Privy Council Appeal No. 29 of 1919.

The Esquimalt and Nanaimo Railway Company - - - *Appellants*

v.

H. W. Treat - - - - - - - *Respondent*

FROM

THE COURT OF APPEAL OF BRITISH COLUMBIA.

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL DELIVERED THE 1ST AUGUST, 1919.

Present at the Hearing:

VISCOUNT HALDANE.
LORD BUCKMASTER.
LORD ATKINSON.

[*Delivered by* VISCOUNT HALDANE.]

The question in this case is what is meant by the expression "coast line" in a statutory conveyance. The Courts below have unanimously held that in its context in the instrument the expression was used to indicate a boundary at high water mark, which excluded the foreshore and the foreshore rights. Their Lordships are of opinion that the decision appealed from was right, and should be affirmed.

The action out of which the appeal arises was brought in the Supreme Court of British Columbia to establish the title of the appellants to the coal and other minerals and substances under the foreshore and sea opposite certain lands which had been conveyed to them. The respondent Treat was a licensee from the Provincial Government who was authorised to prospect for coal under the foreshore and had entered on it for that purpose. The lands in question are situated in Vancouver Island. They form a belt or strip. The portion of it to which the controversy relates are described, in a statute of British Columbia, which is the root of the appellants' title, as bounded on the east by the coast line of Vancouver Island to the point of commencement, and including all coal, coal oil, ores, stones, clay, marble, slate, mines, minerals and substances whatsoever thereupon, therein and thereunder.

When British Columbia entered Confederation in 1871 under the provision enacted by section 146 of the British North America Act of 1867, it was one of the terms of the Imperial Order in Council then made that the Government of the Dominion should secure the construction of a railway from the Pacific towards the Rocky Mountains, and from the east of the Rocky Mountains towards the Pacific, to connect the seaboard of the new Province with the railway system of Canada. To facilitate this the Province agreed to convey to the Dominion Government, in trust to be appropriated in such manner as that Government should consider advisable in furtherance of the construction of the railway, a certain extent of public lands along the proposed line, not to exceed twenty miles on each side. There was subsequent negotiation between the two Governments which resulted in an agreement modifying in a fashion which is not material for the purposes of the present question the description of the lands to be conveyed. In the result the Government of the Province undertook to procure the incorporation, by Act of their Legislature, of certain persons, to be designated by the Dominion Government, for the construction of the portion of the railway in Vancouver Island from Esquimault to Nanaimo, and the Government of the Dominion undertook to secure the construction of this railway.

By Act of the Provincial Legislature, passed on the 19th December, 1883, there was granted to the Dominion Government for the purpose of constructing this railway, land in Vancouver Island described as follows :—Bounded on the south by a straight line drawn from the head of Saanich Inlet to Muir Creek on the Straits of Fuca ; on the west by a straight line drawn from Muir Creek aforesaid to Crown Mountain ; on the north by a straight line drawn from Crown Mountain to Seymour Narrows : and on the east by the coast line of Vancouver Island to the point of commencement ; and including all coal, coal oil, ores, stones, clay, marble, slate, mines, minerals and substances whatsoever thereupon, therein, and thereunder.

By a Dominion Statute (47 Vict., cap. 6) passed subsequently to the British Columbia Act referred to statutory authority was *inter alia* given to an agreement between the Dominion and Provincial Governments, and also to an agreement relative to the construction of the railway, and for a grant of the whole, with certain exceptions which are not material, of the land conveyed to the Dominion by the Government of British Columbia for the construction of the line. The latter agreement, which was scheduled to the statute, was made between Robert Dunsmuir and others, called the contractors, and associated for such construction, and the Minister of Railways and Canals of the Dominion. It provided among other things for the grant by the Dominion to the contractors of the land referred to, in so far as such lands should be vested in the Crown in right of the Dominion, and held for the purposes of the railway, and for the minerals and substances in or under such lands, and the foreshore rights in respect of all such lands as aforesaid which were thereby agreed to be

granted to the contractors and border on the sea, together with the privilege of mining under the foreshore and sea opposite any such land, and of mining and keeping for their own use all coal and minerals under the foreshore or sea opposite any such lands, in so far as such coal and minerals and other substances and foreshore rights were owned by the Dominion Government. The statute authorised the Governor in Council to grant to the Railway Company, which was stated to have been incorporated by the British Columbia Act already referred to, the land in question in terms and with reservations which are for all material purposes identical with those their Lordships have quoted from the Scheduled Agreement.

On the 21st April, 1887, a Crown Grant was made by the Dominion Government to the appellant Railway Company. It recited the British Columbia Act and the Dominion Act already referred to, and that it had been agreed between the Dominion Government, the Government of British Columbia and the Company, that the grant to the Company of the lands in question should be in the terms thereinafter contained, and that the exact boundaries of the lands should be as settled and agreed upon by and between the Government of British Columbia and the Company with certain provisions as to settlers which are not material. It then granted to the Company the land situated on Vancouver Island, which had been granted to the Crown in right of the Dominion by the Act already referred to of the Province of the 19th December, 1883, in so far as such lands were vested in the Crown and held for the purposes of the construction of the railway, with all the coal and other minerals and substances thereunder, and the foreshore rights in respect of such lands as border on the sea, together with the privilege of mining under the foreshore and sea opposite any such land, and of mining and keeping all the coal and minerals mentioned, "in so far as such coal, coal oil, ores, stones, clay, marble, slate, mines, minerals and substances and foreshore rights were vested in," the Crown as represented by the Government of the Dominion.

The question is whether under the terms of the British Columbia and Dominion Acts and the Crown Grant referred to the appellant Company obtained a title to the foreshore or foreshore rights mentioned in the grant. Their Lordships agree with the Courts below in thinking that it did not obtain such a title. The Dominion Statute and Grant are careful to limit what they purport to convey to the appellants to such rights only as were vested in the Crown in right of the Dominion. This throws the question back to the construction of the words in the British Columbia Act of 1883. It may well have been that the general words relating to foreshore rights were introduced to cover the possibility of the Dominion possessing rights apart from the grant to them by the Province in the foreshore on a certain interpretation of the British North America Act of 1867. It has since been made clear by decision that no right of property in the foreshore which was vested in a Province before Confederation has been

taken away by that Act, except so far as transferred by express enactment, and there is nothing in the British North Amercia Act of 1867 or in any other statute referred to in this appeal which transfers the foreshore generally as originally vested in the Crown in right of the Province. There are, of course, the provisions of section 108 of the Act of 1867 which by implication take away the property in specific parts of it, but these provisions have no application to the present case.

Their Lordships are accordingly of opinion that unless the words they have already quoted in full from the statutory grant to the Dominion in section 3 of the Provincial Act of the 19th December, 1883, passed the foreshore, it remains in the Crown in right of the Province. The appellants rely on the use of the expression " coast line " as sufficient to include the foreshore. But it is the natural inference from the context that " coast line " is there referred to as contrasted with " straight line," the expression which is apposite in the descriptions of the other parcels in the grant. They think that the natural interpretation of the expression is that it was intended to indicate the actual and normal boundary of land which was divided from the sea by high water mark, and that it consequently included the land down to the normal high water mark, and not further, to the exclusion of the foreshore and all rights to mine under it. In an instrument which in reality did no more than operate as a transfer by the Crown of administration in right of the Province to administration in right of the Dominion their Lordships think that there is no presumption or other reason for construing words purporting to be words of grant in any other than their natural and strict sense. They will, accordingly, humbly advise His Majesty that the conclusions arrived at by the learned Judges of the Courts of British Columbia were correct, and that the appeal ought to be dismissed with costs to be paid by the appellants to the respondent Treat. In accordance with the usual practice the intervening respondent will bear his own costs.

In the Privy Council.

THE ESQUIMALT AND NANAIMO RAILWAY COMPANY

*

H. W. TREAT.

DELIVERED BY VISCOUNT HALDANE.

Printed by Harrison & Sons, St. Martin's Lane, W.C.

1919.