Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of The Attorney-General for the Province of British Columbia v. *The Canadian Pacific Railway Company, from the Supreme Court of British Columbia; delivered the* 27*th February* 1906.

Present at the Hearing:

LORD MACNAGHTEN.
LORD DAVEY.
SIR FORD NORTH.
SIR ARTHUR WILSON.

[*Delivered by Sir Arthur Wilson.*]

This is an Appeal from a Judgment, dated the 15th April 1905, of the Full Court of the Supreme Court of British Columbia, which affirmed a previous Judgment of a single Judge of the same Court.

The suit out of which the Appeal arises is of the nature of an Information by the Attorney-General of British Columbia, on the relation of the City of Vancouver, against the Canadian Pacific Railway Company. The Statement of Claim alleged that the public was entitled to certain rights of way over the foreshore of the sea in the City of Vancouver, and that the Defendants had so constructed their railway and works upon the foreshore as to obstruct those public rights of way; and it asked for a declaration of the rights of the public and for consequential relief.

The Defendant Company denied the existence of the alleged public rights of way. They

justified what they had done by virtue of their statutory powers; and they raised another defence based upon a bye-law of the City of Vancouver. This last defence their Lordships think it unnecessary to notice further.

The facts necessary for the decision of the present case may be very briefly stated.

In 1871 British Columbia entered the Canadian Confederation, the construction of an inter-colonial railway being one of the terms of the union. The present Railway Company was incorporated in 1881 by the Canadian Pacific Railway Act of the Dominion Parliament (44 Vict. c. 1) for the purpose of constructing and working the inter-colonial railway whose name is embodied in the title to the Act. The railway was first constructed as far as Port Moody, but was afterwards extended some miles further west to the City of Vancouver. The arrangement for this extension appears to have been entered into in 1885.

The City of Vancouver lies along the southern bank of an inlet of the sea known as Burrard's Inlet. It was incorporated as a city in 1886; but some years before that date, apparently in 1870, a portion of what is now the city was laid out (on paper at all events) as the old Granville Townsite. The plans of that townsite, or intended site, showed blocks of land above, on, and below the foreshore. They showed three streets, Carrall Street, Abbott Street, and Cambie Street, parallel to one another running from south to north, that is to say from the landward to the coast line. The alleged public rights of way the interruption of which is now complained of, were in continuation of those streets, across the foreshore down to low-water mark.

The learned Judge who tried the case found that the rights of way contended for did exist both at the time when British Columbia joined

the Confederation and at the time when the Railway Company by the construction of its works interrupted the free access to the sea. The learned Judges of the Full Court did not dissent from this finding, rightly addressing their minds to the more important general questions arising in the case. Their Lordships propose to follow a similar course. Grave difficulties were pointed out in the course of the argument in the way of upholding the validity of the rights of way. But as the Appeal can be disposed of upon broader grounds their Lordships do not think it necessary to enter upon this minor inquiry ; and they assume for the purpose of this Judgment that the public rights of way existed as found.

That those rights of way have been interrupted is not open to question, for the railway and its adjuncts have been carried along the coast both above and below low-water mark. Prior to the time when British Columbia entered the Confederation in 1871, the foreshore in question was Crown property of the Colony, now the Province, of British Columbia.

The Railway Company justifies what it has done under Section 18 (*a*) of the Act of the Dominion Parliament which incorporated it (44 Vict. c. 1.), which says :—

"The Company shall have the right to take, use, and hold "the beach and land below high-water mark in any stream, "lake, navigable water, gulf or sea in so far as the same shall "be vested in the Crown and shall not be required by the "Crown, to such extent as shall be required by the Company "for its railway and other works, and as shall be exhibited by "a map or plan thereof deposited in the office of the Minister "of Railways."

The map or plan required by the last words of the section was duly deposited.

The right of the Dominion Parliament so to legislate with respect to Provincial Crown lands situated as these are, was based in argument upon two distinct grounds.

The first ground was this:—Section 108 with the third Schedule of the British North America Act, 1867 (Imperial Act 30 & 31 Vict., c. 3) includes public harbours amongst the property in each Province which is to be the property of Canada. This certainly empowers the Dominion Parliament to legislate for any land which forms part of a public harbour.

In a case heard by this Board, *Attorney-General for the Dominion of Canada* v. *Attorneys-General for Ontario, Quebec, and Nova Scotia* (A. C. 1898, 700, at p. 712), it was laid down that—

"It does not follow that, because the foreshore on the "margin of a harbour is Crown property, it necessarily forms "part of the harbour. It may or may not do so, according "to circumstances. If, for example, it had actually been used "for harbour purposes, such as anchoring ships or landing "goods, it would, no doubt, form part of the harbour; but "there are other cases in which, in their Lordships' opinion, it "is equally clear that it did not form part of it."

In accordance with that ruling the question whether the foreshore at the place in question formed part of the harbour was in the present case tried as a question of fact, and evidence was given bearing upon it directed to show that before 1871, when British Columbia joined the Dominion, the foreshore at the point to which the action relates was used for harbour purposes, such as the landing of goods and the like. That evidence was somewhat scanty, but it was perhaps as good as could reasonably be expected with respect to a time so far back, and a time when the harbour was in so early a stage of its commercial development. The evidence satisfied the learned Trial Judge, and the Full Court agreed with him. Their Lordships see no reason to dissent from the conclusion thus arrived at. And on this ground, if there were no other, the power of the Dominion Parliament to legislate for this foreshore would be clearly established.

The second contention in support of the right of the Dominion Parliament to legislate for the foreshore in question is rested upon Section 91, read with Section 92 of the British North America Act, which secures to the Dominion Parliament exclusive legislative authority in respect of lines of steam or other ships, railways, canals, telegraphs, and other works and undertakings connecting any Province with any other or others of the Provinces, or extending beyond the limits of the Province, a description which clearly applies to the Canadian Pacific Railway.

It was argued for the Appellant that these enactments ought not to be so construed as to enable the Dominion Parliament to dispose of Provincial Crown lands for the purposes mentioned. But their Lordships cannot concur in that argument. In *The Canadian Pacific Railway Company* v. *Corporation of the Parish of Notre Dame de Bonsecours* (1899 A.C., p. 367) (a case relating to the same Company as the present) the right to legislate for the railway in all the Provinces through which it passes was fully recognized. In *The Corporation of the City of Toronto* v. *Bell Telephone Company of Canada* (1905 A. C., p. 52), which related to a telephone company whose operations were not limited to one province, and which depended on the same sections, this Board gave full effect to legislation of the Dominion Parliament over the streets of Toronto which are vested in the City Corporation. To construe the sections now in such a manner as to exclude the power of Parliament over Provincial Crown lands would, in their Lordships' opinion, be inconsistent with the terms of the sections which they have to construe, with the whole scope and purpose of the legislation and with the principle acted upon in the previous decisions of this Board. Their

Lordships think, therefore, that the Dominion Parliament had full power, if it thought fit, to authorize the use of Provincial Crown lands by the Company for the purposes of this railway.

It was contended however for the Appellant that, assuming the competence of the Dominion Parliament to legislate with respect to Provincial Crown Lands, such as those now in question, it has not in fact done so, for it was said that Section 18 (*a*) of the Canadian Pacific Railway Act, when it authorized the Company to take the foreshore of the sea "in so far as the same shall "be vested in the Crown" should be construed as limited to Dominion Crown Property. The argument was rested mainly upon the words in the same section "in so far as the same shall "not be required by the Crown," and upon the words at the end of the section requiring the deposit of a map or plan in the office of the Minister of Railways.

It was argued that no protection is here provided for Provincial interests and that therefore the section should not be held to apply to Provincial lands. But with regard to the exception of lands required by the Crown, their Lordships think that they apply to Provincial requirements no less than to those of the Dominion. The final words of the section are mere matters of procedure; and in prescribing the procedure the Legislature must be taken to have assumed that all necessary communications between the Dominion Governments and the Provincial Governments would always take place. This argument therefore fails, in their Lordships' opinion.

It was next contended that Section 18 (*a*) of the Canadian Pacific Railway Act, assuming it to apply to such Provincial Crown Lands as those in question, did not authorize the closing of public highways.

It was pointed out that that Act incorporated the Consolidated Railway Act, 1879, in so far as its provisions were not inconsistent with, or contrary to the provisions of, the incorporating Act, and that Section 15 of the Consolidated Railway Act contains a variety of provisions relating to the interference with highways by railway companies which, if applicable, would be inconsistent, it is said, with what the Respondent Company has done. It is unnecessary to inquire whether the provisions referred to would or would not apply to such rights of way as those now in question. It is enough to say that the language of the Canadian Pacific Railway Act must prevail over that of the Consolidated Railway Act which applies only so far as it is not inconsistent with the special Act. And it is clear, in their Lordships' opinion, that the power given to the Company to appropriate the foreshore for the purposes of their railway of necessity includes the right to obstruct any rights of passage previously existing across that foreshore.

Their Lordships will humbly advise His Majesty that this Appeal should be dismissed. The Appellant will pay the costs.