Privy Council Appeal No. 97 *of* 1919.

Esquimalt and Nanaimo Railway Company - - - *Appellants*

v.

Charles Wilson and another - - - - - *Respondents*

AND

Privy Council Appeal No. 98 *of* 1919.

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

v.

Elizabeth Dunlop - - - - - - - *Respondent*

FROM

THE COURT OF APPEAL OF BRITISH COLUMBIA.

REASONS FOR JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 23RD OCTOBER, 1919.

Present at the Hearing:

THE LORD CHANCELLOR.
VISCOUNT HALDANE.
LORD BUCKMASTER.
LORD ATKINSON.
MR. JUSTICE DUFF.

[*Delivered by* LORD BUCKMASTER.]

The question that is raised by these appeals is a question of procedure, technical in its nature, but doubtless of great importance both to the appellants and the respondents. It is simply whether the Attorney-General can and ought to be added as defendant to proceedings in which the appellants are plaintiffs and the respondents are the defendants. Although the merits of these actions are in no way involved in the determination of this point, it is necessary that the facts should be stated in order that it may be clearly understood in what capacity and for what purpose it is sought that the Attorney-General should be brought before the Court.

The following facts are taken from the first of the appeals, but so far as the point for determination before their Lordships is concerned, the appeals are identical and it is unnecessary to state the facts in both.

On the 21st April, 1887, the Crown, in the right of the Dominion of Canada, granted to the appellants, a railway company duly incorporated and having its head office in Victoria, British Columbia, the fee simple of a large tract of land in the island of Vancouver. On the 24th December, 1890, the Company granted the surface rights of part of this land to Joseph Ganner. On the 26th January, 1904, Ganner died, and the respondents in the first appeal are his executors and trustees. Joseph Ganner was one of the original settlers upon the island, and accordingly his representatives became entitled to the benefit of the provisions of the Vancouver Island Settlers Rights Act, No. 54 British Columbia Statutes, 1903–4, which received the royal assent on the 10th February, 1904.

Section 3 of that statute is in the following terms :—

> " Upon application being made to the Lieutenant-Governor-in-Council within twelve (12) months after 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 chapter 14 of 47 Victoria, with the bona fide intention of living on the 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 or improved by said settler."

Many of the settlers, and among these the representatives of Joseph Ganner, failed to avail themselves of the rights conferred by this statute within the time thereby limited, and the rights conferred would consequently have lapsed but for another statute of the Province of British Columbia passed on the 19th May, 1917, called The Vancouver Island Settlers' Rights Act, 1904, Amendment Act, 1917, which provided that the Act of 1904 should be amended by striking out the words " within twelve months of the coming into force of this Act " and inserting in lieu thereof " on or before the 1st day of September, 1917."

Pursuant to the power so obtained, the respondents, as executors and trustees under the will of Joseph Ganner, applied for the Crown grant and obtained the same on the 15th February, 1918, such grant carrying with it the coal rights under the surface. To ascertain the effect of this grant it is necessary to examine the provisions of " the Land Act in force at the time when the said land was first so occupied or improved by the said settler." This was the Land Act of 1875, and by its provisions the grant conveyed the fee simple of the land to the settler or his representatives, according to a form known as Form 9, which contained important reservations in favour of the Crown. These reservations are as follows :—

> " (*a*) The right to ' resume any part of the said lands for making roads, canals, bridges, towing paths or other works of public utility, or convenience.'
>
> " (*b*) The right to ' enter into and upon any part of the said lands, and to raise and get thereout any gold or silver ore which may be thereupon

or thereunder situate, and to use and enjoy any and every part of the same land.'

"(c) The right to authorize any person 'to take and occupy such water privileges and such rights of carrying water over any parts of the lands for mining or agricultural purposes.'

"(d) The right to authorize any person 'to take from or upon any such land, without compensation, any gravel, sand, stone, lime, timber or other material, which may be required in the construction, maintenance or repair of any roads, ferries, bridges or other public works.' "

The effect of the legislation and the effect of the grant, therefore, if nothing more had happened, would have been to defeat the grant previously made by the Crown in favour of the appellants and to reserve to the Crown certain rights which they could not possess if the grant to the appellants were undisturbed. The appellants allege that the grant to the representatives of Joseph Ganner was inoperative, and instituted the proceedings out of which the first appeal has arisen for the purpose of raising and testing that question. The action as originally framed, claimed a declaration that the Crown grant was null and void so far as it purported to grant to :—

"(a) The coal, coal oil, ores, stones, clay, marble, slate, mines, minerals and substances in, upon or under the said lands :

"(b) That part of the surface of said lands to which or upon which the plaintiff is entitled to exercise acts of ownership, purchase or rights of easement : "

and sought for an injunction to restrain the defendants from working the coal and from attempting to register a title. There was an alternative claim that the grant was null and void in a certain and more limited aspect. In the first instance the plaintiffs based their claim upon the ground that the hearing, which they allege was necessary under section 3 of the Act of 1904, was improperly held, or in fact was never held at all. The defendants, among many other defences, objected that the Crown grant could only be impeached in an action to which the Crown was a party. After the issue of the writ a petition was presented for disallowance of the statute of 1917. This was disallowed by the Governor-General in Council on the 30th May, 1918. On the 7th June, 1918, application was made by the plaintiffs asking that the Attorney-General for the Province of British Columbia might be added as a defendant to the action and that certain amendments should be made in the Statement of Claim, the most important being that the statute of 1917 had been disallowed. Mr. Justice Macdonald, before whom the case was heard, granted the relief sought, but the Court of Appeal overruled his judgment, so far as the addition of the Attorney-General was concerned, and from that judgment these appeals have been brought.

The respondents put forward three grounds on which they say the appeals should fail. *First*, that there is no need to make the Attorney-General a party. *Secondly*, if his presence is necessary, a petition of right is, in the circumstances, the only means by which it can be secured ; and *thirdly* that, if a petition of right is

not applicable, the case does not lie within the ambit of the cases where the Attorney-General can be brought before the Court by any means.

With regard to the first of these contentions, their Lordships are clearly of opinion that the Attorney-General ought to be before the Court. It is quite true that the title of the Crown to the land in question is not in controversy, nor is the Crown asked to do any act or grant any estate or privilege ; but in the event of the plaintiffs' success, the rights existing in the Crown and consequent upon the grant to the respondents will cease. If these interests lay in a third party, he ought certainly to be added as defendant, and that is the best means of testing the necessity of the attendance of the Crown. The learned Judges of the Court of Appeal, from whose judgment their Lordships feel compelled to differ upon this point, do not refer to the rights of the Crown which may be affected, but base their opinion solely on the ground that the Crown is not affected by the result, and that consequently a mere declaratory order against the Crown would be of no value. But for the reservation of the rights already referred to, their Lordships would have agreed with this conclusion.

It may further be added that an argument that the Crown ought not to be introduced into the litigation lies strangely upon the lips of the respondents, whose definite assertion that the Crown was a necessary party was the real origin of the application that the Attorney-General should be joined.

With regard to the second point, in their Lordships' opinion this is not a case to which procedure by petition of right is properly applicable. Such procedure is adopted for the recovery from the Crown of property to which the applicant has a legal or equitable right, as, for example, by proceedings equivalent to an action of ejectment or the payment of money. In Blackstone's Commentaries, Stewart's Edition (1841) Book 3, pp. 275-6, it is said that petition of right is of use where the Crown is in full possession of any hereditaments or chattels and the petitioner suggests such a right as controverting the title of the Crown. In the Province of British Columbia the proceeding is regulated by the Crown Procedure Act of 1897, chapter 57. An examination of this will, in their Lordships' opinion, show that procedure by petition of right is inapplicable. In that statute the "relief" is defined as a species of relief claimed or prayed for in any petition of right, whether a restitution of any corporal right or a return of lands or chattels or a payment of money or damages or otherwise, following the old principles by which a petition of right has always been regulated. Section 7 shows that where a petition of right is presented to recover real or personal estate or any right granted away or disposed of on behalf of His Majesty, a copy is to be left at the house of the person last in possession, showing that the main claim is against the Crown, that the person last in possession is not necessarily a proper party to the suit, but that, in order that he may be affected with knowledge, provision is made that he should be served in the manner indicated.

Now if the plaintiffs were to succeed in this case, no order would be made requiring the Crown to do any act at all. It is due to the peculiar circumstances in which the legislation relating to these lands stands that, if the Crown's grant to the respondents be void, the appellants' estate is complete. All that the Crown could do to perfect the appellants' title has already been done, and it is only through the indirect operation of the grant by the Crown to the settlers that any interest arises in the Crown at all. If the grant fail, the interest fails with it. It may indeed be open to argument that the reservations in favour of the Crown cannot be operative where the Crown has already made a grant from which such reservation would derogate. This question was not however raised before their Lordships and they express no opinion upon it.

There remains the consideration of the question upon which much learned argument has been addressed to their Lordships. It is asserted on behalf of the respondents that :—

> "There is no instance of any action in the Court of Chancery or any other Court, save the old Court of Exchequer, where the Crown represented by the Attorney-General has ever been defendant, except as a consequence of a petition of right after granting a fiat,"

and the jurisdiction of the Court of Exchequer is alleged to be due to the application of the statute of 33 Henry VIII, chapter 39.

Their Lordships cannot accept this contention. The reference to proceedings in Chancery under a fiat confuses two separate methods of procedure. It is, of course, true that proceedings in the Court of Chancery covering such a claim as would properly be the subject of petition of right cannot be brought except either by the direct medium of such proceedings or by first asking for a fiat that proceedings might be instituted in Chancery; and the case of *Ryves* v. *The Duke of Wellington* (9 Beavan, 579) is an illustration of this fact.

But there are many cases in which petition of right is not applicable in which the Crown was brought before the Court of Chancery, and the Attorney-General, as representing the interests of the Crown, made defendant to an action in which the interests of the Crown were concerned, apart altogether from the provisions of the statute of Henry VIII. One of the earliest of such cases was *Pawlett* v. *The Attorney-General*, reported in Hardres' Reports, 465. In that case the plaintiff had executed a mortgage in favour of a mortgagee; the mortgagee had died, and his heir being attainted of high treason, the King had seized the lands. The plaintiff thereupon exhibited a bill against the King and the executor, seeking redemption of the mortgage, and the question that arose was whether he could have any remedy against the King for redemption. It was said that he could not, but that he must prefer a petition of grace and favour. It was decided by Lord Hale and Baron Atkins that the proceedings would lie, and though Lord Hale gave as one of his reasons the consideration of the statute of 33 Henry VIII, c. 39, Baron Atkins based his judgment on a far broader basis. It was

stated in the Report that he was strongly of opinion that the party ought in this case to be relieved against the King, because the King was the fountain and head of justice and equity and it was not to be presumed that he would be defective in either, and it would derogate from the King's honour to imagine that what is equity against a common person should not be equity against him—a ground of decision which has no relation whatever to the statute of 33 Henry VIII, but is based on general principles. In *Barclay* v. *Russell*, 3 Ves. jun. 431, the Attorney-General having been made a party to a suit, application was made before Lord Thurlow asking that he might be directed to appear. This, in accordance with practice, he declined to order; but his Lordship asked, when the Attorney-General on behalf of the Crown was a necessary defendant, whether he was served with a subpœna, pointing clearly to the view that the Attorney-General was regarded as being a proper party to proceedings in equity; and *Perkins* v. *Bradley*, 1 Hare, 219, is another instance of such a case. But it is unnecessary to pursue this matter, for in *Deare* v. *The Attorney-General*, 1 Y. & C. 197, a case on the Equity side of the Court of Exchequer, where a bill was brought to obtain discovery against the Attorney-General, the question was examined in some detail by Lord Lyndhurst, then Lord Chief Baron. He stated this: "I apprehend that the Crown always appears by the Attorney-General in a Court of Justice, especially in a Court of Equity, where the interest of the Crown is concerned. Therefore, a practice has arisen of filing a bill against the Attorney-General, or of making him a party to a bill, where the interest of the Crown is concerned." This statement, though made on the Equity side of the Court of Exchequer, is certainly not limited to the Chancery proceedings that were instituted in that Court; it is of wide and general application. It is in entire agreement with the principles enunciated by Baron Atkins in the earlier authority, and it is recognised as being the existing practice in Courts to-day.

It may be mentioned that in *The Duke of Bedford* v. *Ellis*, in [1899] 1 Ch. 494, where the Court of Appeal thought that the rights of the public were involved in the appeal, and that consequently the Crown ought to be represented, Judges of such wide experience as Lord Lindley and Lord Justice Rigby directed that the case should be amended by the addition of the Attorney-General as defendant. The House of Lords thought the amendment unnecessary, but no one questioned that if necessary it could be made. Apart also from statute, the Attorney-General is always added as defendant in Chancery proceedings where his presence is necessary on behalf of charities, and their Lordships have not heard of any objection having been taken at any time to his introduction as a defendant in suits so brought.

It does not follow from this that procedure by petition of right is in any way infringed. In proceedings for which a petition of right is the proper course, the Courts, as already pointed out, would undoubtedly decline to entertain an action brought against the Attorney-General in the ordinary way; and indeed it was this very practice that led to the dispute in the case of *Dyson* v.

The Attorney-General in [1911] 1 K.B. 410. In that case there was no defendant except the Attorney-General, and the claim was for nothing but the declaration that the plaintiff was under no obligation to comply with the provisions of a notice issued by the Commissioners of Inland Revenue on behalf of the Crown. It was there contended that the authorities referred to had no application except in cases in which the rights of the Crown are only incidentally concerned. In all cases where the rights of the Crown are the immediate and sole object of the suit, it was urged that the application must be by petition of right. The question now urged as to the jurisdiction in the Court of Exchequer was raised then before the Court of Appeal, but the Master of the Rolls points out at page 416 that the equity jurisdiction of the Court of Exchequer on the Revenue side had nothing peculiar as distinguished from the Court of Chancery. Their Lordships are of opinion that in making that statement the learned Master of the Rolls was perfectly accurate, and it is unnecessary to consider, and their Lordships pass no opinion upon, whether or no the case of *Dyson* v. *The Attorney-General* was in other respects properly decided.

Turning back once more to the present case, the claim sought is a declaration not against the Crown, but against grantees from the Crown. If the relief be granted and if the injunction sought be made, there will be nothing directing the Crown to do any act whatever. It is true that in these circumstances certain rights which the Crown possesses, if the grant be good, will be interfered with. But in order to see whether this involves a direct claim against the Crown, it is necessary to see how those rights arose. The position is certainly strange. The original grant by the Crown to the appellants is perfectly good and remains unassailed except to the extent to which it may be defeated by application made by the settlers. If such application be made and granted, there is then reserved to the Crown out of the grant certain powers and rights against the grantee which they would not otherwise possess. In the event of the grant being good, these rights arise; if the grant be bad, they fall with it. But the chief substance of the action is the declaration that the grant is void, and the other result is consequential upon that decree.

Their Lordships, therefore, think that the Crown is affected in this matter, so that the presence of the Attorney-General is proper and necessary for the determination of justice. The conclusion arrived at by their Lordships, though at variance with that of the Court of Appeal, does not, as it appears to them, conflict with the view entertained by the learned Judges of the law, but depends entirely on the interpretation which they place on the rights which the Crown possesses unless the grant is overthrown, and this consideration does not appear to have been present to those learned Judges' minds. In the result, therefore, they think these appeals succeed, and they will humbly advise His Majesty that the judgment of Macdonald, J., be restored, and that the costs of the appellants here and in the Court of Appeal be paid by the respondents.

In the Privy Council.

ESQUIMALT AND NANAIMO RAILWAY COMPANY

v.

CHARLES WILSON AND ANOTHER

AND

ESQUIMALT AND NANAIMO RAILWAY COMPANY

v.

ELIZABETH DUNLOP.

DELIVERED BY LORD BUCKMASTER.

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