was not disputed, in the argument for the Dominion at the bar, that all territorial revenues arising within each Province from "lands," (in which term must be comprehended all estates in land), which at the time of the Union belonged to the Crown, were reserved to the respective Provinces by Section 109; and it was admitted that no distinction could, in that respect, be made between Crown lands then ungranted and lands which had previously reverted to the Crown by escheat. But it was insisted, that a line was drawn at the date of the Union, and that the words were not sufficient to reserve any lands afterwards escheated, which at the time of the Union were in private hands, and did not then belong to the Crown.

If the word "lands" had stood alone, it might have been difficult to resist the force of this argument. It would have been difficult to say that the right of the lord paramount to future escheats was "land belonging to him," at a time when the fee simple was still in the freeholder. If capable of being described as an interest in land, it was certainly not a present proprietary right to the land itself. The word "lands," however, does not here stand alone. The real question is as to the effect of the words "lands, mines, minerals, and royalties," taken together. In the Court of Appeal of the Province of Quebec it has been held that these words are sufficient to pass subsequent escheats; and, for

this purpose, stress was laid by some, at least, of the learned Judges of that Court (the others not dissenting) on the particular word "royalties" in this context. If "lands and royalties" only had been mentioned, (without "mines" and "minerals"), it would have been clear that the right of escheats (whenever they might fall), incident at the time of the Union to the tenure of all soccage lands held from the Crown, was a "royalty" then belonging to the Crown within the Province, so as to be reserved to the Province by this section, and excepted from Section 102. After full consideration, their Lordships agree with the Quebec Court in thinking that the mention of "mines" and "minerals," in this context, is not enough to deprive the word "royalties" of what would, otherwise, have been its proper force. It is true (as was observed in some of the opinions of the majority of the Judges in the Supreme Court of Canada) that this word, royalties, in mining grants or leases (whether granted by the Crown or by a subject), has often a special sense, signifying that part of the *reddendum* which is variable, and depends upon the quantity of minerals gotten. It is also true that, in Crown grants of land in British North America, the practice has generally been to reserve to the Crown, not only royal mines, properly so called, but minerals generally; and that mining grants or leases had, before the Union, been made by the Crown both in Nova Scotia and in New Brunswick; and that, in two Acts of the Province of Nova Scotia (one as to coal mines, and the other as to mines and minerals generally), the word "royalties" had been used in its special sense, as applicable to the variable *reddenda* in mining grants or leases. Another Nova Scotia Act of 1849, surrendering to the Provincial Legislature the territorial and casual revenues of the Crown arising within the

Province, was also referred to by Mr. Justice Gwynne. But the terms of that Act were very similar to those now under consideration; and if "royalties," in the context which we have here to consider, do not necessarily and solely mean *reddenda* in mining grants or leases, neither may they in that statute.

It appears, however, to their Lordships to be a fallacy to assume that, because the word "royalties" in this context would not be inofficious or insensible, if it were regarded as having reference to mines and minerals, it ought, therefore, to be limited to those subjects. They see no reason why it should not have its primary and appropriate sense, as to (at all events) *all* the subjects with which it is here found associated,—lands, as well as mines and minerals. Even as to mines and minerals, it here necessarily signifies rights belonging to the Crown, *jure coronæ*. The general subject of the whole section is of a high political nature; it is the attribution of Royal territorial rights, for purposes of revenue and government, to the Provinces in which they are situate, or arise. It is a sound maxim of law, that every word ought, *primâ facie*, to be construed in its primary and natural sense, unless a secondary or more limited sense is required by the subject or the context. In its primary and natural sense, "royalties" is merely the English translation or equivalent of "*regalitates*," "*jura regalia*," "*jura regia*." (See, *in voce* "royalties, Cowel's "Interpreter;" Wharton's Law Lexicon; Tomlins' and Jacobs' Law Dictionaries.) "*Regalia*" and "*regalitates*," according to Ducange, are "*jura regia;*" and Spelman (Gloss. Arch.) says, "*Regalia dicuntur "jura omnia ad fiscum spectantia.*" The subject was discussed, with much fulness of learning, in Dyke *v.* Walford (5 Moore, P. C. 634), where a Crown grant of *jura regalia*,

belonging to the County Palatine of Lancaster, was held to pass the right to *bona vacantia*. "That it is a *jus*," (said Mr. Ellis, in his able argument, *ibid.*, p. 480), "is indisputable; "it must also be *regale;* for the Crown holds it "generally through England by Royal pre- "rogative, and it goes to the successor of the "Crown, not to the heir or personal repre- "sentative of the Sovereign. It stands on the "same footing as the right to escheats, to the "land between high and low water mark, to "felons' goods, to treasure trove, and other "analogous rights." With this statement of the law their Lordships agree, and they consider it to have been, in substance, affirmed by the judgement of Her Majesty in Council in that case.

Their Lordships are not now called upon to decide whether the word "royalties," in Section 109 of the "British North America Act of 1867, extends to other Royal rights besides those connected with "lands," "mines," and "minerals." The question is, whether it ought to be restrained to rights connected with mines and minerals only, to the exclusion of royalties, such as escheats, in respect of lands. Their Lordships find nothing in the subject, or the context, or in any other part of the Act, to justify such a restriction of its sense. The larger interpretation (which they regard as, in itself, the more proper and natural) also seems to be that most consistent with the nature and general objects of this particular enactment, which certainly includes all other ordinary territorial revenues of the Crown arising within the respective Provinces.

The conclusion at which their Lordships have arrived is, that the escheat in question belongs to the Province of Ontario, and they will humbly advise Her Majesty that the judgment appealed from ought to be reversed, and that of the Vice-Chancellor and Court of Appeal of Ontario

restored. It is some satisfaction to know, that in this result the Courts of Quebec and Ontario have agreed; and, though it differs from the opinion of four Judges, constituting the majority in the Supreme Court of Canada, two of the Judges of that Court, including the Chief Justice, dissented from that opinion.

This being a question of a public nature, the case does not appear to their Lordships to be one for costs.