THE CORPORATION OF THE CITY OF VANCOUVER (DEFENDANTS)... } APPELLANTS;

AND

THE CANADIAN PACIFIC RAILWAY COMPANY (PLAINTIFFS).. } RESPONDENTS.

1893
*Nov. 3.

1894
*Feb. 20.

ON APPEAL FROM THE SUPREME COURT OF BRITISH COLUMBIA.

44 *Vic. c.* 1, *sec.* 18—*Power of Canadian Pacific Railway Company to take and use foreshore*—49 *Vic. c.* 32, *(B.C.)*—*City of Vancouver—Right to extend streets to deep water—Crossing of railway—Jus publicum—Implied extinction by statute—Injunction.*

By 44 Vic. c. 1, section 18, the Canadian Pacific Railway Company "have the right to take, use and hold the beach and land below high water mark, in any stream, lake, navigable water, gulf or sea, in so far as the same shall be vested in the crown, and shall not be required by the crown, to such extent as shall be required by the company for its railway and other works as shall be exhibited by a map or plan thereof deposited in the office of the Minister of Railways."

By 50 & 51 Vic. c. 56, sec. 5 the location of the company's line of railway between Port Moody and the City of Westminster, including the foreshore of Burrard Inlet, at the foot of Gore Avenue, Vancouver City, was ratified and confirmed.

*PRESENT :—Sir Henry Strong C.J., and Fournier, Taschereau, Gwynne, Sedgewick and King JJ.

1893

THE CITY OF VANCOUVER v. THE CANADIAN PACIFIC RAILWAY COMPANY.

The act of incorporation of the City of Vancouver, 49 Vic. c. 32, sec. 213 (B.C.) vests in the city all streets, highways, &c., and in 1892 the city began the construction of works extending from the foot of Gore Avenue, with the avowed object to cross the railroad track at a level and obtain access to the harbour at deep water.

On an application by the Railway Company for an injunction to restrain the city corporation from proceeding with their work of construction and crossing the railway:

Held, affirming the judgment of the court below, that as the foreshore forms part of the land required by the railway company, as shown on the plan deposited in the office of the Minister of Railways, the *jus publicum* to get access to and from the water at the foot of Gore Avenue is subordinate to the rights given to the railroad company by the statute (44 Vic. c. 1, sec. 18 *a*) on the said foreshore, and therefore the injunction was properly granted.

APPEAL from a judgment of the Supreme Court of British Columbia (1), overruling the judgment of McCreight J. which had dissolved an injunction and dismissed the plaintiffs' action.

This was an action brought by the plaintiffs praying that the defendants should be ordered to remove an embankment that had been erected by them on the foreshore of Burrard Inlet, the said embankment having been erected to enable the defendants to have access to the waters of Burrard Inlet from a street of the city known as Gore Avenue, and further to restrain the defendants, their servants, agents or employees, from repeating the said offence, and that the defendants, the city, should pay damages for having erected the said embankment.

This action came on to be heard before His Lordship Mr. Justice McCreight, at the city of New Westminster, on the 6th and 12th days of July, 1892, and judgment was given by the said Mr. Justice McCreight on the 19th day of July, 1892, in favour of the defendants. From this judgment the plaintiffs appealed to the full court of British Columbia, which pronounced judg-

(1) 2 B.C.R. 306.

ment on the 12th day of December, 1892, allowing the appeal, with costs of both courts, and granting a mandatory injunction ordering that the defendants be restrained from permitting the said embankment to remain and to remove the same, and perpetually restraining the defendants from committing any trespass upon the said portion of the foreshore of the beach of Burrard Inlet, described in the pleadings in the said action, and that the defendants pay the plaintiffs one dollar as nominal damages.

The material facts and pleadings are fully stated in the report of the case in the second volume of the British Columbia Reports, p. 306, and in the judgments hereinafter given.

Dalton McCarthy Q.C., and *Hammersley*, for the appellants.

The language of section 18a of the schedule A. 42 Vic. cap. 14, Stat. of Canada, does not warrant the construction the plaintiffs seek to place upon it that it grants a title in fee simple or an exclusive right to use the foreshore, but on the other hand the section, as the defendants contend, only gives a right of way or right to use the foreshore to such an extent as may be absolutely required by the Railway Company and "in so far as the same is vested in the crown," that is subject always to the *jus publicum* of navigation and access to the water of the sea, and the proper use of the foreshore at the ends of the streets of the defendant city, otherwise it would be *ultra vires*.

The true meaning of an act of the legislature is to be found not only from the words of the act, but from the cause and necessity of its being made, from a comparison of the several parts and from extraneous circumstances.

1893

THE CITY OF VANCOUVER v. THE CANADIAN PACIFIC RAILWAY COMPANY.

Maxwell on Statutes (1); *Walsh* v. *Trevanion* (2); *Holliday* v. *Overton* (3).

We would also call attention to the fact that where specific grants by way of aid are made to the plaintiffs in other clauses of the act provision is made for the granting of title deeds to the plaintiffs therefor, but there is no such provision here, which goes to prove that the intention of the legislature was merely to grant to the plaintiffs a right of way over the foreshore for their line of railway, not a fee simple or exclusive right.

The test of the plaintiffs' ownership lies in the question whether they have the right to convey or alienate any portion of the foreshore if they should so desire, and it is submitted that the said subsection 18a of their act has not granted them such property in the said lands, for on the authority of *Hewlins* v. *Shippam* (4), a freehold interest cannot be created or passed other than by deed, and there is no language in the act which can justify any interference with the *jus publicum*.

By the act of 1881 incorporating the Canadian Pacific Railway Company and authorizing the construction thereof and of which act the schedule A, clause 18, is a part under which the plaintiffs base their claim in this action, authority was only given to the company to construct their line as far as Port Moody in the province of British Columbia and not further. The company took the foreshore of Burrard Inlet as shewn by the plaintiffs under the powers of the said 18th section, but as to any portion of the line of railway authorized to be constructed by the act containing said section it is submitted that the powers contained

(1) 2 ed. pp. 28, 95, 230, 346, 359 and cases there cited.
(2) 19 L. J. (Q. B.) 458.
(3) 15 Beav. 480.
(4) 5 B. & C. 221.

in the 18th section must be limited, at all events, to the line of railway authorized by that act to be constructed and not to any branch line or lines that might be constructed by the company at any subsequent period and not contemplated by the legislature when the act was passed and the powers conferred.

Clause 5 of the Canadian Pacific Railway company Act, 1887, does not grant the company any further powers beyond confirming the location of the branch line from Port Moody to the City of Vancouver.

We also contend that the map deposited by the company under section 18 subsection A of the company's incorporation act, shewing the foreshore of Burrard Inlet as taken by the company, was deposited in 1886 and was not contemplated or sanctioned by the legislature when the said act became law.

The wording of the subsection A itself shows that the right granted to the Railway Company is not an exclusive right, but only to such an extent as shall be required by the company for its railways and the evidence shows that is now held by the Railway Company to the extent it is required and the user by the defendants would not interfere with the use by the Railway Company.

Moreover the defendants by erecting the embankment in no way interfered with the using of the foreshore by the Railway Company, and the use of the foreshore over the embankment by the defendants was quite consistent with the use of the foreshore by the Railway Company under the act in the same manner as the use by the defendants of any street crossing the railway is consistent with the use by the plaintiffs of the railway crossing the street.

If it is held that the Dominion Government granted the Canadian Pacific Railway Co. such an exclusive right, as held by the full court of British Columbia in

1893

THE CITY OF VANCOUVER v. THE CANADIAN PACIFIC RAILWAY COMPANY.

the judgment of the chief justice, is it such a grant as the Dominion Government could make and is it a valid exercise of legislative power consistent with the trust to the public upon which the foreshore is held by the Government ?

See *Illinois Central Railway Co.* v. *State of Illinois* (1); Moore's Law of Foreshore (2).

If the crown had intended to grant to the company the exclusive right to use the foreshore and hold it as against all other rights that might exist at common law the language of the section granting that right would have been more explicit. See judgment in *Arthur* v. *Bokenham* (3).

The general rule is, that in all doubtful matters and where the expression is in general terms, the words are to receive such a construction as may be agreeable to the rules of common law.

See Hardcastle on Statutes (4); *The Queen* v. *Scott* (5); *The Queen* v. *Morris* (6); *Galloway* v. *Mayor of London* (7).

The rights of the public to approach and use the foreshore by the street so established is clearly sustained by the following authorities: *Pion* v. *The North Shore Railway* (8); *The Queen* v. *Buffalo & Lake Huron Railway Co.* (9); *Lyon* v. *Fishmonger's Co.* (10); and the authorities collected and discussed in these cases.

See also *Wood* v. *Esson* (11); *Warin* v. *London & Canadian Loan Co.* (12)

The rights of the public were vested in the appellant corporation and could be enforced by them;

(1) 13 S. Ct. 110; 146 U. S. R. 387.
(2) 3 ed., pp. 444-445.
(3) 11 Mod. 150.
(4) 2 ed. pp. 292, 294, 322.
(5) 25 L. J. (M. C.) 133.
(6) L. R. 1 C. C. R. 90, 95.
(7) L. R. 1 H. L. 34.
(8) 14 Can. S. C. R. 677, affirmed 14 App. Cas. 612.
(9) 23 U. C. Q. B. 208.
(10) 1 App. Cas. 662.
(11) 9 Can. S. R. C. 239.
(12) 7 O. R. 706.

Fenelon Falls v. *Victoria Railway Co.* (1); but as they are not here as plaintiffs the absence of the Attorney General to the record cannot be set up by the respondents.

The learned counsel also cited and referred to *Standly* v. *Perry*. (2); *Yarmouth* v. *Simmons* (3); *Orr Ewing* v. *Colquhoun* (4); *Badger* v. *The South Yorkshire Railway, &c., Navigation Co.* (5); *Gann* v. *Freefishers of Whitestable* (6); *St. Mary, Newington* v. *Jacobs* (7); and Moore's Law of Foreshore (8).

See also argument of counsel in court below as to dedication of the land to appellants (9).

Christopher Robinson Q.C. for respondents:

The respondents contend that the judgment of the full court is right and should be supported.

The respondents under their charter had the right to extend their line from Port Moody to English Bay. *Canadian Pacific Railway Company* v. *Major* (10).

The location of the branch lines of the respondents between Port Moody and the city of New Westminster and between Port Moody and the city of Vancouver was ratified and confirmed by the Parliament of Canada. (50 & 51 Vic., ch. 56, sec. 55.).

The foreshore of the harbour was, previous to 1881, vested in the Dominion Government. *Holman* v. *Green* (11); *The Queddy River Driving Boom Co.*, v. *Davidson* (12); followed on the 10th day of November, 1891, by Hon. Mr. Justice Drake in *Canadian Pacific Railway Company* v. *Vernon*.

See *Sydney & Louisburg Coal & Railway Company* v. *Sword* (13).

(1) 29 Grant 4.
(2) 3 Can. S. C. R. 356.
(3) 10 Ch. D. 518.
(4) 2 App. Cas. 839.
(5) 28 L. J. (Q. B.) 118.
(6) 35 L. J. (C. P.) 29.
(7) L. R. 7 Q. B. 47.
(8) Pp. 669, 770.
(9) 2 B. C. R. 315.
(10) 13 Can. S. C. R. 233.
(11) 6 Can. S. C. R. 707.
(12) 10 Can. S. C. R. 222.
(13) 21 Can. S. C. R. 152.

1893

THE CITY OF VANCOUVER v. THE CANADIAN PACIFIC RAILWAY COMPANY.

By subsection (*a*) of section 18 of the act of incorporation (44 Vic. ch 1 Dominion Statutes) "The company shall have the right to take, use and hold the beach and land below high water mark, in any stream, lake, navigable water, gulf or sea, in so far as the same shall be vested in the crown and shall not be required by the crown, to such extent as shall be required by the company for its railway and other works, and as shall be exhibited by a map or plan thereof deposited in the office of the Minister of Railways."

Under this clause the respondents submit they are entitled to the exclusive right to the foreshore of the whole of Coal Harbour including that portion in front of Gore Avenue.

"'Take' may mean actual taking, that is taking possession of, or it may mean acquiring a title. In the Land Clauses act it is generally used in the latter sense of acquiring title, that is a complete title, though it is occasionally there used in the former sense;" per Jessel M. R., in *Spencer* v. *Metropolitan Board of Works* (1) and also remarks of Lord Justice Bowen (2).

Coal Harbour was a public harbour within the meaning of the words "public harbour" in the third schedule of the British North America Act.

The land in question is not required by the crown. The assent of the crown is presumed from user. *Attorney-General* v. *Midland Railway Company* (3).

Registration of a plan does not constitute a dedication of the lands thereon to the public. In *re Morton and the Corporation of the City of St. Thomas* (4).

The learned judge at the trial was in error in assuming that the deposit of the railway plan without any

(1) 22 Ch. D. 163.
(2) Pp. 172 173.
(3) 3 O. R. 511.
(4) 6 Ont. App. R. 323.

evidence as to the act of dedication operated as a dedication.

Dedication is a question of fact, and in order to dedicate the fee must be vested in the owner of the soil. See *Dovaston* v. *Payne*, (1); Woolrych on Waters (2); *Wood* v. *Veal* (3); Angell on Highways (4); *Harrison* v. *Duke of Rutland* (5); *Moubray Rowan & Hicks* v. *Drew* (6); *Poole* v. *Huskinson* (7); *Spedding* v. *Fitzpatrick* (8).

The respondents have no power to alienate the foreshore inasmuch as they have the right to take, use and hold the beach and land to such extent as shall be required by the company for its proposed railway and other works, and for no other purpose.

A railway cannot grant a right of way over land required by the company. *Mulliner* v. *Midland Railway Company* (9); *Pratt* v. *Grand Trunk Railway* (10); *Corporation of Welland* v. *Buffalo & Lake Huron Railway Company* (11).

The common law right of the inhabitants of the city of Vancouver to pass over the foreshore was of a very limited nature. *Blundell* v. *Catterall* (12).

Under any circumstances the respondents submit that the appellants have no right to place an embankment on the foreshore, which is a superstructure. Per Bayley, J. in *Blundell* v. *Catterall* (12).

Places where the public can go on the beach can only be established by the crown; per Abbott, C.J., in *Blundell* v. *Catterall* (12).

No right to cross the railway with a street can be obtained without application to the Railway Committee

(1) 2 Sm. L. C. 9 ed. 154.
(2) 2 ed. p. 15.
(3) 5 B. & Ald. 454.
(4) 2 ed. ss. 132-134.
(5) 9 Times L. R. 115.
(6) [1893] A. C. 301.
(7) 11 M. & W. 827.
(8) 38 Ch. D. 410.
(9) 11 Ch. D. 611.
(10) 8 O. R. 499.
(11) 31 U. C. Q. B. 539.
(12) 5 B. & Ald. 268.

1893

THE CITY OF VANCOUVER v. THE CANADIAN PACIFIC RAILWAY COMPANY.

of the Privy Council of Canada; 51 Vic. cap. 29, sec. 11 (Dom). By sec. 14 the company have the option of making the street authorized by the committee.

The appellants have not applied to the Minister of Public Works nor obtained the approval of the Governor General in Council under Dominion Act, cap. 92, R.S.C. sec. 5, to construct their works in the harbour. See also sec. 57.

McCarthy Q.C. in reply referred to *Mulliner* v. *Midland Railway Co.*(1); *Rankin* v. *Great Western Railway Co.*(2).

THE CHIEF JUSTICE,—I am of opinion that this appeal should be dismissed with costs for the reasons given in the judgment of Mr. Justice Gwynne.

FOURNIER J.—I am of opinion that the appeal should be dismissed with costs for the reasons given in the judgment of Mr. Justice King.

TASCHEREAU J.—I think that Chief Justice Sir M. Begbie's reasoning in the court below is unanswerable. I would dismiss the appeal.

GWYNNE J.—The question in controversy in this appeal is whether or not the appellants have the right of extending a street in the city of Vancouver over a portion of the sea beach lying between the extreme limit of the said street and the Canadian Pacific Railway which has been constructed on the beach below high water mark opposite to the said street, and so of obtaining access to the waters of the harbour of Vancouver in Burrard's inlet, a portion of the sea there, which access between the said street and Burrard's inlet has been cut off by the Canadian Pacific Railway as there constructed. The appellants' contention is that

(1) 11 Ch. D. 611. (2) 4 U.C.C.P. 463.

the railway as constructed there is a public nuisance, and that being so the appellants, as being seized of the soil and freehold of the said street, have, in the interest of the public, a right to abate such nuisance by constructing an embankment from the terminus of the street to and over the railway and to construct a way from the other side of the railway down to the waters of Burrard's inlet and to construct a landing stage there. This contention raises two questions. 1st. Is the railway as constructed a public nuisance? And 2nd. Assuming it to be so, have the appellants the right contended for by them, and which they have asserted by proceeding to make as and for a public highway the structure necessary to provide access from the street across the railway to the sea, and so to extend the said street?

By sec. 17 of the Canadian Pacific Railway Act, 44 Vic. ch. 1, it is enacted that:—

17. The Consolidated Railway Act of 1879 in so far as the provisions of the same are applicable to the undertaking authorized by the charter, in so far as they are not inconsistent with, or contrary to, the provisions hereof, and save and except as hereinafter provided is hereby incorporated herewith.

And by sec. 18 it is among other things enacted that:—

18. As respects the said railway the seventh section of the Consolidated Railway Act 1879 relating to powers and the eighth section thereof relating to plans and surveys shall be subject to the following provisions:—

a. The company shall have the right to take, use and hold the beach and land below high water mark in any stream, lake, navigable water gulf or sea in so far as the same shall be vested in the Crown, and shall not be required by the Crown, to such extent as shall be required by the company for the railway and other works and as shall be exhibited by a map or plan thereof deposited in the office of the Minister of Railways; but the provisions of this section shall not apply to any beach or land lying east of Lake Nipissing except with the approval of the Governor in Council.

1894

THE CITY OF VANCOUVER v. THE CANADIAN PACIFIC RAILWAY COMPANY.

Gwynne J.

The object of this section plainly was, as it appears to me, to give to the company incorporated for the construction of this great public national work extending over the continent, and which for nine-tenths of the length of the proposed work was as yet wholly unsettled, much greater powers and privileges than were given to the railway companies of purely commercial character constructed under the provisions of the Railway Act of 1879, which, enlarged as it was by the provisions of 44 Vic. ch. 1, was made applicable to the Canadian Pacific Railway.

By the Railway Act of 1879, sec. 7, subsec. 3, railway companies with whose act of incorporation the said act was incorporated were only empowered, with the consent of the Governor in Council, but not without such consent, to take, use and appropriate for the use of their railway and works so much of the public beach, or of land covered with the waters of any lake, river, stream or canal, or of their respective beds, as might be necessary for completing and using their railway, subject to certain exceptions therein contained. And by sec. 9, subsec. 2, they were restrained from taking any greater extent of any public beach or of land covered with the waters of any lake, etc., etc., than thirty-three yards in width, except in places where the railway is raised more than five feet higher, or cut more than five feet deeper, than the surface of the line, or where offsets are established, or where stations, depots or fixtures are intended to be erected, or goods to be delivered, and there not more than two hundred and fifty yards in length by one hundred and fifty yards in breadth. Whereas, as we have seen, the Canadian Pacific Railway Company are empowered, without the consent of the Governor in Council, to take, use and hold any beach or land below high water mark in any stream, lake, navigable water, gulf or sea west of Lake Nipis-

sing, in so far as the same is vested in, and not required by, the crown, to such extent as shall be required by the company for their railway and other works, and as shall be exhibited on a map or plan thereof deposited in the office of the Minister of Railways. By these words in sec. 18 of 44 Vic., ch. 1, "in so far as the same shall be vested in the crown, and shall not be required by the crown," it has been argued on behalf of the appellants that all which the statute effected was to vest in the railway company only such estate and interest in the public beach or land covered with the waters of the sea as the crown could grant to a subject, that is to say, subject to the public right of navigation on the sea, and to free access to the public from the land to the sea for that purpose, and that therefore it was incumbent upon the railway company so to construct their railway on the beach in front of the street in question as to leave free access to the public from the street to the sea, under the railway. Such a construction would make the powers conferred on the Canadian Pacific Railway Company more restricted instead of more extensive than those conferred on other railway companies by the act of 1879, which, when the consent of the Governor in Council is obtained to the companies acquiring the public property required by them, reserves no right of the public therein; moreover, such a construction would not only be more restricted than is the act of 1879, as affects the public beach, but would render the Canadian Pacific Railway act almost wholly inoperative in so far as relates to the construction of the railway upon any beach or land below high water mark in any stream, lake, navigable water, gulf or sea, for if the railway could only be so constructed as not to interfere with the free access for the public from the street in question, under the railway, to the sea it must needs be

1894

THE CITY OF VANCOUVER v. THE CANADIAN PACIFIC RAILWAY COMPANY.

Gwynne J.

so constructed in like manner opposite all lands fronting on the beach or sea shore. The true construction, however, of the section appears to me to be that the railway company may take, use and hold to such extent as may be required by them, and as shall be exhibited on a map or plan by them deposited in the office of the Minister of Railways, any beach and any land below highwater mark in any stream, lake, navigable water, gulf or sea, west of Lake Nipissing, which is vested in and not required by the crown, the object of the section being to provide for the company's acquiring to their own absolute use so much of such lands as should be required by the company for their railway and other works as are still vested in, and not required by, the crown, excluding in this manner from the operation of the section all such land of the description stated as having been vested in the crown had been granted already by the crown, and leaving the company as to such land or land covered with water, &c, to deal with the grantees thereof, as to their property therein, under the provisions of the act as to the taking possession of, and holding to their own use, property vested in others than the crown.

Now, in or prior to the year 1885, the Canadian Pacific Railway Company acquired a large tract of land consisting of parts of lots nos. 181 and 196 in group no. one of the Westminster District of the Province of British Columbia, with a view of laying out a town site thereon which should form the terminus of their railway on the coast of the Pacific Ocean, and in 1885 they caused the site of a town to be surveyed and laid down thereon, which they designed to call Vancouver, and upon the 30th day of November, in that year, they deposited pursuant to the provisions of a statute of British Columbia a map and plan of the said town site, in the district land Registry Office, upon which map

and plan was delineated a certain street called Gore avenue, terminating on the edge of the beach or sea shore, at or above the highwater mark of the Harbour of Vancouver, in Burrard's Inlet, an arm of the Pacific Ocean. Upon the 6th of April, 1886, an act was passed by the legislature of British Columbia, intituled: "An Act to incorporate the City of Vancouver", whereby the inhabitants of the land therein described as the City of Vancouver were incorporated as a municipal corporation. The land so described as and for the City of Vancouver included within its boundaries the land surveyed, laid out and registered by the Railway Company as the said town site. By the 213th section of the above act it is enacted that every public street, road, square, lane, bridge or other highway in the city should be vested in the city (that is in the city corporation), subject to any right in the soil which the individuals who laid out such road, street, bridge or highway should reserve, and that such road, street, bridge or highway should not be interfered with in any manner whatever by excavation or otherwise by any company or by any person whomsoever, except upon application to, and permission given by, the city engineer in writing.

No right was reserved by the railway company over Gore avenue or in the soil thereof or over or in any other of the streets laid down on the town site, the map and plan of which was so registered as aforesaid, and so it is contended by the appellants and not disputed by the company that the municipal corporation of the city of Vancouver are seized in fee of the soil of the said street called Gore avenue subject to the trust of using and suffering to be used and maintaining the same as and for a public street in the said city of Vancouver.

Upon the 12th of May, 1886, the company deposited in the office of the Minister of Railways, as required by

1894

THE CITY OF VANCOUVER v. THE CANADIAN PACIFIC RAILWAY COMPANY.

Gwynne J.

the said 18th section of their act of incorporation, a plan which showed the location of their railway as proposed to be constructed by them on the beach and foreshore of Burrard's inlet in front of the said city of Vancouver, and they subsequently constructed their railway upon the said beach and foreshore by a continuous solid embankment of about 50 feet in width at the base and about 20 feet in width on the top, which is about 12 or 14 feet in perpendicular height above the beach. Between this embankment and the extreme limit of Gore avenue there is a space of 41 feet and 6 inches. This space the company have ever since the construction of their railway there kept enclosed by a fence running along the extreme limit of Gore avenue and for some distance on either side of Gore avenue, and such space was so enclosed as part of the beach and foreshore taken and required by the company for their railway there.

After the construction of their said railway in manner aforesaid and after the establishment of their terminus upon the coast of the Pacific Ocean at the said city of Vancouver, an act was passed by the Canadian Parliament on the 23rd of June, 1887, intituled "An act further to amend the act respecting the Canadian Pacific Railway Company" whereby, after reciting that the Canadian Pacific Railway Company had by petition represented among other things :—

> That under the powers already possessed by the company it has constructed branch lines to the city of Vancouver and to the city of New Westminster, and desires to have the location thereof confirmed, and that it is expedient to grant the prayer of the said petition

it was among other things enacted that :—

> The location of the branch lines of the company between Port Moody and the city of New Westminster and between Port Moody and the city of Vancouver is hereby ratified and confirmed, and the lien and charge created by the mortgage bonds of the company and by the deed of mortgage securing the same under the provisions of the

act passed in the session held in the forty-eighth and forty-ninth years of Her Majesty's reign ch. 57 shall extend to and attach upon the said last mentioned branch of the company's railway.

It was contended for the appellants that the object of this enactment was merely to make the said branch railway subject, like the main railway, to the recited mortgage bonds and mortgage; but, granting that this may have been the motive for enacting the clause in question, it cannot be doubted that the location of the railway, so made subject to the mortgage, is expressly ratified and confirmed as constructed, so that if there had been any doubt as to the legality of the mode of construction on the beach opposite Gore Avenue such doubt is effectually removed. It is admitted that the appellants are not entitled, in virtue of their seisin of the soil of the street, to claim compensation as for lands injuriously affected by the construction of the railway; doubtless they are not. The cases of *Rose* v. *Groves* (1); *Eastern Counties Railway Co.* v. *Dorling* (2); *Attorney-General* v. *Conservators of the Thames* (3); *Lyon* v. *Fishmongers' Co.* (4); *Attorney-General of Straits Settlements* v. *Wemyss* (5); and *North Shore Railway Co.* v. *Pion* (6); conclusively show such a right to be a private right of the proprietors of land abutting on tidal or navigable rivers and the sea shore, and as the corporation of the city of Vancouver only claim to be seised of the soil of the street upon trust to use it, and to permit it to be used, by the public as a street or highway, which right is unaffected by the construction of the railway on the beach, they have no private right affected which can give them any claim for compensation as for lands injuriously affected, and if they had, such claim could only be asserted in the manner provided by the statute. The corporation of the city of Vancouver, that is to say, the

(1) 5 M. & G. 613.
(2) 5 C.B.N.S. 821.
(3) 1 H. & M. 1.
(4) 1 App. Cas. 662.
(5) 13 App. Cas. 192.
(6) 14 App. Cas. 612.

1894

THE CITY OF VANCOUVER v. THE CANADIAN PACIFIC RAILWAY COMPANY.

Gwynne J.

inhabitants of the city, have no more right to complain of their access with the sea from Gore Avenue having been cut off by the railway as constructed on the beach there, than any other member of the public desirous of having such access.

It was further contended for the appellants that an act of parliament could not take away a public right of access from the shore to the sea unless by suitable express words. This point was raised in *Corporation of Yarmouth* v. *Simmons* (1) and was held not to be maintainable.

It was likewise contended that the public had a right of access from Gore Avenue across the beach to the sea; that point was also raised in the same case, where it was contended on the one side, and denied on the other, that the right of the public to get from the end of a street on to the shingle on the sea shore was a right appertaining to Her Majesty in right of her crown, and that the crown could not deprive the public of such right. The point, however, was not decided in that case, because it was agreed that another question should be first argued and determined, and it having been determined concluded the case. However, it may be here observed that in *Blundell* v. *Catterall* (2), Holroyd J. says:—

> The public common law rights with respect to the sea, &c., independently of usage, are rights upon the water, not upon the land, of passage and fishing on the sea, and on the sea shore when covered with water; and though, as incident thereto, the public must have the means of getting to the water for those purposes, yet it will appear that it is by and from such places only as necessity or usage have appropriated to those purposes, and not a general right of lading, unlading, landing, or embarking where they please upon the sea shore or the land adjoining thereto except in case of peril or necessity.

And Abbott C. J. at p. 311, says:—

(1) 10 Ch. D. 518. (2) 5 B. & Ald. 301.

1894

THE CITY OF VANCOUVER v. THE CANADIAN PACIFIC RAILWAY COMPANY.

Gwynne J.

As the waters of the sea are open to the use of all persons for all lawful purposes it has been contended, as a general proposition, that there must be an equally universal right of access to them for all such purposes over land like the present. If this could be established the defendant must undoubtedly prevail. But in my opinion there is no sufficient ground either in authority or in reason to support this general proposition.

And then he proceeds to give his reason for his conclusion that such proposition cannot be maintained. It cannot, however, be disputed that Parliament can extinguish such right of the public, if any such existed, and that Parliament has done so in the present case cannot in my opinion admit of a doubt. But assuming the public to have the right contended for, no authority has been cited which warrants the corporation of the city of Vancouver in assuming to represent the public and to redress the public injury complained of by erecting the structure at the beach and across the railway which the corporation have proceeded to construct; the case of *Fenelon Falls* v. *Victoria Railway Company* (1) was cited for the purpose, but that was a wholly different case from the present, and is not at all an authority in support of the contention of the appellants; it was a case of wrongful acts committed by a railway company upon the soil of a street vested in the corporation, in short the common case of trespass upon the soil of the street of which the corporation were seised.

For the above reasons I am of opinion that the appeal must be dismissed with costs.

SEDGEWICK J.—Concurred.

KING J.—This is an appeal from a judgment of the Supreme Court of British Columbia restraining the city of Vancouver from interfering with land held by the Canadian Pacific Railway Company.

(1) 29 Gr. 4.

1894

THE CITY OF VANCOUVER v. THE CANADIAN PACIFIC RAILWAY COMPANY.

King J.

The line of the Canadian Pacific Railway runs east and west along the foreshore in front of the city of Vancouver at or near the foot of Gore Avenue. The track is carried upon a solid embankment about 12 feet in height, and the site of it is about half way between high and low water mark.

The city corporation began the construction of a stone and earth embankment extending in a line from the foot of Gore Avenue across the intervening piece of foreshore to the railroad track, the outer end of such embankment resting upon the slope of the railroad embankment. The avowed object of the city corporation was to cross the railroad track at a level and obtain access to the harbour at deep water, and with this view they proposed to raise the embankment to the level of the railroad track and then continue it down the foreshore to low water mark.

The waters in front of Vancouver were part of Burrard Inlet, and the part directly in front was known as Coal Harbour. This harbour was accustomed to be frequented by vessels before the incorporation of the railroad company or of the city of Vancouver. Being a public harbour the foreshore vested in the Queen in right of the Dominion. *Holman* v. *Green* (1).

The Canadian Pacific Railway Company was incorporated by 44 Vic. ch. 1, 1881. By section 18*a* it was enacted that the company should have the right to take, use and hold the beach and land below highwater mark in any stream, lake, navigable water, gulf or sea, in so far as the same shall be vested in the crown and shall not be required by the crown, to such extent as shall be required by the company for its railway and other works and as shall be exhibited by a map or plan thereof deposited in the office of the Minister of Railways.

(1) 6 Can. S. C. R. 707.

1894

THE CITY OF VANCOUVER v. THE CANADIAN PACIFIC RAILWAY COMPANY.

King J.

The act of incorporation provided for the construction of the line to Port Moody, B. C., as a terminus, but it also, as was held in *Canadian Pacific Railway Co.* v. *Major*, (1) empowered the company to extend their line from Port Moody to Coal Harbour and English Bay.

In March, 1886, the company deposited in the office of the Minister of Railways a map or plan certified as showing the "lands required for right of way, Burrard Inlet, B. C." On this was exhibited the mainland and the foreshore at the foot of Gore Avenue and for some distance east and west of it. A portion of the mainland fronting on the water, both to the east and west of Gore Avenue (but not including Gore Avenue itself), was tinted yellow on the plan, as indicating that it was vested in the Canadian Pacific Railway Company. A tract coloured pink was shown extending along the harbour front and including all the foreshore out to deep water, but this is not now material. A red line running along and upon the foreshore indicated the centre of the railroad track. Although there is no note explanatory of it the part coloured pink evidently represents lands held by the crown, which the company proposed to take, use and hold for the purposes of its railroad and other works, and covers the land in question.

By 51 Vic. ch. 6 sec. 5 the location of the branch between Port Moody and Vancouver was ratified and confirmed; this, at least, went to confirm to the company the right to take, use and hold the land then in fact taken, held and used, in the sense in which subsection *a* of section 18 of the act of incorporation authorized a taking, using and holding.

What then is the meaning of such subsection? The appellant contends that the words "in so far as the

(1) 13 Can. S. C. R. 233.

1894

THE CITY OF VANCOUVER v. THE CANADIAN PACIFIC RAILWAY COMPANY.

King J.

same shall be vested in the crown" excludes the right of interference with the *jus publicum*; that the crown having no right, of itself, to grant to a subject the foreshore freed from the public right of navigation there is a saving of such right. I think, however, that these words refer to the title of the crown in the lands as such. The term "vested" denotes title. If the lands remained in the crown and were not required by the crown the company were empowered to take them "to such extent as shall be required by the company for its railway and other work," the company exhibiting the extent of their requirements by a map or plan thereof deposited in the office of the Minister of Railways and Canals. If the contention of the appellant as to this is correct the company could not build on the foreshore at all, because this would necessarily take away public rights of fishing there.

At the same time I think that whether or not the public right is extinguished is a matter of construction, even though it may not be intended to be saved by the clause already referred to.

The public right is not to be taken away to a greater extent than is rendered necessary by what the act authorizes. In *Yarmouth* v. *Simmons* (1), and *Standly* v. *Perry* (2), it was held that a public right of way may be extinguished by statute by implication if the implication is a necessary one. These were both cases of the interruption of travel from the foot of a public highway to the shore of navigable waters through the construction of a pier. In the latter case the present Chief Justice of Canada says:—

> It is argued that the act did not confer power to erect the harbour works so as to intercept the passage from the end of a public highway to the waters of the lake. The answer to this is to be found in the original statute which authorizes the selection of any site at

(1) 10 Ch. D. 518. (2) 3 Can. S. C. R. 356.

Cobourg, without exception of streets, for works which are to be the private property of the company.

In the former case Fry J. says (1):

> The result of the construction of the pier was this, that, whereas persons had been in the habit of getting from the sea-wall at the end of Bank Street on to the shingle, there was now to be placed, on the very space through which every person so doing had to pass, a permanent structure of planks through which persons could not pass. There was a physical impossibility in persons who had exercised the alleged right continuing to exercise it in the manner in which they had previously done. The exercise of the right and the existence of the pier were absolutely inconsistent.

There was a clause in the General Harbours Act that nothing in the act should abrogate or prejudice any estate, right, title, interest, prerogative, royalty, jurisdiction or authority of or pertaining to Her Majesty in right of her crown. Assuming the statute to be applicable it was held that the rights referred to in that section were rights of property, or rights in the nature of property, belonging to the crown as crown property. It is true that the act authorized the pier owners to take toll from every one, but this was relied on only to rebut the contention that the act had given a substituted right of way.

The principle of the judgment (as also the principle of *Standly* v. *Perry*) (2) is that:

> Where the legislature clearly and distinctly authorizes the doing of a thing which is physically inconsistent with the continuance of an existing right the right is gone, because the thing cannot be done without abrogating the right.

And that is the principle that I conceive is to be applied here. The *jus publicum* is to be subordinated to the rights given to the railroad company by statute, so far, and only so far, as there is a physical inconsistency between the maintenance of the *jus publicum* and the doing of the thing which the legislature has authorized to be done. Now, what was being authorized

(1) P. 526. (2) 3 Can. S. C. R. 356.

1894

THE CITY OF VANCOUVER v. THE CANADIAN PACIFIC RAILWAY COMPANY.

King J.

was the construction of a line of railway with its incidental works. A line of railway upon low level (as the sea shore) is ordinarily built by solid embankment. The company was authorized to take and hold the foreshore, for the purpose of making their railway, and the natural and ordinary result of this would be to interfere with, and to some extent to extinguish, the public right of navigation. How could navigation be carried on where a line of railway was authorized to be constructed and operated? If it be said that the road might be built on trestles this would not save the right of navigation; and, besides, in a grant of power to be exercised over such great areas it is not reasonable to conclude that the company were to be bound to unusual modes of building. The contention of the appellant requires that no rod of foreshore shall be taken without the company being subject to the same obligation.

In saying this much I do not mean to say that the public rights of navigation are destroyed entirely. The public right of navigation involves the right to land and ship goods at places which law or usage points out for such purpose. This is a right which I think need not by necessary implication be deemed inconsistent with the rights given by statute to the railway company. It would, indeed, be wholly impracticable for the company usefully and beneficially to exercise their statutory privileges if the right of every riparian owner to get access to and from the water at his land is to be preserved. This would not be properly the exercise of public right of navigation as such, but rather something incidental to the exercise of the property right to get access to and from the property.

But the public right involved in the right of navigation of loading and unloading at recognized public places is a different matter, and I wish to guard against

saying anything against the right of the public to protect such right even in the face of the powers given by this act. That, however, is not the right attempted to be set up here. It does not sufficiently appear, that this was a public or necessary place of lading and unlading waterborne goods or of the embarking or disembarking of persons, and of thus carrying on navigation through or by means of it.

From the evidence it would appear as though it were proposed to make a new landing for the benefit of the city of Vancouver, and not to maintain the right to an accustomed public landing place established as such before the railroad company built their line. As expressed by the learned Chief Justice of British Columbia, the claim of the city of Vancouver involves the equal right of every owner on the foreshore to cross the line of the railroad at will and place embankments and other structures upon the soil which the legislature has authorized the railroad company to take, use and hold for the purpose of the railroad and its works. I think also that, except in cases of necessity, the public right is to be maintained and defended and protected by the Attorney-General for the crown. Therefore I think that the appeal should be dismissed.

Appeal dismissed with costs.

Solicitor for appellants : *A. St. G. Hamersley.*

Solicitor for respondents : *R. E. Jackson.*