

*Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of The City of Vancouver v The Vancouver Lumber Company and another, from the Court of Appeal of British Columbia; delivered the 25th July 1911.*

PRESENT AT THE HEARING :

LORD MACNAGHTEN.

LORD SHAW.

LORD MERSEY.

LORD DE VILLIERS.

LORD ROBSON.

[DELIVERED BY LORD MERSEY.]

This is an Appeal from a Judgment of the Court of Appeal of British Columbia, dated the 1st November 1910, reversing the Judgment of the Hon. Mr. Justice Morrison, dated the 31st January 1910.

The writ, which was issued on the 7th June 1909, claimed possession of an island known as Deadman's Island, situate in Coal Harbour in Burrow Inlet, City of Vancouver. At the date of the writ the island was in the possession of the Defendant City, and the question at issue between the parties was whether the Plaintiffs (the Lumber Company and Ludgate) had a title to the property as against the City.

The facts are shortly as follows : —Deadman's Island, which is about five acres in extent, has either been a Military Reserve of itself or has formed part of a larger Military Reserve comprising the island and an adjoining peninsula since the year 1858, and it now belongs to the Crown in

right of the Dominion of Canada. It lies off a peninsula of the mainland, from which it is separated by a narrow channel which is dry at low tide. It is always shown and described on maps and charts as an island. In 1886 the Corporation of the City of Vancouver was formed, and the boundaries of the city were prescribed. The reserve fell within the boundaries.

In the summer of the same year the mayor and aldermen of the City presented a petition to the then Governor-General of Canada in Council, which, after reciting that land known as "The Dominion Government Military Reserve" was within the City limits, asked that they might have control thereof in order to use it as a park. This petition was referred to the Minister of Militia and Defence for consideration and report, and on the 10th May 1887, that Minister reported that he saw no objection to the proposal, provided the Corporation kept the park in proper order, and the Dominion Government retained the right to resume possession when required at any time. The report went on to state that in the opinion of the Minister the property would be required for military purposes, but that "until this" he recommended that the Corporation should have the use of the same as a park "subject to the provisions mentioned." This report came before a Committee of the Privy Council on the 8th June 1887, and the Committee advised "that the Minister of Militia and Defence be authorised to take the necessary steps for carrying the same into effect." The Order in Council is in the following terms :

" Order in Council.

" Copy of the report of a Committee of the Honourable the Privy Council, approved by

" His Excellency the Governor-General in Council, on the 8th June 1887.

" On a report dated 10th May 1887, from the Minister of Militia and Defence stating that he has had under

“ consideration a petition of the Mayor and Aldermen of the  
 “ City of Vancouver, B.C., praying that the Dominion  
 “ Government Military Reserve near the First Narrows  
 “ bounded on the west by the English Bay and on the east  
 “ by Burrard Inlet may be handed over to the said  
 “ Corporation for use as a park.

“ The Minister reports that he sees no objection to this  
 “ proposal, provided the Corporation keep the park in proper  
 “ order, and the Dominion Government retain the right to  
 “ resume the property when required at any time.

“ The Minister further states that he does not deem it  
 “ advisable to recommend that this property be transferred  
 “ to Class 2 as not available for military use, as he is of  
 “ opinion that it will be required for military purposes, but  
 “ until this he recommends that the Corporation have the  
 “ use of the same as a park, subject to the provisions  
 “ mentioned.

“ The Committee advise that the Minister of Militia  
 “ and Defence be authorized to take the necessary steps for  
 “ carrying the same into effect.

“ (Signed) JOHN J. MCGEE,  
 “ Clerk, Privy Council.”

A copy of this Order was sent to the Mayor of Vancouver, and on the 9th March 1888 the City Clerk wrote to the Minister of Militia and Defence asking what would be the character of the title to the lands given to the City, and suggesting that a lease for a long period subject to the conditions of the Order in Council should be the mode of conveyance. The receipt of this letter was acknowledged in due course in a letter which contained a promise that the matter should be “ looked into.” The City then proceeded to lay out the land for a park, and spent a large sum of money in so doing. On the 9th January 1889, the Minister of Militia and Defence was made aware of the action of the Corporation, for on that date the City Clerk wrote to him stating that the City had already expended \$30,000 in forming roads through the Reserve, and asking that the Government should make a grant on account of the sum so expended. An answer was sent on the 26th January 1889. This letter

served also as an answer to the City Clerk's letter of the 9th March 1888 written on the question of title. The letter expresses the Minister's regret that there are no funds available for the making of any grant, and it contains also this passage, "with reference to the City Clerk's enquiry what title will be given to the City of of the land which the Corporation is permitted to occupy as park, I am to state that no other document can be furnished than the copy of the Order in Council of the 8th June 1887, officially furnished to you by this department." Nothing further appears to have been done in the matter of the City's title to the land for many years.

In 1888 the park was opened to the public by the then Governor-General, Lord Stanley, and was called Stanley Park after him. Up to this time Deadman's Island had remained separated from the mainland as before described, but in 1890 (two years later) the City threw a bridge across the channel thereby permanently connecting the island with the mainland. They also made a trail over the island. It does not appear that the Government was apprised of the erection of this bridge or of the work done upon the island, and that the Government regarded the two properties, namely the park and the island, as separate and distinct seems clear from two documents forming together Exhibit 32, and dated in 1896. These two documents are official memoranda drawn up in connection with an application which had apparently been made by some strangers for a lease of Deadman's Island. The first document describes the island by name and refers to it not as forming part of, but as being "contiguous" to, Stanley Park. The second document, which also refers to the island by name, declares it to be a property which the writer cannot recommend should be leased either

to a corporation or to an individual. In this same year (1896) the City appointed one Eldon as park caretaker, and he employed a man named Hammersley to work in the park. Both these men used the bridge for the purpose of crossing to the island, and Hammersley availed himself of the opportunities so afforded him to build a cottage on the island, which he now occupies, and the title to which he claims, as against all the world. Hammersley does not appear to have been the only squatter; others came both to the park and to the island, and the City could not get rid of them. It was then resolved, in August 1898, to petition the Governor-General to accord such a title as would enable the City to deal effectively with the evil which had arisen. This petition (a copy of which forms Exhibit 28) after reciting that by the Order in Council of the 8th June 1887 the Reserve had been handed over to the City of Vancouver for use as a park, "subject to the right of the Dominion Government to resume the property when required at any time," and that no power was vested in the corporation of the City further than the right to use the said Reserve as a park, and after reciting the existence of the nuisance caused by the squatters, and the absence of any power in the corporation to prevent the continuation thereof, prays for an Order in Council vesting the Reserve in the corporation and conferring power to evict trespassers. This petition was duly forwarded by the Governor-General to the Minister of Militia and Defence, the Honourable Dr. Borden, with a request that it should be favourably considered. Nothing, however, was done upon it, although Dr. Borden, in a letter of the 3rd September 1898 to Mr. G. R. Maxwell, M.P. (Exhibit 52 at page 99 of the Record), expressed an opinion that the Government might

give a lease under which the City would have all the power they desired. Up to this time there had been no reference to the island, by name or otherwise, in the communications passing between the City and the Government.

While matters were in this position the negotiations began which led up to the title upon which the Plaintiffs rely. On the 20th January 1899, the Plaintiff Ludgate, by his agent, a Mr. Martin, wrote to the Minister of Militia and Defence a letter, proposing to buy Deadman's Island, for the purpose of erecting thereon a large lumber mill. The result was not a sale but the grant of a lease by the Crown to the Vancouver Lumber Company (Ludgate's name in this connection) of Deadman's Island for a term of 25 years from the 1st March 1899, at a yearly rent of \$500. This lease is dated the 14th February 1899. The granting of the lease was duly approved by an Order in Council of the 16th February 1899. The lease was executed on behalf of the Crown by Dr. Borden, the Minister of Militia and Defence. Upon this lease being brought to the attention of the City authorities, they put forward a request to the Government on the 9th March 1899, that it should be revoked, on the ground that Deadman's Island was comprised in the Reserve mentioned in the Order of the 8th June 1887. In answer to this request, the Deputy Minister of Militia and Defence wrote to the City Clerk on the 15th April 1899: "Deadman's Island " has never been considered by this Department " as in any way forming a portion of the Military " Reserve granted to your Corporation by Order " in Council in 1887." Ludgate then entered upon the island and began work. Thereupon a writ was issued against him claiming an injunction, and also a declaration that the Plaintiff

was the owner in fee simple of the island. This writ was not issued by the City but by the Attorney-General of the Province of British Columbia in which the city is situate; and the claim was put forward on the ground that Deadman's Island was owned by the Crown in right of the Province, and not in right of the Dominion, and that therefore Ludgate, who claimed through the Dominion, had no title. An interim injunction was granted. The effect of this proceeding was to bring the Attorney-General of Canada to the Court, and he was added as a Defendant. This litigation lasted for about seven years. Ludgate took no active part in it, and in its final stages his name does not appear. In the year 1906, the case reached this Board and it was then decided that Deadman's Island belonged to the Crown in right of the Dominion. The case will be found reported in 1906, A. C., at page 552. In the meanwhile, nothing had happened to the property except that in 1902 the bridge had been blown away by a gale of wind. But after the Judgment negotiations were re-opened between the City of Vancouver and the Dominion Government with the result that on the 31st August 1906, the original Order in Council of the 8th June 1887 was cancelled with a view to the granting of a lease of the property. The Order by which this was done is in the following terms:—

“ Extract from a report of the Committee of the Privy  
 “ Council approved by the Governor-General on the 31st  
 “ day of August 1906.

“ The Minister of Militia and Defence recommends that  
 “ the Minute of Council of the 8th June 1887, empowering  
 “ the Minister of Militia and Defence of that date to take  
 “ the necessary steps to hand over to the City of Vancouver  
 “ for park purposes the military property now known as  
 “ ‘ Stanley Park ’ be cancelled.

“ The Minister further recommends that the said  
 “ property be leased for park purposes for a period of

“ 99 years renewable to six Commissioners, three of whom  
 “ shall be appointed by the Governor in Council, and three  
 “ shall be members of the City Council, of whom the Mayor  
 “ shall be one, and the remaining two selected by the said  
 “ Council.

“ The Minister further recommends that the conditions  
 “ of said lease be made generally on the lines of those under  
 “ which the Point Pleasant Park, Halifax, Nova Scotia, has  
 “ been leased by the Imperial Government to the City of  
 “ Halifax.

“ The Minister further recommends that the three  
 “ Commissioners to represent the Dominion Government  
 “ be: Charles Dorning, Brewer; Robert Kolly, Merchant;  
 “ and Fred C. Wade, Barrister.

“ The Committee submit the same for approval.

“ (Sd.) JOHN J. MCGEE,

“ Clerk of the Privy Council.

“ The Honourable

“ The Minister of Militia and Defence.”

Delay arose in settling the form of the lease, but it was finally executed on the 1st November 1908. Some dispute has since arisen as to whether the boundaries set out in the lease are not sufficiently wide to include Deadman's Island, but having regard to the fact that in a letter of the 11th August 1906, the City Clerk had asked that the island should be specifically included in the lease and to the fact that the lease is silent as to the island and describes the property merely as “ that peninsula known as Stanley Park,” their Lordships are of opinion that the lease cannot be read as including the island. This was the view taken by two of the three Judges in the Court below, and it was not dissented from by the third Judge. The lease was for 99 years at a nominal rent of one dollar per annum, and it is to be noted that it is expressed to be made “ subject until their determination to any existing leases of portions of “ the said land.” The City then either re-entered the island, or if still in possession they remained there. On the 7th June 1909 Ludgate made a



formal demand for possession ; it was refused ; and thereupon the writ in the present action was served.

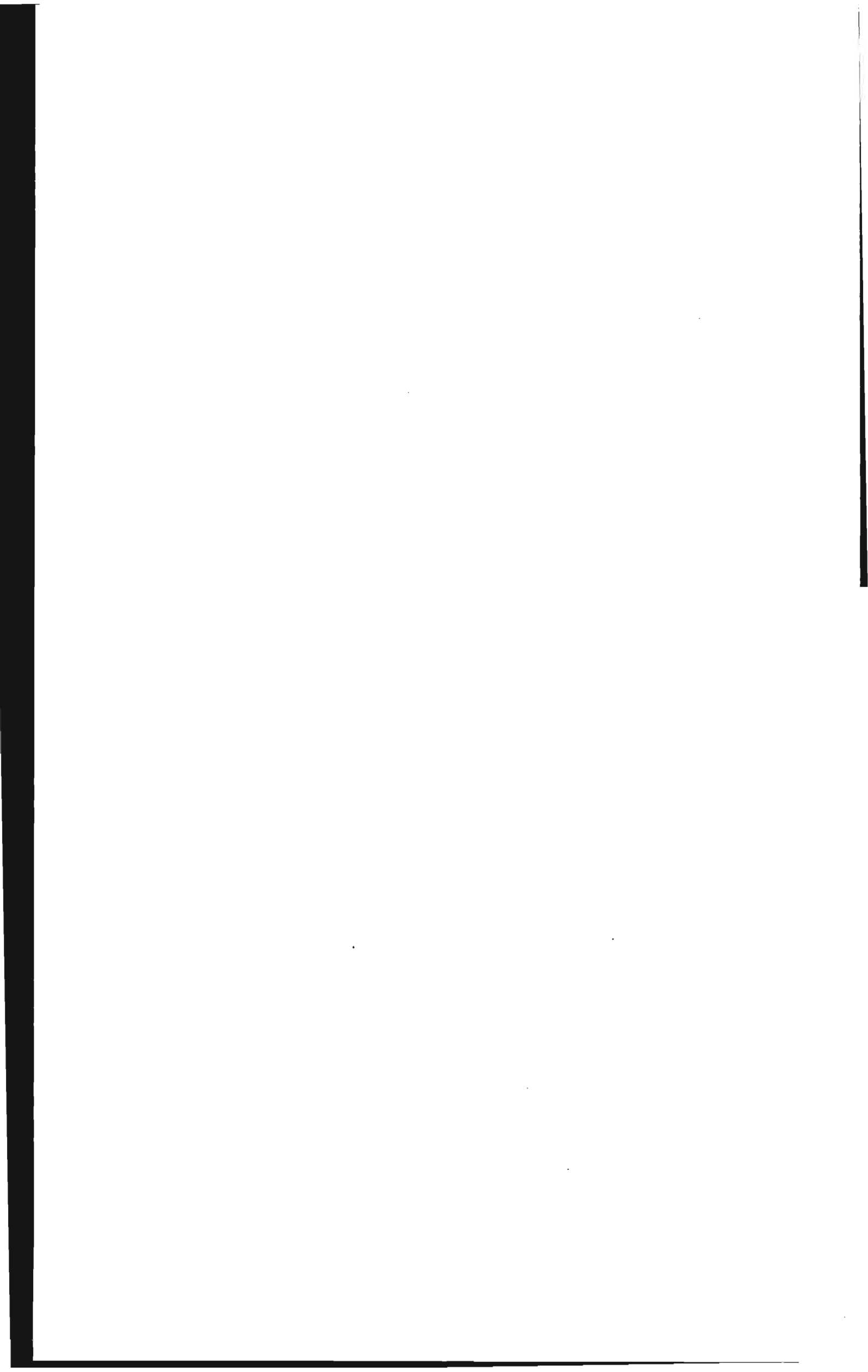
These being the facts the Defendants take up the position that they are in possession and (as they properly may do) they rely on their possessory title. The question therefore turns entirely upon the strength of the Plaintiffs' title. Is it better than the possessory title of the Defendants ? The Plaintiffs' title is to be found in the lease of the 14th February 1899 by which Deadman's Island was by name demised to them. If that lease is a good and valid demise it must prevail over the Defendants' rights, which rest in mere possession. It was argued for the Appellants that it was not a good demise, firstly because it was not granted under the Great Seal ; and, secondly, because it was obtained by "deceit" practised upon the Crown within the meaning of *Alcock v. Cooke* reported in 5 Bingham at p. 340. As to the first of these points it was intimated by their Lordships in the course of the argument that it was not open to the Appellants to rely upon it inasmuch as they had never put it forward in the Courts below, although it was open to them to have done so. As to the second point it is perhaps desirable to state the rule of law on which the Court of Common Pleas proceeded in delivering judgment in *Alcock v. Cooke*. The rule is a rule of common law by which a grant by the King which is wholly or in part inconsistent with a previous grant, is held absolutely void unless the previous grant is recited in it. But the rule is qualified to this extent, that if the subject had no actual or constructive notice of the previous grant, the second grant will be good to the extent to which it may be consistent with the first grant though void as to

the rest. The rule arises out of a duty which the law casts upon the subject of making known any previous inconsistent grant of which he may himself have notice. If he neglect this duty he is held to have deceived the King when accepting the grant made to him, with the result that he takes nothing by his grant. It was sought in the argument to apply this rule to the facts of the present case. It was said that Ludgate knew, or had notice, of the grant to the Appellants contained in the Order of Council of the 8th June 1887, and the trial Judge seems to have taken this view (p. 163 of the Record). Their Lordships, however, are of opinion that there is no evidence to support this contention, and they think that the Chief Justice was right in finding as he did that the Court ought not to presume, and could not properly presume, that the Plaintiff had either knowledge or notice of the City's alleged rights at the time he obtained his lease, or that he in any way "deceived" the Crown. This being so, the case of *Alcock v. Cooke* has no application, and both points are disposed of.

Their Lordships would further add that in their opinion no rights over the island passed to the City under the Order of the 8th June 1887, and that even if any such rights did pass, they were destroyed when the Order was cancelled in 1906, from which date the rights of the parties must be ascertained with reference to their respective leases.

In these circumstances the Appeal fails, and their Lordships will humbly advise His Majesty accordingly. The Appellants must pay the costs of the Appeal.

---



In the Privy Council.

---

THE CITY OF VANCOUVER

v.

THE VANCOUVER LUMBER COMPANY  
AND ANOTHER.

---

DELIVERED BY LORD MERSEY.

LONDON :

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

1911.