Privy Council Appeals Nos. 43 *and* 44 *of* 1921.

Charles Wilson and others - - - - - - *Appellants*

v.

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

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

v.

Charles Wilson and others - - - - - - *Respondents*

(*Consolidated Appeals*)

FROM

THE COURT OF APPEAL OF BRITISH COLUMBIA.

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 18TH NOVEMBER, 1921.

Present at the Hearing:

VISCOUNT HALDANE.
VISCOUNT CAVE.
LORD CARSON.
MR. JUSTICE DUFF.
SIR ROBERT STOUT.

[*Delivered by* MR. JUSTICE DUFF.]

This is an appeal from the judgment of the Court of Appeal of British Columbia of the 3rd February, 1921, affirming the judgment of the Trial Judge, Mr. Justice Gregory, in favour of the respondent company in which their Lordships have to consider the effect of the Vancouver Island Settlers' Rights Act of 1904 and the amending Act of 1917 that was subsequently disallowed, as well as the effect of that disallowance upon the rights of the grantees under Crown grants issued by authority of those enactments.

Two actions were brought by the respondent company to establish its title to certain lands comprised in a grant to the appellants professedly made under the authority of the statutes mentioned.

A history of the legislation and other public and private proceedings and transactions affecting more or less directly the land whose title is in controversy would be a rather voluminous one, but it is unnecessary now to enter into that history in detail.

Admittedly, these lands are situated in a considerable district in Vancouver Island known as the Esquimalt and Nanaimo Railway Belt; a tract of land granted by a provincial statute to the Dominion Government in execution of the terms of an arrangement arrived at in the year 1883 in settlement of disputes between the two governments, and in turn by the Dominion Government, pursuant to the same arrangement, granted to the Esquimalt and Nanaimo Railway Company (the respondent company) as a subsidy in aid of the construction of a line of railway (the Esquimalt and Nanaimo Railway) in Vancouver Island. But for the legislation of 1904 and 1917 the respondent company's title would be indisputable.

In 1904 the Vancouver Island Settlers' Rights Act was passed by the Legislature of British Columbia; the relevant provisions of it being these:—

> Section 2. In this Act, unless the context otherwise requires:—
>
> (*a*) "Railway Land Belt" shall mean the lands described by Section 3 of Ch. 14 of 47 Vict., being "An act relating to the Island Railway, the Gravingdock, and Railway lands of the Province."
>
> (*b*) "Settler" shall mean a person who, prior to the passing of the said Act, occupied or improved lands situate within the said railway land belt, with the *bona fide* intention of living thereon.
>
> Section 3. Upon application being made to the Lieutenant-Governor in Council, within twelve months from the coming into force of this Act, showing that any settler occupied or improved land within said railway land belt prior to the enactment of Ch. 14 of 47 Vict., with the *bona fide* intention of living on said land, accompanied by reasonable proof of such occupation or improvement and intention, a Crown grant of the fee simple in such land shall be issued to him, or his legal representative, free of charge and in accordance with the provisions of the Land Act in force at the time when said land was first so occupied by said settler.

By a judgment of this Board in *The Esquimalt and Nanaimo Railway Company* v. *McGregor*, 1907, A.C. 462, it was decided that a grant under the statute of 1904 had the effect, as to the lands comprised in the grant, of displacing the title of the Railway Company and vesting a title in fee simple in the grantee. The time limit of 12 months fixed, by Section 3 of the Statute of 1904, was extended by a Statute of 1917 to the 1st September of that year.

On the 5th day of July, 1917, the appellants, Wilson and McKenzie, as executors of Joseph Ganner, deceased, applied under the Act of 1917 for a Crown grant of the lands in dispute alleging that Joseph Ganner in his lifetime and before the 19th December, 1883, the relevant date mentioned in Section 3 of the Act of 1904, had improved these lands with a *bona fide* intention of living thereon; this allegation being supported by statutory declarations of the executors and others. The late Joseph Ganner had already in his lifetime received a conveyance of these lands, "less the right of way for the railway," by deed reserving to the company the right to take timber for railway purposes, "rights of way for their railway" and the right to enter and to take such land as might be required for stations and workshops and excepting all

minerals including coal; and subsequently, pursuant to this application on the 15th February, 1918, a Crown grant was issued purporting to convey to Wilson and McKenzie, as executors of Ganner, a title in fee simple to the land applied for, subject only to certain exceptions and reservations in favour of the Crown. On the 30th May, 1918, the Governor-General by an Order in Council disallowed the Act of 1917.

The Court of Appeal, with the exception of Mr. Justice McPhillips, who dissented, concurred with the Trial Judge, Mr. Justice Gregory, in holding, though not precisely upon the same grounds, that the authority vested in the Lieutenant-Governor in Council by the Statutes of 1904 and 1917 was subject to certain conditions that had not been observed in the proceedings resulting in the issue of the grant, which they decided was consequently invalid. The questions which thus engaged the attention of the courts below will require discussion, but, in the meantime, it is more convenient to deal with the points arising in consequence of the fact that in the year 1905 that is to say, after the passing of the Act of 1904, but before the passing of the Act of 1917, the "railway" of the respondent company was, by an Act of Parliament of Canada (Cap. 90 s. 1), declared to be "a work for the general advantage of Canada"; the word "railway" in this Statute signifying by force of Section 2 Sub-section 21 of the Dominion Railway Act (R.S.C. 1906, Cap. 37):—

> "Any railway which the company has authority to construct or operate, and . . . all branches, sidings, stations, depots, wharfs, rolling stock, equipment, stores, property, real or personal, and works connected therewith, and also any railway bridge, tunnel, or other structure which the company is authorised to construct."

Upon the passing of the Act of 1905, in virtue of the enactments of Section 91 (29) and Section 92 (10) of the B.N.A. Act, the "railway" of the respondent company passed within the exclusive legislative jurisdiction of the Parliament of Canada and, accordingly, their Lordships think the Legislature of the Province ceased to possess the authority theretofore vested in it under No. 10 of Section 92 and No. 13 of the same section of the B.N.A. Act, to deprive the railway company of its legal title to any of the subjects actually forming part of the "railway" so declared to be "a work for the general advantage of Canada," and to vest that title in another. It does not follow, however, that lands acquired by the railway company as a subsidy granted for the purpose of aiding in the construction of the railway and not held by the company as part of its "railway" or of its undertaking as a railway company were withdrawn from the legislative jurisdiction of the province in relation to "property and civil rights"; and, in their Lordships' opinion, that authority was, notwithstanding the enactment of the Dominion Act of 1905, still exercisable in relation to such subjects.

On the other hand, as their Lordships have already noticed, the railway company was, by virtue of the stipulations contained in the conveyance to Ganner, the owner of certain rights (to take

timber for railway purposes, rights of way for the railway, to take land for stations and workshops), which rights, it cannot be denied, were held by the company as part of its railway undertaking. Whether or not they were actually part of the "work," that is to say of the "railway" declared to be "a work for the general advantage of Canada," these rights were so identified with the railway undertaking as to justify the most serious doubts whether they could legally be swept away or impaired by provincial legislation. And it was with entire propriety that Mr. Taylor, as counsel for the appellants, agreed that all lands and all such rights as ought to be considered as part of the railway undertaking, should be treated as excluded from the operation of the grant.

Indeed, the real controversy seems to concern the coal only, and as regards the coal it appears to have been so dealt with that it would be impossible to regard it as any longer a part of the railway undertaking, though in respect of the working of it, in so far as such working may affect the railway, all parties are of course under the control of the Board of Railway Commissioners.

The question that was principally discussed before their Lordships' Board was that presented by the contention of the respondent company concerning the effect of the disallowance of the Act of 1917, by which it is argued the grants already made to the appellants are nullified. In relation to this question the pertinent sections of the B.N.A. Act are Sections 56 and 90. By the first of these a power of disallowance in respect of Dominion Acts is vested in the Queen in Council; by Section 90 the provisions of Section 56 are, *inter alia*, made applicable to statutes passed by the provincial legislatures, the Governor-General in Council being substituted as disallowing authority for the Queen in Council, and the period of two years named in Section 56 being reduced to one year. Textually, Section 56 is as follows:—

> Where the Governor-General assents to a Bill in the Queen's name, he shall by the first convenient opportunity send an authentic copy of the Act to one of Her Majesty's Principal Secretaries of State, and if the Queen in Council within two years after receipt thereof by a Secretary of State thinks fit to disallow the Act such disallowance (with a certificate by the Secretary of State of the day on which the Act was received by him) being signified by the Governor-General, by speech or message to each of the Houses of the Parliament or by Proclamation, shall annul the Act from and after the day of such signification.

For the purposes of the present appeal the point under examination turns, as their Lordships think, upon the effect to be ascribed to the words "shall annul the Act from and after the day of such signification."

Cases may no doubt arise giving place for controversy touching the application of this phrase, but their Lordships think that the language itself discloses with sufficient clearness an intention that, at all events as to private rights completely constituted and founded upon transactions entirely past and closed, the disallowance of a provincial statute shall be inoperative.

It is important in construing such a provision to consider the probable tendency of any proposed construction in relation to its

effect upon the working of the constitutional system set up by the B.N.A. Act, and from this point of view the construction advocated by the appellants is open to two objections of not a little weight. If private rights that have been finally constituted under provincial legislation are swept away by disallowance—which may take place at any time up to the expiration of a year after the enactment of the legislation—then provincial legislation may obviously become the subject of a considerable degree of doubt as to its ultimate operation and effect. This uncertainty would, of course, be much limited in its practical incidence by recognized constitutional conventions restricting the classes of cases in which disallowance is permissible; but it is indisputable that in point of law the authority is unrestricted, and under conceivable conditions the uncertainty touching the fate of provincial enactments might be productive of some degree of general inconvenience. Another objection of some practical importance lies in the probability that under the proposed construction, the Dominion Government when considering the advisability of disallowing a provincial enactment in circumstances making the exercise of the power proper and desirable on general grounds, would be faced at times with the certainty that in many cases that Government would encounter embarrassments (otherwise not likely to arise) by reason of apprehensions as to the consequences of its action upon the rights and interests of private individuals.

It was urged by counsel for the respondent company that these considerations have no relevancy in the present controversy, since (it is argued) by force of Section 104 of the Land Registry Act the Crown grant upon which the appellants' right is founded could not vest a title or an interest in the lands comprised in the grant until the grant had been registered in the proper Land Registry Office; and that, admittedly, registration had not in fact taken place at the time the Act was disallowed.

The appellants (to advert briefly to the facts), having applied for the registration of their title, were met with the objection that a *lis pendens* having been filed in the action out of which this appeal arises (and in another action which has since been dismissed), the title ought not to be registered until the *lis pendens* had been removed. To this objection the Registrar gave effect, and his decision, which had been reversed by the Court of Appeal, was, on appeal to His Majesty in Council, eventually sustained.

Their Lordships have now to decide whether or not the actions in respect of which the *lis pendens* was filed should be dismissed and the *lis pendens* vacated. And their Lordships having for the reasons now given, some of which are yet to be explained, come to the conclusion that the actions are not well founded, it follows that the appellants had, when they applied for registration, a completely constituted right to register their title; though the exercise of that right was, in consequence of the proceedings taken by the respondent company, suspended pending the determination of the questions which the company itself had raised. Their Lordships entertain no doubt that such a right is one of the

class of rights intended to be protected by Section 56 of the British North America Act.

It should not, however, be assumed that their Lordships are in accord with the contention that Section 104 of the Land Registry Act applies either to grants of a special character, such as those authorised by the legislation of 1904 and 1917, or to ordinary Crown grants issued under the authority of the Land Acts. On these points their Lordships express no opinion.

The last point for consideration arises in consequence of the contention of the respondent company (to which the Court of Appeal gave effect) that the powers of the Lieutenant-Governor in Council under the legislation of 1904 and 1917 were not validly exercised, inasmuch as certain conditions, some expressly, others impliedly, attached to those powers were not observed.

The statute of 1904 no doubt requires that before the authority to issue a Crown grant under Section 3 is acted upon, the Lieutenant-Governor in Council shall decide the question whether or not there is " reasonable proof " of " improvement " or " occupation " and of intention to reside ; and their Lordships consider that the function of the Lieutenant-Governor in Council in deciding upon such questions is judicial in the sense that he must, to adapt the language of Lord Moulton in *Arlidge's* case, 1915 A.C. 150, " preserve a judicial temper " and perform his duties " conscientiously with a proper feeling of responsibility " in view of the fact that a decision in favour of the applicant must result in the transfer to the applicant of property to which, but for the statute and but for the production of the necessary proof, the respondent company (or its successors in title) would have possessed an unassailable right ; and it may be assumed for the purposes of this appeal that a grant issued in consequence of a decision arrived at through proceedings wanting in these characteristics would be impeachable by the respondent company (or its successors), as issued without authority or in abuse of the authority which the statute creates.

There are two grounds upon which this contention is supported.

First it is said that the respondents were denied an adequate opportunity of showing that the essential allegations made on the application were not well founded in fact, and second that in the material produced there was no " reasonable proof " of those allegations.

The second of these grounds is that upon which the judgment of the majority of the Court of Appeal proceeded. The judgment of the learned Chief Justice with whom Galliher, J., concurred, contains a searching examination of the evidence adduced, leading him to the conclusion that no such " reasonable proof " was before the Lieutenant-Governor in Council. The reasons of the learned Chief Justice are cogent reasons in support of the conclusion that the allegations of the appellants' petition were not supported by complete evidence ; but their Lordships do not think that this, if established to the satisfaction of the Court of Appeal, was necessarily conclusive in favour of the respondent company.

Whether or not the proof advanced was "reasonable proof" was a question of fact for the designated tribunal, and the decision by the Lieutenant-Governor in Council in the affirmative could not be questioned in any court so long, at all events, as it was not demonstrated that there was no "proof" before him which, acting judicially, he could regard as reasonably sufficient.

This the majority of the Court of Appeal has held to be shown. But the Chief Justice, at all events, who examined the evidence in detail, and Galliher, J. (who concurred with him), proceeded largely upon the view that, generally, the deponents seem to speak without personal knowledge of the facts to which they depose, and such statements he seems to put aside entirely as valueless if not altogether incompetent. Their Lordships think the Lieutenant-Governor in Council was not bound by the technical rules of British Columbia law touching the reception of hearsay evidence, and they think there was nothing necessarily incompatible with the judicial character of the inquiry in the fact that such evidence was received. Ganner, as already mentioned, did in fact acquire the surface rights in 1885; and the proof includes formal depositions by the executors and others to the effect that Ganner "squatted" on the land in question in 1883 with the intention of residing thereon, and that he was in that year engaged in improving it, as well as a statement by his son that he, with others, personally assisted in working on this land preparatory to "clearing" it in that year. While appreciating both the relevancy and the force of the comments made upon this evidence in the Court below, their Lordships are constrained to think that there was some evidence in support of the application, and that there is no adequate reason for holding that this evidence might not be properly considered to be reasonably convincing.

Similar considerations apply to two other criticisms upon the course taken by the Lieutenant-Governor in Council, those, namely, touching the refusal to direct the production of the deponents for cross-examination, and the refusal to grant an adjournment for the purpose of enabling the company to adduce evidence in opposition to the application.

The respondents were given the fullest opportunity to present before the Lieutenant-Governor in Council everything they might desire to urge against the view that the depositions produced in themselves constituted "reasonable proof," and they had the fullest opportunity also of supporting their contention that the depositions alone, in the absence of cross-examination, ought not to be considered sufficient, and that further time should be allowed to enable them to prepare their case. The appointed authority for dealing with the matter, it must be remembered, was the Executive Government of the Province directly answerable to the legislature, and their Lordships agree without hesitation with the majority of the Court of Appeal in holding as they explicitly decided upon the same facts in *Dunlop's* case, that the Lieutenant-Governor in Council was not bound to govern himself by the rules of procedure regulating proceedings in a court of justice.

It cannot be suggested that he proceeded without any regard to the rights of respondents and the procedure followed must be presumed, in the absence of some conclusive reason to the contrary, to have been adopted in exercise of his discretion under the statute as a proper mode of discharging the duty entrusted to him. His decisions taken in the exercise of that discretion are, in their Lordships' opinion, final and not reviewable in legal proceedings.

On these grounds their Lordships consider that the appeal in substance succeeds. The respondent company is, however, for the reasons mentioned, entitled to a declaration that the Crown grant does not operate to take away or to prejudice the company's title to its right of way as at present established, or to its rights under the deed of conveyance to Ganner of 1890, already mentioned, to take timber and to use the surface for railway purposes. As no contention in respect of these rights of the company appears to have been seriously pressed in the courts below it may be assumed that they are of little or no practical value; and their Lordships, therefore, think that the respondent company's success upon this minor point should not affect the question of costs. For these reasons their Lordships think that the appeal should be allowed with costs here and of the appeal to the Court of Appeal and the actions dismissed with costs throughout, and subject to the declaration above mentioned, that the cross appeal should be dismissed with costs. Their Lordships will humbly advise His Majesty accordingly.

In the Privy Council.

CHARLES WILSON AND OTHERS

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DELIVERED BY MR. JUSTICE DUFF.

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