IN THE MATTER OF THE PETITION OF RIGHT OF

THE CALGARY AND EDMONTON RAILWAY COMPANY AND THE CALGARY AND EDMONTON LAND COMPANY, LIMITED..... } SUPPLIANTS:

1902
Nov. 10.

AND

HIS MAJESTY THE KING..... RESPONDENT.

Railway—Land Subsidy in the N. W. Territories — Mines — Reservation in grant—53 Vict. c. 4 sec. 2.—Dominion Lands Act.

By the Act 53 Vict. c. 4, the suppliant railway company, among others, was authorized to receive a grant of Dominion lands of 6,400 acres for each mile of its railway, when constructed. Under the provisions of section 2 the grants were to be made in the proportion and upon the conditions fixed by the orders in council made in respect thereof, and, except as to such conditions, the said grants should be free grants, subject only to the payment by the grantees, respectively, of the cost of survey of the lands, and incidental expenses. The Act came into force on the 16th of May, 1890. On that date there were certain regulations in force, made on the 17th September, 1889, under the provisions of *The Dominion Lands Act*, which provided that all patents for lands in Manitoba and the North-west Territories should reserve to the Crown all mines and minerals which might be found to exist in such lands, together with the full power to work the same.

Orders in council authorizing the issue of patents, for the lands in question, to the suppliant railway company were passed from time to time, according to the number of miles of railway constructed. There was no reference in these orders to the regulations respecting the reservation of mines and minerals of 17th September, 1889.

Held, that the regulations reserving mines and minerals applied to all grants of lands made under the provisions of the Act 53 Vict. c. 54, and that the omission of reference to such regulations in the orders in council authorizing patents to be issued did not alter the position of the suppliant railway company under the law.

1902

THE CALGARY AND EDMONTON RWAY. CO. v. THE KING.

Argument of Counsel.

Semble, that where Parliament grants a subsidy of lands in aid of the construction of a railway, and nothing more is stated, the grant is made under ordinary conditions, and subject to existing regulations concerning such lands.

PETITION OF RIGHT for a free grant of Dominion lands under 53 Victoria, cap 4.

The facts are stated in the reasons for judgment.

June 10th, 1902.

The case came up for hearing at Ottawa.

I. F. Hellmuth for the suppliant: The Act incorporating the Calgary and Edmonton Railway Company is followed by the Act granting the land subsidy, and, with these two Acts, my submission is that we have nothing to do with the orders in council of October, 1887, and September, 1889. We submit that the Calgary and Edmonton Railway land grant is altogether outside and apart and free from the operation of these orders in council. This is the first position that we take.

The second position we take is that the orders in council have no application to the Calgary and Edmonton land grant, because they are *ultra vires* the Governor in Council, so far as that railway is concerned. These are the two positions upon which our claim is based. If my first position is sound it is immaterial whether the orders in council are *ultra* or *intra vires*, because then they would have no application; but again, if they do apply, I submit they are *ultra vires*. The position of the suppliants is that they were to receive under 53 Victoria, chapter 4, land to the extent not exceeding 6,400 acres per mile. This was under section 2 of the Act, which reads as follows:

"2. The said grants and each of them may be made in aid of the construction of the said railways respectively, in the proportion and upon the conditions

fixed by the orders in council made in respect thereof, and except as to such conditions, the said grants shall be free grants, subject only to the payment by the grantees, respectively, of the cost of survey of the lands and incidental expenses, at the rate of ten cents per acre in cash on the issue of the patents therefor."

Now, I submit that the words "orders in council made in respect thereof" apply to orders in council made in respect of such grants and not in respect of the lands. Therefore, if my contention is right, that class of orders in council would not include any order in council made generally under *The Dominion Lands Act*; but to orders in council made in respect of these grants only. And upon the conditions fixed by such orders in council the said grants and each of them may be made as provided for by section 2 of the Act. We submit that it is not necessary to go outside of this specific Act (1), and such orders in council as have been passed under that Act. Now we have orders in council respecting the grants to us which prescribe the conditions that shall govern us, and you do not find amongst them any reservation of mines and minerals. We have reservations but no reservation excepting minerals from the operation of the grant. I submit that the suppliants are to be governed by the orders in council made under the provisions of this Act and not by any general orders or regulations.

Turning to section 90 of *The Dominion Lands Act* it will be seen that certain powers are given there to the Governor in Council. The Crown claims what seems to me to be utterly untenable, namely, that it was beyond the power of the Parliament of Canada, in view of the order in council of 1887, to grant these lands without a reservation of coal and other minerals. That is to say, that the Parliament of Canada, having

(1) 53 Vict. c. 4.

1902

THE CALGARY AND EDMONTON RWAY. CO. v. THE KING.

Argument of Counsel.

passed that Act, which authorizes the Governor General to deal with coal lands, can never repeal the Act. Why, they have been repealing that Act from time to time since it has been in operation. The first Act is 35 Victoria, chapter 23, in the year 1872. By sections 36 and 37 it is enacted that no reservation of gold, silver, iron, copper or other mines or minerals shall be inserted in any patent from the Crown granting any portion of the Dominion lands, and any person or persons may explore for mines or minerals, on any of the Dominion lands surveyed or unsurveyed, and not then marked or staked out and claimed or occupied, and may, subject to the provisions hereafter contained, purchase the same. If my learned friend's argument is correct, it amounts to the declaration that the Parliament of Canada is not competent to grant to these suppliants coal lands without a reservation as to coal, and the only question is, did they do it? Then your lordship has to find whether they had the power to do it.

The next Act is 46 Victoria, chapter 17, which consolidates the Acts of 1883, and is very similar in its terms to chapter 54 of *The Revised Statutes of Canada.* The section under which the regulations in question were made that are relied upon by the respondent, is section 47 of chapter 54 R. S. C. Now, this is a section to which I specially call your lordship's attention. There is an amending Act, 55-56 Victoria, chapter 15, section 5. That section amends section 47 of the Act in *The Revised Statutes.* Now, your lordship will observe that the Governor in Council had the right to dispose of the lands under the section as it exists in *The Revised Statutes;* but under the amending enactment his power is limited to making regulations in respect of the lands. But it must not be forgotten that so far as this petition is concerned it is

section 47, unaffected by the amendment, that prevails. It was in force at the time of the grant in question here was made. What we say shortly in respect of this is that the Governor in Council, having disposed of these lands by order in council to us, that they conceded the coal that is in them to us. And that the disposal of the lands containing coal is a disposal of the coal as well.

Now, by section 90, subsection (*b*) of *The Dominion Lands Act*, power is given to the Governor in Council to dispose of the coal lands completely. That being so, if there is a disposition by the Governor in Council of coal lands, would it not be absurd to say that in disposing of the coal lands the Governor in Council reserves the coal?

[BY THE COURT: Is there any question in this case as to this particular lot of land being within the area reserved for coal lands?]

No, my lord, there is no evidence of that. In the Crown's statement of defence they say that the lands did contain coal. It appears in the order in council that there were lands reserved for coal lands, but these were not. We were not within the coal district. I submit that even if the fact were otherwise it would not tell against us. I do not know whether, as to this particular lot, coal is contained therein, but I am prepared to admit that in similar lands that have already been patented to the suppliants there was coal. There was some, but I do not know in what proportion.

There are regulations published in the statutes of 1888 which set apart coal lands, but the townships mentioned here do not include these particular lands. They are all lands in the Province of British Columbia. The regulations applying to lands in British Columbia are different from those applying to lands in the North-

1902

THE CALGARY AND EDMONTON RWAY. CO v. THE KING.

Argument of Counsel.

west Territories. Our grants are not subject to these regulations as to coal, such as "lands containing anthracite at upset price of twenty dollars per acre." Now, how is it possible for lands that are sold to us to be sold to somebody else. Clearly these regulations do not apply. (He refers to section 44 and on to 49 of the regulations of 1889).

Section 47 provides for the sale of mining rights. Now it cannot be said that we obtained only surface rights. Lands granted to a railway company are applied to different purposes from those that lands granted to an individual are usually applied. And inferentially these regulations cannot apply to our lands. We would be liable to be deprived of the lands after being used for our purposes when coal is found under them, if my learned friend's contention is to prevail. It clearly was the intention that the regulations should not apply to lands acquired by a railway company. The lands of railways were never lands that could be taken away for any such purpose, because if so you would find provision expressly made for taking the right of way and the station grounds, etc. Furthermore, it could be just as well argued that the lands of the railway company under these regulations would be subject to leases to cut hay, to leases for grazing, or for any of the purposes contemplated by the statute in the case of ordinary lands. The lands in our hands were only affected by parliamentary legislation, and the orders in council especially made under such legislation. If the lands did not contain coal the regulations surely did not affect them. I should have thought that there should have been first a coal belt established before there were general regulations made.

The Minister of the Interior has duties under the Act, but they are purely ministerial. He could not add to

1902

THE CALGARY AND EDMONTON RWAY. CO. v. THE KING.

Argument of Counsel.

the conditions imposed by the Parliament of Canada. We were clearly entitled to a free grant, and the Minister of the Interior had no right to impose conditions and reservations. (He cites chapter 51 R. S. C., section 3, subsection (*a*), as to the meaning of the word "lands"). The Crown says that our argument might be extended to a claim for the gold and silver too. We say no, because under *The Dominion Lands Act* gold and silver are expressly taken out of the grant. And we should have had an express provision granting them if we wished to obtain them. The distinction between gold and silver and coal is marked in the statute. (He refers to schedule "B.") I think I said before that in some of the lands which have not yet been patented there is no doubt but there is some coal.

[BY THE COURT: Patents have issued to you with the reservations?]

All patents that have issued have had the reservation. The department insisted upon doing this, and we have asked as to the future that no patents shall be issued reserving mines and minerals. Your lordship will probably consider the case first as if this particular lot did contain coal, and secondly, as if it did not. The issue between the parties is simply whether the patent should be issued with or without the reservation.

D. W. Saunders: It appears to me that the position of the Crown is that the Governor in Council by these regulations may control the legislature. Apparently these regulations, so far as section 8 goes, ousts the jurisdiction of Parliament in respect to the subject-matter. I submit that this is not reasonable. We have *The Dominion Lands Act*, section 47, providing that coal or other minerals could be disposed of upon such conditions as are from time to time fixed by the

1902

THE CALGARY AND EDMONTON RWAY. CO. v. THE KING.

Argument of Counsel.

order in council. Section 47 simply reserves the coal lands, but section 90 also provides for reservations. If I understand at all the principles under which legislation has to be interpreted it is that the whole Act, all the provisions of the Act, are to be given effect to, and so that the whole Act is rendered sensible and operative. Then we must consider sections 47 and 90 together, and see if they are not in their very words consistent. Section 47 provides for the reservation of coal lands, and section 90 provides for the reservation of lands from sale and homestead entry to be given in aid of any railway; so that the Governor in Council might under section 90 have passed orders in council giving Dominion Lands to such railways as might be entitled to them *i. e.*, lands under section 90 containing coal or otherwise. There is no reason why in such a grant to a railway there should be any reservation at all, unless as a matter of contract between the Government and the particular railway mineral rights should be excepted. I submit that is the position under *The Dominion Lands Act.* Section 8 of the regulations of 1899 was apparently framed under section 47 of the Act. Taking the general Act (*Dominion Lands Act*) as a whole we might have obtained land grants under it without any reservation, but we have specific legislation dealing with the Calgary and Edmonton Railway Company. We have the Subsidy Act of 1890 providing for grants to a railway company, and providing that these grants and each of them may be made upon certain conditions. At the date of this Act, 16th May, 1890, what orders in council were in force in respect of the grants of subsidies in lands? Simply that of May, which was cancelled afterwards. I desire to point out that the grants were to be made "in respect thereof." But this section had no reference to any existing order in council, because it provides "except

1902

THE CALGARY AND EDMONTON RWAY. CO. v. THE KING.

Argument of Counsel.

as to such conditions, the grant shall be a free grant." If we give any meaning at all to the word "free" it must be free from any burden except as found in the order in council made "in respect thereof." (He refers to section 90 of *The Dominion Lands Act*, subsection (*b*)). There are provisions for reservation from sale and homestead entry. This may be done by the Governor in Council, notwithstanding anything in this Act, so as really there is no conflict between sections 47 and 90.

The grant is to be subject only to such conditions as may be fixed by orders in council made "in respect thereof." That is the wording of our special Act. Now where the language in the statute is clear and explicit there is no reason to import any extraneous matter into it which might create a difficulty in its interpretation Where you have clear expression in words, words which are grammatical, you cannot call to your aid in its interpretation anything to cover that which is beyond such expressions. The rule is laid down most clearly in *Warburton* v. *Loveland* (1). See also last edition of *Hardcastle on Statutes* (2). And *Bradlaugh* v. *Clark* (3).

There is no reason in this case why we should not construe this statute just as Parliament has expressed it. The onus of establishing any other sense lies entirely upon those, heavily upon those, who wish it to be adopted. (He cites *Richards* v. *McBride* (4).

In paragraph seven of the statement of defence there are allegations that bear out what I have stated to be the real contention of the Crown, namely, that Parliament has exhausted its power to deal with these lands, and that by passing these regulations the Crown has exhausted its power. I fail to understand the argu-

(1) 2 Dow & Cl. 489.
(2) 3rd ed. p. 75.
(3) 8 App. Cas. 354.
(4) 8 Q. B. D. 119 at p. 122.

1902

THE CALGARY AND EDMONTON RWAY. CO. v. THE KING.

Argument of Counsel.

ment or the premises upon which it is based, because we see that section 34 provides for selling the coal lands, and there is nothing asserting that the regulations were made in respect to mines and minerals.

What is the contract here? It is made up by the statute and the order in council. We are entitled to disregard every other document but those. You cannot go outside of the contract and refer for its terms to any such document as a departmental letter. The authorities are conclusive on that point. (He cites *Ellphinstone on Interpretation of Deeds* (1); *Shore* v. *Wilson* (2); *McNeely* v. *McWilliams* (3).

The Attorney-General of Canada for the respondent: I submit that the intention of the legislature was to distinguish between surface and mining rights. And this is not at all an unusual provision in legislative enactments. Your lordship knows that in the several provinces we have had legislation of this character, with reference to asbestos mines, mica, and so on. Sec. 47 of *The Dominion Lands Act* shows what regulations should be made as to the disposal of these mining rights. Section 8 of the regulations of 1889 contains the necessary dispositions that have to be made. These regulations have been duly published in the *Canada Gazette*. Therefore, in my view, you must read section 8 of the regulations of 1889 into *The Dominion Lands Act*. There must be a reservation of mines and minerals in any grant under the Act. This being the will of Parliament as unequivocally expressed at the time, and being the law of the land in 1890, we find that 53 Victoria, chapter 4, is passed by which the suppliants became entitled to a subsidy in Dominion Lands, in lands which the Parliament of Canada has said are not to be granted except upon a reservation of mines and

(1) Rule 10 & 11, p. 45. (2) 9 Cl. & F. 355.
(3) 13 Ont. A. R. 324.

minerals. I cannot agree with Mr. Hellmuth when he says that the suppliants "purchased" these lands. On the contrary they were given grants as a subsidy to assist them in building a railway. Now, a subsidy to Dominion Lands must surely mean a subsidy of lands that would be granted under ordinary conditions, and, as the statute says, upon the terms fixed by the "orders in council in respect thereof." That is, in respect of the lands. I submit that the true construction is that the order in council referred to here is an order in council made in respect of the lands which are granted. Parliament has authorized 6,400 acres per mile as a subsidy in lands If I am right, then Parliament has prescribed that in every grant of Dominion Lands for the purposes of the subsidy the grant is to be taken to be made subject to the reservation. Is it a good canon of construction to say that an express direction of Parliament can be set aside?

Your lordship will see that the point is a very narrow one, although the issue is a most important matter.

E. L. Newcombe, K.C., followed for the respondent. [He showed that the order in council of 1889 was published in the *Canada Gazette* of the 21st and 18th December, 1889, and the 4th and 11th of January, 1890. He also stated that the order in council of 31st October, 1887, was not published in the *Canada Gazette*.] So far as the latter is concerned, it was not necessary in order to give the regulations validity that they should be published. There is a statute, 57-58 Victoria, chap. 26, sec. 2, which legalizes the regulations even if they have not been published. The same provisions are in the order of 1889. I submit that the regulations are perfectly valid; those of 1889 having been published, and those of 1887 being made valid by the Act of 1894. I would also direct the court's attention to page 847

1902

THE CALGARY AND EDMONTON RWAY. CO. v. THE KING.

Argument of Counsel.

of *Bligh's Orders in Council of* 1889. These regulations are passed under *The Dominion Lands Act*, section 47. I submit in the first place that in pursuance of this section the Governor in Council could not but say that the grants to the suppliants must be made with a reservation of coal and other minerals. I understand my learned friend contends that this order in council is *ultra vires*, but how can it be *ultra vires* when Parliament provides for the regulations, and we have regulations saying that lands containing coal and other minerals should not be patented except on such a reservation? Section 90 of *The Dominion Lands Act* is broad enough to authorize these regulations, if section 47 is not. As I said before, the order in council of 1889 has been published for four consecutive weeks, and as for the order in council of 1887, we have the enabling Act.

We do not contend that the Governor in Council has exhausted his power to make orders; we say that this power has been executed by passing these regulations which have the force of law under the statute. (He cites section 48 of *The Dominion Lands Act*). It might very well be, as my learned friend contends, that there is authority under section 90 for the Governor in Council to repeal the regulations of 1889. But that could only be done by regulations brought into force in the same way as the original regulations themselves were brought into force. If, as they say, the order in council giving the suppliants their lands is a repeal of the regulations of 1889, then I say that the repealing order in council has to be put in force in the same way. If one concedes what they claim, and that an order in council giving them a subsidy is a repeal of the general order, so far as these regulations of 1889 are concerned, then the repealing order must be attended with the same formalities as the original.

1902

THE CALGARY AND EDMONTON RWAY. CO. v. THE KING.

Argument of Counsel.

Then with reference to the argument that the grant was to be a free grant, we have to say that when the Act authorizing the subsidy to be granted was passed there was a statute already in existence, namely, *The Dominion Lands Act* which regulated the granting of such lands. Then may it not be said that Parliament voted authority to the Governor in Council to grant lands in the way of subsidy in conformity with the provisions of *The Dominion Lands Act?* The grants were to be made only as they were authorized to be made. The Subsidy Act does not authorize the Crown to grant them without reserving the mines and minerals. There is a difference between a land Subsidy Act and a money Subsidy Act. Under a land Subsidy Act, such as this, it is possible for the Crown to say to the company, we will issue these lands to you now, in order for the company to proceed with the construction of its railway. The Crown might enter into a contract with the company in respect to the subsidy in lands. With regard to the money subsidy it could only be paid upon the conditions set forth in the Act. But the lands could only be granted in conformity with the law as it existed, and under that law it was necessary for the grants to be made with a reservation. Now this particular section of lands may contain coal or it may not; but there is no doubt about this, that there is coal in that country and there is coal in lands which are already granted and which may be granted to the company. If there is any coal or other minerals in the lands, then the reservation will take effect. If there are none then your lordship should not entertain a claim to rectify the grant where the reservation has nothing to operate upon. The remedy is inherent in the condition of the parties. If the land does not contain coal or other minerals then I do not see how your lordship could rectify the patents. Of course

1902

THE CALGARY AND EDMONTON RWAY. CO. v. THE KING.

Argument of Counsel.

there might be a declaration as to the rights of the parties. But there is no case stated here for that. In the 11th paragraph of the statement of defence the fact is stated that the obligation of the Crown, if any, to grant land to the suppliants, or either of them, arises under the order in council of 27th June, 1890, whereby a free grant is authorized to be made to them, subject, *inter alia*, to the condition that the grant shall be without interference with any previous grants or reserve; and also subject to the reservation of the coal and other mines and minerals existing, or which may be found to exist therein. Then they are entitled to a "free" grant subject to these reservations. Now, what does the word "reserves" or "reservations" mean? Because these are quotations from what they claim is the contract between the parties, so it is necessary to interpret what the words mean between the parties. We submit that the words clearly refer to a reservation of the mines and minerals.

Then there is a statement in the 15th paragraph of the defence that by the statute 53-54 Victoria, chapter 4, it was enacted that the grant to be made in aid of the construction of the railway should be made on the conditions fixed by order in council "made in respect thereof." Now I submit that the orders of 1887 and 1889 are orders in council "made in respect thereof," that is in respect of grants of land to the railway company in so far as the territory is part of that from which the grant is to be made. We have *The Dominion Lands Act* saying that coal or other minerals should always be reserved. Then the Crown passes an order in council and sends it to the railway company, and says, we will agree to make a grant to you if you will build the railway according to these specifications. I submit that their grant must be construed as being subject to the general statutory provisions, and these regulations made by the Gover-

nor in Council are part of the statute. Of course this was the view that was taken by the Government at the time, and which was notified to the suppliants before the contract, or so called contract, was executed. Orders in council of the 5th of May, 1890, 26th December, 1890 and 25th May, 1890, were sent to the company. They were informed that they were not to get the coal and other minerals. The contract which they put forward was not executed, according to their contention, until the 26th of December, 1890, and yet on the 5th of May, 1890, the order in council was passed and communicated to them by which they were to be subject to the reservation. But the evidence shows no representation on the part of the company, and no claim, that they were entitled to have the coal and other minerals. It is clear, I think, that at the time the contract was signed the suppliants did not expect to get the coal and other minerals.

I. F. Hellmuth in reply: The Attorney-General has argued upon the intention of Parliament in passing *The Dominion Lands Act.* He says that in section 47 they were from the first careful to distinguish between surface and mining rights. Now I am free to admit that 55-56 Victoria, amending the original Act, does make some distinction between surface and mining rights; but the amending Act was passed in 1892, long after our grant. There was no such distinction between surface and mining rights in the original section. In the amendment it will be noticed that the power of the Governor in Council is limited to making regulations with regard to the grants of coal and other minerals, while in the original Act he could make regulations respecting the disposal of the lands containing coal, etc. Now, I say, this distinction being made by Parliament after our grant, it is not necessary for the court to consider it in this case. We have

1902

THE CALGARY AND EDMONTON RWAY. CO. v. THE KING.

Argument of Counsel.

to deal with this case under *The Dominion Lands Act* in *The Revised Statutes*, and section 90 may practically be wiped out if you desire to proceed under section 47. But my learned friends say you must have made a formal repeal of the regulations of 1889 by the order in council made in respect of our grant. In answer to that we say the Governor in Council disposed of these lands to us under section 90, plus such other powers as the Governor in Council had.

Now what is the fair construction to be put upon the whole Act? We say the position of the parties is this: If your lordship is forced to conclude that the 2nd section of the Subsidy Act, where it mentions "orders in council made in respect thereof" refers to the grants and not to the lands, then we must succeed beyond a doubt. Then again, if you add the word "lands," and make the passage read "orders in council made in respect of the grants of land," then I submit you do not change the meaning. The whole passage is one which invokes the primary canon of construction cited by my learned friend Mr. Saunders. The grammatical meaning supports our contention. Under the order in council of 1889 our rights are not to be determined. It was published, but the regulations of 1887 were not. The Act of 1894 could not validate an order in council as against us when our contract was executed in December, 1890. The Act of 1894 attempts to validate the order in council of 1887, but it could not enforce it as against parties who, at the time the Act of 1894 was passed, were entitled to rely upon a purchase of the lands free from the effect of the order of 1887.

Now, it is further to be remembered that the departmental letter (Exhibit E) only gives us notice of the order in council of 1887, and not that of 1889. The order of 1887 being of no force and effect so far as we

are concerned, the notification is nugatory. I further submit that the word "reserves," in the special order in council referring to the company, means the lands themselves, and has no reference to the reservation of coal or other minerals.

My learned friends say that the order in council should have been published, but is it not unusual for the Crown to set up its own negligence in order to invalidate an order in council? I submit that the Crown cannot take advantage of any act or omission of this sort. I refer to the *Canadian Coal and Colonization Company* v. *The Queen* (1).

THE JUDGE OF THE EXCHEQUER COURT now (November 10th, 1902) delivered judgment.

The Calgary and Edmonton Railway Company has earned and is entitled to the grant of Dominion Lands of six thousand four hundred acres for each mile of its railway, as provided in the Act of Parliament 53 Victoria, chapter 4. The Calgary and Edmonton Land Company, Limited, is interested in that grant. In the patents that have hitherto been issued for portions of such land grant, all mines and minerals and the right to work the same have been reserved. The suppliants contend that no such reservation should be inserted in the patents for such lands, and that the insertion of such a reservation therein is an infringement of their rights, and they claim relief against the action of the Crown in that behalf. The Crown justifies its action; and the question at issue is whether or not the grant mentioned is subject to the reservation in question.

This grant was one of a number authorized by the Act cited (53 Vict., c. 4). By the second section of the Act it was provided that the said grants and each of them might be made in aid of the construction of the

(1) 3 Ex. C. R. 157.

1902

THE CALGARY AND EDMONTON RWAY. CO. v. THE KING.

Reasons for Judgment.

said railways respectively, in the proportion and upon the conditions fixed by the orders in council made in respect thereof, and, except as to such conditions, the said grants should be free grants, subject only to the payment by the grantees respectively of the cost of survey of the lands, and incidental expenses, at the rate of ten cents per acre in cash on the issue of the patents therefor. The Act was assented to on the 16th of May, 1890. At that date certain regulations made on the 17th of September, 1889, respecting the sale, settlement, use and occupation of Dominion Lands were in force. By the 8th section of these regulations, with an exception not material in this case, it was provided that all patents from the Crown for lands in Manitoba and the North-west Territories should reserve to Her Majesty, Her Successors and Assigns forever all mines and minerals which might be found to exist in such lands, together with full power to work the same. A similar provision occurred in an order in council passed on the 31st of October, 1887, which was not published in the manner prescribed by the 91st section of "*The Dominion Lands Act*"(1), and which for that reason failed to be operative and in force, at least until the passing of the Act 57-58 Victoria, chapter 26, by the second section of which it was provided that the omission to publish any such order or regulation in the prescribed manner should not be held to invalidate it or anything done under it.

As has been noticed, the Act authorizing the grant of land to the Calgary and Edmonton Railway Company was passed on the 16th of May, 1890. The first order in council made in respect of such grant was passed on the 5th of May of that year. That order was followed by one of the 22nd of May; and these two were cancelled by a third order in council passed on

(1) R. S. C. c. 54, s.. 91.

1902

THE CALGARY AND EDMONTON RWAY. CO. v. THE KING.

Reasons for Judgment.

the 27th of June following. There are a number of other orders in council relating to the grant, but it is sufficient for the present to say in respect of all of them that no one of them contains any condition as to the reservation of the mines and minerals in the lands which it was proposed to grant. As to that all such orders in council are silent.

About the 20th of May, 1890, that is within a few days after the Act authorizing the land grant was passed, the attention of The Calgary and Edmonton Railway Company was, through its solicitor, called to the order in council of October 31st, 1887, which provided that the reservation as to mines and minerals now in controversy should be inserted in patents for lands west of the 3rd Meridian, the lands to which the suppliants are entitled being west of that meridian. In the letter (Exhibit "E") by which the company's attention was called to this matter, it was stated that public notice of it had been given through the *Canada Gazette*. So far as that statement may be taken to have reference to the order in council of the 31st October, 1887, the writer of the letter was in error. The order in council of the 17th of September, 1889, and the regulations thereby "established and adopted" (to the 8th section of which reference has been made) had been published in the prescribed manner (1); but the earlier order in council had not been published. If in any of the orders in council made pursuant to the second section of the Act by which the Governor in Council was given authority to make the grant (2), a condition had been inserted that the grant was subject to existing regulations respecting Dominion lands, or that all mines and minerals in the lands which it was proposed to grant were reserved, there would have been

(1) The *Canada Gazette* of December 21st and 28th, 1889, and of January 4th and 11th, 1890.

(2) 53 Vict. c. 4.

1902

THE CALGARY AND EDMONTON RWAY. CO. v. THE KING.

Reasons for Judgment.

no room for controversy. That would have been the end of the matter. But that was not done, and the company have not, it seems, acquiesced in the view taken by the officers of the Crown responsible for the administration of these affairs.

Of the matters that I have mentioned there are two that may, I think, be dismissed with a brief reference. In the first place I do not, in the conclusion to which I have come, rely upon the order in council of the 31st of October, 1887. It has been seen that there was a later regulation to the same effect that was in force in May, 1890, when the Act giving authority to the Governor in Council to make the grant was passed, and it is not necessary to determine any question that otherwise might have arisen on the second section of the Act 57-58 Victoria, chapter 26, by which, as already observed, it was declared that the failure to publish any such order in council or regulation should not invalidate it or anything done under it. Neither do I think it at all material that in the letter to which reference has been made the attention of the company was called to the order in council of October 31st, 1887, as the authority for inserting in the patents for the grant to be earned by the company a reservation of the mines and minerals. The Crown officers were not bound to give any such notice, though it was a very proper and prudent thing to do. The reference to the earlier order in council prejudiced no one, and the later order in council and regulations had been published in a manner that constituted notice to everyone. The rights of the parties would have been the same if the company's attention had not been directed to any regulation on the subject.

The question to be determined is: Did the provision contained in the 8th section of the regulations of September 17th, 1889, referred to, apply to the grants

1902

THE CALGARY AND EDMONTON RWAY. CO. v. THE KING.

Reasons for Judgment.

of land mentioned in the Act 53 Victoria, chapter 4, the orders in council made under that Act being silent on that subject? Were such grants subject to the reservation mentioned in the regulations?

The suppliants contend (1st) that the provision did not apply to such grants; and (2ndly) that if it did, it was *ultra vires*. Dealing with the second contention first, it will be found that the regulations mentioned purport to be made in virtue of the powers vested in the Governor in Council by *The Dominion Lands Act* (1). By the 47th section of the Act it is provided that lands containing coal and other minerals, whether in surveyed or unsurveyed territory, shall not be subject to the provisions of the Act respecting sale or homestead entry; but shall be disposed of in such manner and on such terms and conditions as are, from time to time fixed by the Governor in Council by regulations made in that behalf. That section was amended in 1892 (2), but the amendment, being later than the transactions with which we are now concerned, is not material to the decision of the present question. By clause (*h*) of the 90th section of *The Dominion Lands Act* the Governor in Council was given a general power to make such orders as are deemed necessary, from time to time, to carry out the provisions of this Act according to their true intent or to meet cases which arise, and for which no provision is made in the Act. It may also be noticed in passing that, by clause (*b*) of the same section, the Governor in Council was authorized to reserve from general sale and settlement lands required to aid in the construction of railways in Manitoba or in the Territories, but nothing turns on that provision here. The authority for the regulation in question is to be found in the special provisions of the 47th section of the Act and in the

(1) R. S. C. c. 54. (2) 55-56 Vict. c. 15, s. 5.

1902

THE CALGARY AND EDMONTON RWAY. CO. v. THE KING.

Reasons for Judgment.

general provisions contained in clause (*h*) of the 90th section.

Now it will be noticed that the 47th section of the Act gives authority for the making of regulations for the disposition of lands containing coal and other minerals, and that the 8th section of the regulations of September 17th, 1889, is not in terms a regulation respecting the disposition of lands known to contain coal or other minerals, but a general regulation affecting all lands in Manitoba and the North-west Territories which had not been sold or disposed of for valuable consideration, or entered as homestead, before the regulation came in force. That I understand to be the ground on which it is argued that this regulation is *ultra vires*. But that objection takes no account of the general power conferred on the Governor in Council by the 90th section of the Act. The reason for the form the regulation took is, I suppose, to be found in the necessities of the case. It was not to be expected that the Governor in Council should know, except in particular cases and to a limited extent, what lands in Manitoba and the Territories contained, and what lands did not contain, coal and other minerals. The intention of Parliament was no doubt thought to be that lands containing minerals should not be sold or disposed of as agricultural lands, and with the knowledge then possessed it was not possible effectively to deal with the matter except in the mode adopted in the regulation. And it seems to me that way was open to the Governor in Council, and that the regulation is within the authority conferred upon him.

Then as to the application of the regulation to the land grants mentioned in the Act 53 Victoria, chapter 4, I do not know that there is a great deal to be said. As the learned Attorney-General in his argument

1902

THE CALGARY AND EDMONTON RWAY. CO. v. THE KING.

Reasons for Judgment.

stated, the point is a very narrow one, although the issue is a most important matter. For the Crown it was argued that the expressions "orders in council made in respect thereof" occurring in the second section of the Act 53 Victoria, chapter 4, should be construed as orders in council made in respect of the lands granted, of which the regulation in question was one. I do not so read the provision. I think the words "in respect thereof" refer to the word "grants," and, as I have said, all the orders in council made in respect of the grant to the suppliants are silent on this subject. That is the view I take of them. By referring to them more particularly it will be seen that they provided that the grant shall be satisfied out of certain specified lands "in so far as practicable without interfering with any previous grants or reserves," and it is suggested that the reservation in question is included in this word "reserves." I am unable to adopt that suggestion. But it does appear to me that there is great force in the argument that when Parliament grants a subsidy in Dominion lands in aid of the construction of a railway, and nothing more is stated, that must mean a grant under ordinary conditions and subject to existing regulations respecting such lands. There is nothing to indicate any intention in the present case to grant lands containing coal or other minerals in aid of the construction of the railways mentioned in the Act, or to give the companies more than they would have acquired had they purchased the lands for money instead of earning them by constructing such railways. If the lands had been purchased by the company at the time the grant was authorised the mines and minerals would have been reserved to the Crown, and in issuing the patents for such lands the reservation mentioned in the regulation would have been inserted.

1902

THE CALGARY AND EDMONTON RWAY. CO. v. THE KING.

Reasons for Judgment.

It seems to me that the regulation is equally applicable to the present case, and that the course of proceeding adopted on behalf of the Crown was right.

The case of *The Canadian Coal and Colonization Company, Limited* v. *The Queen* (1) was referred to, though not relied upon, as the circumstances were different. In that case it was held that where the Crown, having authority to sell, agrees to sell and convey public lands, and the contract is not controlled by some law affecting such lands, and there is no stipulation to the contrary, express or implied, the purchaser is entitled to a grant conveying such mines and minerals as pass without express words. Here, however, we have a regulation which I think applies to the grant to which the suppliants are entitled.

There will be judgment for the respondent.

Judgment accordingly.

Solicitors for suppliants: *Kingsmill, Torrance, Hellmuth & Saunders.*

Solicitor for the respondent: *E. L. Newcombe.*

---

(1) 3 Ex. C. R. 157; 24 S. C. R. 713.