IN THE MATTER OF a Reference by His Honour the Lieutenant Governor of the Province of British Columbia in Council to the Court of Appeal of Certain Questions Relative to the Esquimalt and Nanaimo Railway Company Land Grant from the Dominion of Canada on 21st April, 1887.

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*Feb. 9, 10, 11, 12, 13, 16

*June 25

ESQUIMALT AND NANAIMO RAILWAY COMPANY,

AND

ALPINE TIMBER COMPANY LTD.

AND

THE ATTORNEY - GENERAL OF CANADA .....

APPELLANTS;

AND

THE ATTORNEY - GENERAL OF BRITISH COLUMBIA .....

RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

Constitutional law—Statutory exemption from taxation—Parliamentary contract—Public statute—Severance tax—Levies—Indirect taxation—Interpretation Act, c. 2 of Consolidated Act, 1877, of B.C.—Forest Act, c. 102, R.S.B.C. 1936, s. 123, am. c. 29, Statutes of 1946—Constitutional Questions Determination Act, c. 50, R.S.B.C., 1936.

*PRESENT: Kerwin, Rand, Kellock, Estey and Locke JJ.

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By an Act relating to the Island Railway, the Graving Dock and Railway Lands of the Province, cap. 14, Statutes of British Columbia 1884, sec. 22, it was provided that:—"The lands to be acquired by the company from the Dominion Government for the construction of the railway shall not be subject to taxation unless and until the same are used by the company for other than railroad purposes or leased, occupied, sold or alienated."

Held: answering a question submitted by the Lieutenant-Governor in Council under the provisions of The Constitutional Questions Determination Act, cap. 50 R.S.B.C. 1936, and reversing the judgment of the Court of Appeal, that the Province of British Columbia was obligated by contract to exempt from taxation the lands acquired by the Esquimalt and Nanaimo Railway Company from the Dominion Government and remaining in its hands in the manner provided by the section.

Held: reversing the judgment of the Court of Appeal (except as to Question 4) the further questions submitted should be answered in the manner indicated in the Statement of Facts.

APPEAL from the decision of the Court of Appeal for British Columbia on certain questions relative to the Esquimalt and Nanaimo Railway Company Land Grant from the Dominion of Canada on 21st April, 1887, referred to the Court by His Honour the Lieutenant Governor of British Columbia.

By the Terms of Union which declared the conditions upon which the Colony of British Columbia became part of Canada, the Dominion undertook to secure the commencement within two years and the construction within ten years from the date of the Union of a railway to connect the Pacific sea board with the railway system of Canada. The province agreed to convey to the Dominion in trust, to be appropriated in such manner as the Dominion Government might deem advisable, in furtherance of the construction of the railway, an extent of public lands along the line of railway not to exceed twenty miles on each side of the said line. By Order-in-Council of June 7, 1873, the Dominion fixed Esquimalt as the terminus of the proposed railway, it being then contemplated that the line should cross to Vancouver Island at Seymour Narrows and proceed thence to Esquimalt. Later the Dominion determined that the terminus should be at a place upon Burrard Inlet. The Province contended that the Terms of Union required the construction of the railway on Vancouver Island as a section of the Canadian Pacific Railway but the Dominion

contended that the terminus on Burrard Inlet complied with the said Terms of Union. On August 20, 1883, an agreement was made, subject to the approval of Parliament and the Legislature, whereby Canada agreed to contribute a sum of $750,000 towards the cost of construction of a railroad between Esquimalt and Nanaimo and to convey to a company to be incorporated to construct the railway lands upon Vancouver Island lying between Esquimalt and Seymour Narrows, to be conveyed by the Province to the Dominion for that purpose. A draft of the Act to be passed by the Legislature approved by the representatives of the Dominion and the Province provided that:—

> the lands to be acquired by the company from the Dominion Government for the construction of the railway shall not be subject to taxation unless and until the same are used by the company for other than railroad purposes or leased, occupied, sold or alienated.

On the same date a memorandum of agreement was signed between the Dominion and Robert Dunsmuir et al as contractors for the construction of the railway, which was to bind the parties only upon the passage of the agreed legislation by the Dominion and the Province and which provided, inter alia, for the payment of the sum of $750,000 in instalments and the conveyance by the Dominion to the company to be formed of the lands received by it from the Province upon the completion of the railway. In December 1883 an Act in the form so agreed upon was passed by the Legislature (cap. 14, Statutes of B.C. 1884) which provided for the incorporation of such persons as might be nominated by the Governor General in Council as the Esquimalt and Nanaimo Railway Company and, by cap. 6, Statutes of Canada, 1884, the agreements were approved by the Dominion and thereafter Robert Dunsmuir and his associates were nominated by the Governor General in Council as the persons to be so incorporated. The company constructed the railroad in accordance with its contract and received from the Dominion a conveyance of the lands.

In consequence of a report made by the Chief Justice of British Columbia, acting as a Commissioner under the Public Inquiries Act of British Columbia appointed to inquire into the forest resources of the Province and the legislation relating thereto, and among other matters to

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inquire into and report upon "Forest Finance and Revenue to the Crown from Forest Resources", wherein the Commissioner expressed the opinion that there was no contract between the Province and the company which would be broken by the imposition of a severance tax upon timber cut upon the lands remaining in the hands of the railway company after such lands were sold or otherwise alienated, the Lieutenant-Governor in Council acting under the Constitutional Questions Determination Act (cap. 50, R.S.B.C. 1936) referred the following questions to the Court of Appeal for hearing and consideration:

Question 1. Was the said Commissioner right in his finding that "there never was any contractual relationship between the provincial government and the contractors or the Railway Company in relation to the transfer of the Railway Belt to the Railway Company?"

Question 2. If there was a contract, would any of the legislation herein outlined, if enacted, be a derogation from the provisions of the contract?

Question 3. Was the said Commissioner right in his finding that "There is no contract between the Province and the company," which would be breached by the imposition of the tax recommended by the Commissioner?

Question 4. Would a tax imposed by the Province on timber, as and when cut upon lands in the Island Railway Belt, the ownership of which is vested in a private individual or corporation, the tax being a fixed sum per thousand feet board measure in the timber cut, be ultra vires of the Province?

Question 5. Is it within the competence of the Legislature of British Columbia to enact a Statute for the imposition of a tax on land of the Island Railway Belt acquired in 1887 by the Esquimalt and Nanaimo Railway Company from Canada and containing provisions substantially as follows:—

(*a*) When land in the belt is used by the railway company for other than railroad purposes, or when it is leased, occupied, sold, or alienated, the owner thereof shall thereupon be taxed upon such land as and when merchantable timber is cut and severed from the land:

(*b*) The tax shall approximate the prevailing rates of royalty per thousand feet of merchantable timber:

(*c*) The owner shall be liable for payment of the tax:

(*d*) The tax until paid shall be a charge on the land.

Question 6. Is it within the competence of the Legislature of British Columbia to enact a Statute for the imposition of a tax on land of the Island Railway Belt acquired in 1887 by the Esquimalt and Nanaimo Railway Company from Canada and containing provisions substantially as follows:—

(*a*) The tax shall apply only to land in the belt when used by the railway company for other than railroad purposes, or when leased, occupied, sold, or alienated:

(*b*) When land in the belt is used by the railway company for other than railroad purposes, or when it is leased, occupied, sold, or alienated, it shall thereupon be assessed at its fair market value:

(*c*) The owner of such land shall be taxed on the land in a percentage of the assessed value, and the tax shall be a charge on the land:

(*d*) The time for payment of the tax shall be fixed as follows:

(i) Within a specified limited time after the assessment, with a discount if paid within the specified time;

(ii) Or at the election of the taxpayer made within a specified time after assessment, by paying each year on account of the tax a sum that bears the same ratio to the total tax as the value of the trees cut during that year bears to the assessed value of the land.

Question 7. Is the Esquimalt and Nanaimo Railway liable to the tax (so-called) for forest protection imposed by section 123 of the "Forest Act," being chapter 102 of the "Revised Statutes of British Columbia, 1936," in connection with its timber lands in the Island Railway Belt acquired from Canada in 1887? In particular does the said tax (so-called) derogate from the provisions of section 22 of the aforesaid Act of 1883?"

The Court of Appeal (Sidney Smith, J.A. dissenting) answered Questions 1, 3, 5 and 6 in the affirmative and Question 2 in the negative. The Court unanimously answered Question 4 in the affirmative. The Court (O'Halloran, J.A. dissenting) answered the first part of Question 7 in the affirmative and the second part in the negative.

Held: reversing the judgment appealed from (except as to the answer to Question 4) as follows:—

Question 1: The Commissioner was right in his finding that there never was any contractual relationship between the Provincial Government and the contractors.

The Commissioner was not right in finding that there never was any contractual relationship between the Provincial Government and the railway company.

Question 2: Yes.
Question 3: No.
Question 4: Yes.
Question 5: No.
Question 6: No.
Question 7: As to the first part, no; as to the second part, yes.

C. F. H. Carson, K.C., J. E. McMullen K.C. and *I. D. Sinclair* for the Esquimalt and Nanaimo Railway Company.

D. N. Hossie K.C. for the Alpine Timber Company Limited.

F. P. Varcoe K.C. and *A. H. Laidlaw* for the Attorney-General of Canada.

J. W. de B. Farris K.C. and *John L. Farris* for the Attorney-General of British Columbia.

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The judgment of Kerwin and Locke JJ. was delivered by

LOCKE J.:—There are two matters to be determined in answering Question 1 and the first of these is as to whether the Commissioner was right in finding that there never was any contractual relationship between the Provincial Government and the contractors. It is common ground that the expression "Provincial Government" is intended to mean His Majesty in right of the Province of British Columbia and that the question is as to whether there is a contract to exempt the lands in question from taxation in the manner provided by sec. 22 of the *Settlement Act*.

It is conceded that there was no written agreement between the contractors and the Province: if there was an oral agreement made on or prior to August 20, 1883, no witness is available to prove it since the then Premier, Mr. Smithe, and Mr. Robert Dunsmuir and his associates are long since dead, and the existence of such a contract if there was one must, therefore, be a matter either of inference from the known facts, or the legal result of the actions of the parties so far as they are now capable of proof.

By the terms of Union the Colony of British Columbia became part of the Dominion of Canada on July 20, 1871, and by sec. 11 the Government of the Dominion undertook to secure the commencement simultaneously, within two years from the date of Union, of the construction of a railway from the Pacific towards the Rocky Mountains, and from such point as might be selected, east of the Rocky Mountains, towards the Pacific, to connect the sea board of British Columbia with the railway system of Canada, and to secure the completion of such railway within ten years from the date of the Union: on its part the Government of British Columbia agreed to convey to the Dominion, in trust, to be appropriated in such manner as the Dominion Government might deem advisable "in furtherance of the construction of the said railway, a similar extent of public lands along the line of railway, throughout its entire length in British Columbia, (not to exceed, however, twenty miles on each side of the said line) as may be appropriated for the same purpose by the Dominion Government from the public lands in the Northwest Territories and the Province of Manitoba". The section further provided that the quantity of land which might be held

under pre-emption right or by Crown grant within the limits of the tract of land in British Columbia to be so conveyed to the Dominion should be made good to the Dominion from contiguous public lands. In consideration of the land to be so conveyed in aid of the construction of the railway, the Dominion agreed to pay to British Columbia from the date of the Union the sum of $100,000 per annum. In addition to other obligations assumed by Canada, it was to guarantee the interest for ten years from the date of the completion of the works on such sum not exceeding £100,000 sterling, as might be required for the construction of a first class graving-dock at Esquimalt.

The failure of the Dominion to commence the construction of the railway and to complete it within the times limited by sec. 11 gave rise to great dissatisfaction in the new Province. With the merits of the various disputes which arose between the Dominion and the Province in consequence, all of which were composed by the *Settlement Act* (Cap. 14, Statutes of B.C. 1884), we are not here concerned. While the Dominion had by Order-in-Council passed on June 7, 1873, fixed Esquimalt as the terminus of the proposed railway and asked for the conveyance of a strip of land twenty miles in width along the east coast of Vancouver Island between Seymour Narrows and the Harbour of Esquimalt, in furtherance of the construction of the railway, and this request had been extended in March, 1875, by a request that the belt of land to be conveyed should be twenty miles on each side of the proposed railway on Vancouver Island, and while the Province had by cap. 13 of the Statutes of 1875 granted to the Dominion Government, in trust, to be appropriated in such manner as it might deem advisable an area of public lands not to exceed twenty miles on each side of the proposed line between Esquimalt and Nanaimo, the Province had considered itself at liberty to rescind the land grant and, by cap. 16 of the Statutes of 1882, the Act of 1875 which authorized the grant was repealed.

While all matters in dispute were settled by the Act of December, 1883, the attitude adopted on behalf of the Dominion and of the Province respectively is of importance in considering the question to be determined. The position taken by the Dominion is summarized in a report of a Committee of the Privy Council approved by the Governor

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General in Council on May 17, 1881, and addressed to the Minister of Railways and Canals, which, stated shortly, was that while it had originally been contemplated that the railway should run by Bute Inlet and an Order-in-Council had been passed declaring that Esquimalt should be the terminus on the Pacific coast, further information had disclosed that this was inadvisable and that it had been determined in October, 1879, that the Western terminus of the road should be on Burrard Inlet, which was a compliance with the terms of sec. 11. As to the terms proposed by Lord Carnarvon, then Secretary of State for the Colonies, made for the purpose of ending the differences which had arisen between the Dominion and the Province and which recommended that the railway from Esquimalt to Nanaimo should be commenced as soon as possible and completed with all practicable despatch, the Government of Canada took the attitude that while entitled to every respect they had never received the sanction of the Parliament of the Dominion and that, on the contrary, a bill to give effect to these terms having been introduced by the Government into the House of Commons, providing for the construction of the Esquimalt and Nanaimo line, though passed by the House was lost in the Senate and, in the words of the report, "consequently Parliamentary sanction refused to the construction of what was regarded by the majority in the Senate as a Provincial work quite unnecessary to the fulfilment of the terms of Union with British Columbia". The report further recited that a contract had been entered into and received the sanction of Parliament for the construction of the railway from the end of the existing system near Lake Nipissing to Burrard Inlet (this referring to the contract made by the Dominion and the persons who became the incorporators of the Canadian Pacific Railway Company, which forms a schedule to cap. 1, Statutes of Canada 1881), that Parliament had not authorized the construction of the Esquimalt and Nanaimo line and that, in view of the large expenditure involved in the building of the Canadian Pacific Railway, it was not probable that it would do so.

The position taken by the Province was as stated in an Order-in-Council passed on February 10, 1883, a copy of which was forwarded by the Lieutenant-Governor to the Secretary of State on that date. Briefly this was that the

Province, upon being advised in 1873 that an Order-in-Council had been passed by the Dominion fixing Esquimalt as the terminus of the Canadian Pacific Railway and deciding that a line of railway should be located between the Harbour of Esquimalt and Seymour Narrows, had first reserved a belt of land twenty miles in width between these two places and thereafter, on the request of the Dominion, conveyed these lands to it for railway purposes, that communications passing between the Province and the Dominion showed that both parties understood that the eleventh section of the Terms of Union required the construction of the road on the Island as a section of the Canadian Pacific Railway and that the Dominion had defaulted in complying with its obligations. The Order-in-Council recited that the reservation of the railway belt on the Island and the withholding of these lands from development or settlement had caused great injury to the commercial and industrial interests of the Province and the Committee recommended as a basis of settlement between the Governments of the railway and railway lands questions that the Dominion Government be urgently requested to carry out its obligation to the Province by commencing at the earliest possible period the construction of the Island Railway and complete the same with all practicable despatch, or by giving to the Province such fair compensation for failure to build said Island Railway as will enable the Government of the Province to build it as a Provincial work and open the East Coast lands for settlement.

While the negotiations between the Dominion and the Province which followed resulted in a settlement, it is of importance to note that at the session of the Provincial Legislature in 1882 an Act to incorporate the Vancouver Land and Railway Company had been passed in pursuance of a petition presented by Lewis M. Clement et al, praying for the incorporation of a company for the purpose of constructing and working a railway from Esquimalt Harbour and for a grant of public lands in aid thereof, and that the *Act* of *1875* which authorized the land grant to the Dominion was repealed. The *Act*, cap. 15 Statutes of 1882, (hereinafter referred to as the *Clement Act*) constituted the applicants a body corporate by the above name, and by sec. 9 the company was required to lay out, construct, acquire, equip, maintain and work a continuous line of railway from a point on Esquimalt Harbour to a point on Seymour Narrows; the survey was to be com-

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menced within sixty days after the Government should have notified the company that it was prepared to set apart and reserve to the company the lands referred to, and it was provided that not less than ten miles of the portion of the railway between Esquimalt and Nanaimo should be completely constructed, equipped and in running order on or before July 1, 1883, and the entire railroad was to be constructed and equipped on or before the 1st day of July, 1890. Sec. 17 required the company to give security to the satisfaction of the Government of the Province to the extent of $250,000 for the due construction of the railway in accordance with the terms of the *Act*, and provided that if this was not given within sixty days from the repeal by the Legislature of the *Esquimalt* and *Nanaimo Railway Act* 1875, which had authorized the grant of the railway belt on the Island to Canada, a sum of $10,000 required to be deposited should be forfeited and the provisions of the Act should be "null and void". Sec. 18 provided that upon satisfactory security having been given and "in consideration of the completion and perpetual and efficient operation of the said railway by the company" the Government would set apart and reserve to the company 1,900,000 acres of public land lying on both sides of the proposed line between Esquimalt and Seymour Narrows, and upon completion of the railway, in accordance with the terms of the *Act* should grant the fee simple in the said lands to the company. Sec. 21 provided a limited exemption from taxation for the railway and its properties and the capital stock of the company, and that "the lands of the company shall also be free from provincial taxation until they are either leased, sold, occupied or in any way alienated". Nothing resulted, however, from this legislation: the company did not provide the security stipulated for and its rights under the statute lapsed and the Province was again at liberty to resume its negotiations with the Dominion.

When on February 19, 1883, the Lieutenant-Governor sent to the Secretary of State the copy of the report of the Provincial Executive Council the Dominion Government sent Mr. Trutch to Victoria to negotiate with the Province in an endeavour to settle all matters in dispute. Negotiations were carried on between Mr. Smithe, the Premier of the Province, and Mr. Trutch on behalf of the Dominion.

Sir John A. Macdonald had advised the Premier that the Dominion Government was prepared to submit to Parliament the proposals of the Province, with such modifications as might be settled on with Mr. Trutch and concurred in by the Dominion Government, and stipulated that the Provincial Legislature should legislate first. On May 5, 1883, Mr. Trutch wrote to the Premier making certain proposals on behalf of the Dominion, these including the suggestion that the Province should grant to the Dominion a portion of the lands described in the *Clement Act* and procure the incorporation by Act of the Legislature "of certain persons to be designated by the Government of Canada for the construction of the railway from Esquimalt to Nanaimo", and offering, *inter alia* on behalf of the Dominion to appropriate these lands and the sum of $750,000 to be paid as the work proceeded to the proposed company, provided it gave satisfactory security for the completion of the railway within three and a half years from the date of its incorporation.

On May 7, 1883, an Order-in-Council of the Provincial Executive Committee, which had considered these proposals, after reciting the desirability that the long-standing dispute should be settled and that the Dominion and the Province should unite in a common endeavour to open the country to settlement, recommended their acceptance.

On May 9, 1883, a Dominion Order-in-Council, after reciting the proposals made by the Lieutenant-Governor on behalf of the Province in his communication of February 10, 1883, authorized the making of counter proposals without prejudice, which included the following:

> The Provincial Government shall grant to the Dominion Government the lands in Vancouver Island specified in Mr. Dunsmuir's last proposal for the construction of the Esquimalt and Nanaimo Railway.
>
> That the British Columbia Government shall procure an Act of Incorporation for such parties as shall be designated by the Dominion Government for the construction of the Railway on Vancouver Island.
>
> That the Dominion Government shall appropriate the lands on Vancouver Island and a sum of $750,000 to be paid as the work proceeds, to a Company to be incorporated at their instance by the Legislature of British Columbia, and which Company shall give satisfactory security for the completion of the Railway from Esquimalt to Nanaimo within four years from the date of the Act of Incorporation.

While these matters were taking place the Provincial Legislature was in session at Victoria and on May 12, 1883, passed an Act relating to the Island Railway, the Graving

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Dock and Railway Lands of the Province: cap. 14 Statutes of B.C. 1883, hereinafter referred to as the *May Act*. The text of this statute had been submitted in advance to Mr. Trutch and by him transmitted to the Prime Minister, and on the day the *Act* was passed the former wrote to the Premier pointing out that certain provisions of the *Act*, in particular one which recited that "the Government of Canada agrees to secure the construction of a railway from Esquimalt to Nanaimo", were not in conformity with the proposals made in the letter of May 5th. The Premier took the attitude that the *Act* was in accordance with the arrangements made between Mr. Trutch and himself; the latter said that any position he had taken in the negotiations was expressed to be subject to the approval of the Government of Canada and, by a letter of May 15th, informed the Premier that he had received a message from the Prime Minister directing him to communicate to the Premier that "Parliament long ago refused to build the Island Railway and cannot successfully be asked now to change that policy" and that the Dominion Government had offered to ask Parliament to vote $750,000 "to subsidize a company to construct that railway and to take satisfactory security from such company for the construction of that work", and regretted the offer had not been accepted. On May 23rd the Premier telegraphed to the Prime Minister regarding the matter and on the following day the latter replied:

> Dominion Government greatly regrets that your Act in effect makes Island Railway a Government work, although to enable Government to build it power to use agency of a railway company is given. We never agreed to that provision. Useless to ask Parliament to confirm your Act. We are quite ready to perform conditions telegraphed to Mr. Trutch and accepted by you, and meanwhile will proceed provisionally to carry out such arrangement, to be completed when your Act amended in conformity with agreement.

Negotiations were continued between the two Governments during the latter part of May and in June of 1883, and by an Order-in-Council of June 23rd the Dominion authorized the Minister of Justice, Sir Alexander Campbell, to proceed to Victoria in an endeavour to bring the matter to a conclusion. The instructions to the Minister included the following:

That Sir Alexander Campbell should then communicate with Mr. Dunsmuir or other capitalists who are understood to be desirous of forming a company to construct the railway under the terms of the Provincial Act.

On the arrival of Sir Alexander Campbell he apparently carried on negotiations not only with the Provincial Government, in regard to the amendment to the *May Act* upon which the Dominion insisted, but also with Mr. Dunsmuir and his associates. In these negotiations the Dominion maintained the position it had taken in the Order-in-Council of May 17, 1881, regarding the obligations of Canada in respect to the Island Railway. In a letter addressed by Sir Alexander Campbell to the Premier on August 6, 1883, a copy of a proposed contract for the construction of the railway between the Dominion and Dunsmuir et als was submitted for the consideration of the Provincial Government. What part, if any, the province had taken in these negotiations is not known. The letter, after stating that a copy of the proposed contract (in draft) for the construction of the railway was enclosed and the suggestions of the Premier invited, said in part:

> The Government of the Dominion are anxious that in all respects it should meet the just expectations of the Government of your Province. The obligations, so far as regards the Government of the Dominion, are confined, as you will see, to the payment, as the work progresses, of the assistance promised to the Railway by us, and the transfer, after the work is wholly completed of the land grant which the Government of the Province has placed in our hands for that purpose. We assume no responsibility for non-completion, or delay in the progress of the work. The security which the Company will deposit with the Dominion Government will be held, however, by us in trust for this purpose.
>
> We understand that with this contract (involving no other undertaking on our part than those I have mentioned), and the deposit of the security above referred to, the Government of the Province are satisfied that the terms of the Act concerning the Island Railway will have been completely performed on the part of the Government of Canada.

After stating that he proposed on obtaining the approval of the local Government to the contract to execute it and that Mr. Dunsmuir and his friends would be invited to do so, the letter said that after having it executed the writer thought the contract should be placed in the hands of Mr. Trutch "awaiting the change which your Legislature is to make in the *Act* relating to the Island Railway, by striking out any language under which Canada might be

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called upon to construct or secure the construction of the railway, and substituting language involving an obligation simply to take security for such construction to the satisfaction of your Government. The clause in the *Island Railway Act* relating to the sale to actual settlers for four years at a dollar an acre has, I understand, received the assent of Mr. Dunsmuir and his friends". On August 17th Sir Alexander Campbell again addressed the Premier, noting that he had had no reply to the above quoted letter and asking whether the Provincial Government would have any objection to the $250,000 to be deposited by the contractors being invested in approved securities. On the day following the Premier answered, saying that he had carefully considered the proposed contract and had a few suggestions to make and suggested an interview to discuss them: as to the cash deposit being exchanged for approved securities he saw no objection but added that "in the event of the forfeiture of the security by the contractors it ought to be understood that it would be handed over to the Province by the Dominion Government". In a reply written on the same date Sir Alexander Campbell declined to agree to this latter proposal saying that the disposition of the security in case of default "must depend upon the circumstances of the moment, and unless the Dominion should be released from all obligations in the matter they would not hand over the security but retain it for the purpose for which it was given".

On August 20, 1883, a memorandum of agreement was signed by Sir Alexander Campbell and Mr. Smithe providing, inter alia, that the Government of British Columbia would invite the adoption by the Legislature of certain amendments to the *May Act,* such amendments being indicated by red lines in the copy of the proposed new Bill annexed to the memorandum and that the said Government "will procure the assent of the contractors for the construction of the Island Railway to the provisions of clause (*f*) of the agreement recited in the amending Bill". That clause provided that the lands on Vancouver Island to be conveyed to the Dominion should with certain exceptions be open for four years from the passing of the *Act* to actual settlers, for agricultural purposes, at the rate of one dollar an acre, to the extent of 160 acres to each

such actual settler, and that in any grants to settlers the right to cut timber for railway purposes and rights of way for the railway, and stations, and workshops should be reserved: in the meantime and until the railway should be completed the Government of British Columbia was to be the agent of the Government of Canada for the purpose of administering these lands, for the purposes of settlement, and provision was made for the making of pre-emption records by the Government of the Province and for the deposit of all moneys received by the Province in respect of such administration into the Bank of British Columbia, to the credit of the Receiver General of Canada, and that such moneys, less expenses, should upon completion of the railway be paid over to the railway contractors. The memorandum further stipulated that upon the amending Bill becoming law in British Columbia and the assent of the contractor for the construction of the railway to the provisions of clause (*f*) above referred to being obtained, the Government of the Dominion would seek the sanction of Parliament to enable them to give effect to the stipulations on their part contained in the agreement recited in the amending Bill. On the same day Sir Alexander Campbell, acting on behalf of the Minister of Railways and Canals of Canada, signed a contract for the construction of the Esquimalt and Nanaimo Railway with Robert Dunsmuir and his associates.

In view of the letter of the Premier of August 18, it may be assumed that the terms of this contract were approved by the representatives of the Province. While the Dominion was the contracting party, its representatives had made it abundantly clear in the correspondence that Canada assumed no responsibility for the non-completion or delay in the progress of the work and considered its part in the matter as being restricted to the payment of the $750,000 as the work progressed and the transfer after it was completed of the land grant which the Province had placed in its hands for that purpose. While of importance to the Dominion as a whole, in that the development and progress of the Province would contribute to the welfare of the country as a whole, the Island Railway was after all primarily a matter of Provincial concern: with the exception of the money contribution and the granting

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of foreshore rights it was the Province which was contributing the consideration for the building of the road. As might be expected under these circumstances, the contract imposed upon the contractors not merely the obligation to build and equip the line from Esquimalt to Nanaimo but also to maintain and "work continuously" the said line and a telegraph line throughout and along the railway line (sec. 3) and (by sec. 9) a covenant that they would "in good faith keep and maintain the same and the rolling stock required therefor in good and efficient working and running order; and shall continuously and in good faith operate the same, and also the said telegraph line, and will keep the said telegraph line and appurtenances in good running order". The Bill referred to in the memorandum of agreement signed on the same date by the representatives of the Province and the Dominion, which was to amend the *May Act,* contained in sec. 27 a provision that the Esquimalt and Nanaimo Railway Company

> shall be bound by any contract or agreement for the construction of the railway from Esquimalt to Nanaimo which shall be entered into by and between the persons so to be incorporated as aforesaid and Her Majesty represented by the Minister of Railways and Canals, and shall be entitled to the full benefit of such contract or agreement which shall be construed and operate in like manner as if such company had been a party thereto in lieu of such persons, and the document had been duly executed by such company under their corporate seal.

The necessity for this is apparent: the subsidies were to be given to ensure not merely the construction of the railway and telegraph lines but also their operation in perpetuity. It was apparently considered necessary to obtain the covenant of the contractors as well as that of the company to be formed and in addition to impose the obligation to operate in the statute of incorporation which, by sec. 9, required the company to "lay out, construct, keep, maintain and work the railway and telegraph lines". The contract also referred to the agreement between the two Governments whereby the Province would procure the incorporation "of certain persons to be designated by the Government of Canada" for the construction of the road and the Dominion agreed to grant to the contractors a subsidy of $750,000 and the lands it was to receive from the Province "for which subsidies the construction of the

railway and telegraph line from Esquimalt to Nanaimo shall be completed and the same shall be equipped, maintained and operated.

That Mr. Dunsmuir must have been a party to the negotiations which resulted in the agreement between the Dominion and the Province of August 20th is, I think, apparent. The terms of the proposed *Settlement Act* were, of course, of vital importance to the contractors and the reference to the draft Bill identified by the signatures of Sir Alexander Campbell and the Honourable Mr. Smithe in clause 15 of the contract made with them makes it evident that Mr. Dunsmuir was satisfied with the terms of the proposed *Act* prior to the signing of the memorandum on behalf of the two Governments on August 20th. That memorandum had required the Province to obtain the approval of the contractors to the very material change made in clause (*f*) of the *May Act,* and it was apparently in consequence of this that by a memorandum dated at Victoria on August 22, 1883, Robert Dunsmuir wrote on a copy of the draft which had been signed by Messrs. Campbell and Smithe the following:

> I have read and on behalf of myself and my associates acquiesce in the various provisions of this Bill, so far as they relate to the Island Railway & lands.

By the terms of these documents neither the memorandum signed on behalf of the two Governments nor the contract with Dunsmuir et als were to become binding until both the Legislature of the Province and the Dominion Parliament had acted and meanwhile the documents were held in escrow. In due course the *Settlement Act* was passed by the Legislature in December, 1883 and the agreement with the contractors authorized by Parliament by cap. 6 of the Statutes of 1884, and by an Order-in-Council of April 12, 1884, Mr. Dunsmuir and his associates were named as the persons to be incorporated as the Esquimalt and Nanaimo Railway Company.

While the agreement for the construction of the railway required that the lands should be conveyed to the contractors, the statute passed by the Legislature, as has been shown, provided that the Esquimalt and Nanaimo Railway Company should be entitled to the full benefit of that contract, and all parties understood that it was to

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the company that the conveyance would be made and this was done upon the completion of the road in 1887. While it appears to me to be obvious from the events above recited that Robert Dunsmuir, acting on his own behalf and on behalf of his associates, was a party to the negotiations which resulted in the two agreements of August 20, 1883, the passing of the *Settlement Act* and of the *Dominion Act* of 1884 and the construction of the railway and while it may perhaps be assumed that the Provincial Premier assured him that his Government would pass the *Settlement Act,* I am unable to find sufficient evidence of an agreement between these contractors and the Province of British Columbia that the lands to be granted would be subject to the tax exemption embodied in sec. 22 of the *Settlement Act.* These negotiations took place nearly sixty-five years ago and there is no living witness to testify what took place between the contractors and the Government. I think the proper inference to be drawn from the facts as disclosed by the documents is that Dunsmuir and his associates, having the covenant of the Dominion that the subsidies would be given and the Dominion having agreed with the Province that the Legislature would be asked to pass the *Settlement Act* and Parliament asked to ratify the agreement with the Province and authorize the granting of these subsidies, would be most unlikely to ask the Province to contract with him and his associates for the tax exemption. Being assured on August 20, 1883, that the two Governments proposed to take these steps and being safeguarded by the arrangement that the agreement for the construction of the road would not become binding until the two Governments had legislated, it would, I think, be assumed by Mr. Dunsmuir that the statutory exemption from taxation contained in sec. 22 of the Provincial Act, which undoubtedly was a material part of the consideration to be received from the Province in exchange for the covenant to build, maintain and operate the railway and telegraph line, would protect the company to be formed as amply as if the same terms had been included in a formal agreement with the Province. While the contractors should be assumed to have known that the *Interpretation Act* (cap. 2 Consolidated Acts 1877) by sec. 7 (31) provided that every Act shall be so construed as

to reserve to the Legislature the power of repealing it or amending it or of revoking or modifying any power, privilege or advantage thereby vested in or granted to any person or party whenever the Legislature should deem such modification required for the public good, it would not, I think, occur to these business men nor their advisers that where an exemption such as this was granted as part of the consideration for the construction and operation of the Island Railway such power would be exercised.

I conclude, therefore, that the answer to the first part of the first question is that the Commissioner was right in finding that there was no contract between the Province and the contractors to exempt these lands from taxation in the terms of sec. 22.

As to the second part of the first question: if there was a contract between the Province and the Esquimalt and Nanaimo Railway Company it is either evidenced by the statute itself or must be implied by reason of what occurred between the parties after the passing of the Order-in-Council of April 12th, 1844, which presumably was communicated to the Provincial authorities then or shortly thereafter.

There is, in my opinion, much to be said for the view that the contract is evidenced by the statute. In form it differs materially from that commonly adopted for the incorporation of companies to carry out business enterprises. A comparison with statutes of this nature in British Columbia, both before and after the passing of the *Clement Act*, such as caps. 2 and 3 of the Statutes of 1878, cap. 25 of the Statutes of 1881, cap. 33 of the Statutes of 1883 and cap. 31 of the Statutes of 1884, shows that in the case of companies applying for powers to carry out various enterprises the language used to grant such powers is permissive while in the *Clement Act*, the *May Act* and the *Settlement Act* the sections authorizing the construction and operation of the railway and telegraph lines are mandatory in form. In the case of the *Settlement Act* the language used is:—

> The company and their agents and servants shall lay out, construct, equip, maintain and work

the railway and telegraph lines from Esquimalt to Nanaimo and sec. 27, as has been noted, provided that the

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company shall be bound by the covenants in the construction contract which obligated the contractors to maintain and work continuously the said lines. The word "shall" was by the *Interpretation Act,* cap. 32 Consolidated Statutes of 1887, sec. 6 (and by cap.1, R.S.B.C. 1936, sec 23 (1)) to be construed as imperative "unless it be otherwise provided and there be something in the context or other provisions thereof indicating a different meaning or calling for a different construction". There is nothing in the context to suggest that any other meaning should be assigned to the word in secs. 9 and 27: on the contrary, it is clear that is what was intended, since otherwise the railway company might have simply built the line for the purpose of obtaining the valuable subsidies and discontinued operation if it proved unprofitable. It will be seen that the same language was employed in these sections in the *May Act* and that a similar obligation was imposed by sec. 9 of the *Clement Act* and it appears to me not improbable that the draftsman considered the Act incorporating the Canadian Pacific Railway Company (cap. 1, Statutes of 1881) and the contract forming a schedule to that Act which authorized large grants of money and lands in consideration of the completion and perpetual and efficient operation of the railway in settling the form of the legislation. The *Settlement Act* not only bound the railway company by the covenants of the contractors in this respect but also imposed upon them a statutory duty to build, equip, maintain and operate the line. The Agreement between the Province and the Dominion confirmed by the statute obligated the Dominion to hand the lands over to the contractor and paragraph 15 of the construction contract determined the time when this should be done. While sec. 18 of the *Clement Act* provided that the Province, in consideration of the completion and perpetual and efficient operation of the railway,, should set apart the lands described and convey them to the company on the completion of the railway and sec. 21 provided the exemption from taxation, the plan adopted in both the *May Act* and the *Settlement Act* was that the land should be conveyed to the Dominion in trust and turned over to the company upon the completion of the road: in the result the only difference was that the lands which constituted the main

consideration to be received by the railway company were conveyed by the trustee rather than directly from the Province. The obligation of the Province to exempt the lands from taxation upon the terms of sec. 22 was not to arise unless and until the lands were conveyed by the Dominion to the Railway Company and this, it was contemplated, would be some years hence: no question of taxation was involved so long as the lands remained vested in the Dominion. I think the obligation imposed by sec. 22 was no less an obligation of the Crown than that cast upon it by the section of the *Vancouver Island Settlers' Rights Act,* 1904, considered by the Judicial Committee in McGregor v. *Esquimalt and Nanaimo Railway Company* (1), and referred to by Sir Henri Elzéar Taschereau at p. 467, and that the right to enforce performance of this duty became vested in the railway company. As I see the matter, the statutory obligation of the Province to exempt the lands from taxation upon the terms of sec. 22 continues in perpetuity in the same manner as the obligations of the railway company under secs. 9 and 27, subject of necessity to the right of the Province to repeal the exempting section, a power expressly reserved by sec. 7 (31) of the *Interpretation Act,* (cap. 2 Consolidated Acts 1877: sec. 23 (8) cap. 1, R.S.B.C. 1936).

While the *Settlement Act,* with the exception of the preamble and the first seven sections, relates entirely to the obligations and powers of the railway company, and the status of certain of the assets to be acquired by it in regard to taxation it is not declared to be a private Act and is, therefore, to be deemed a public Act (sec. 7 (37) cap. 2 Consolidated Acts 1877: sec. 23 (7), cap. 1, R.S.B.C. 1936). Unlike private Acts incorporating other companies for the purpose of carrying on business enterprises, it was not passed pursuant to a petition filed by the promoters asking for formation of the company with specified powers but pursuant to the arrangements hereinbefore described. In *Davis* v. *Taff Vale Railway Company* (2), Lord Macnaghten at p. 559 said in part:

> Ever since it has become the practice of promoters of undertakings of a public nature to apply to Parliament for exceptional powers and privileges, the Acts of Parliament by which those powers and privileges are granted have been regarded as parliamentary contracts, as bargains

(1) [1907] A.C. 462. (2) [1895] A.C. 542.

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between the promoters on the one hand and Parliament on the other—Parliament acting on behalf of the public as well as on behalf of the persons specially affected. Those powers and privileges are only conceded on the footing that the concession is for the benefit of the public who are likely to use the railway as well as for the benefit of the promoters.

It may be noted that the expression here used "parliamentary contract" is stated in the Third Edition of Lindley on Partnerships and Companies, p. 155, (published in 1878) to have been the name by which the contract signed by the subscribers when petitioning for incorporation was commonly called. The signing of such a contract by the subscribers, whereby each covenanted to pay a sum set opposite his name either as a part of the estimated expense of the undertaking or of the capital it was proposed to raise, was apparently a pre-requisite of incorporation. In the same case Lord Watson said, p. 552, in part:

> In cases where the provisions of a local and personal Act directly impose mutual obligations upon two persons or companies, such provisions may, in my opinion, be fairly considered as having this analogy to contract, that they must, as between those parties, be construed in precisely the same way as if they had been matter, not of enactment, but of private agreement. It was in that sense that in Countess of Rothes *v.* Kirkcaldy Waterworks Commissioners, 7 A.C. at p. 707, I ventured to observe that "such statutory provisions as those of sect. 43 occurring in a local and personal Act, must be regarded as a contract between the parties, whether made by their mutual agreement, or forced upon them by the Legislature." For all purposes of construction, I thought that the provisions which the House had to interpret might be legitimately viewed in that light. But it did not occur to me then, nor am I now of opinion, that the analogy of contract, for it is nothing more, could, in an English case especially, be carried further.
>
> The provisions of a Railway Act, even when they impose mutual obligations, differ from private stipulations in this essential respect, that they derive their existence and their force, not from the agreement of parties, but from the will of the Legislature.

In an early case, *Sir John Brett* v. *Cumberland* (1), where Queen Elizabeth had by letters patent made a lease of certain mills in which there was a clause binding the grantee and his assigns to repair the mills and leave them in a proper state of repair at the end of the term, the successor in title of the grantee was held liable in an action of covenant though his predecessors had not signed the instrument of grant. In *Lyme Regis* v. *Henley* (2), where the King had granted to the Mayor and Burgesses of Lyme Regis the borough so called and also the pierquay or cob, with all liberties and profits belonging to the same and

(1) (1688) 3 Bulstrode 164. (2) (1834) 2 cl. & F. 331.

willed that they and their successors should repair, maintain and support the buildings, banks, seashore, etc. it was held that having accepted the letters patent the defendants were liable to repair. Park, J. deciding the matter, considering that the decision in *Sir John Brett* v. *Cumberland* (1) was decisive of the matter, said in part (p. 351):

> So in the charter in question, the words are in show the words of the King only, but the corporation having accepted the charter and enjoyed the benefits of it, as is averred in the declaration, they are as strongly bound as if they had covenanted expressly by an indenture.

In *Atkinson* v. *Newcastle Waterworks* (2), Lord Cairns dealing with the question as to when the breach of a public statutory duty might be the basis of an action for damages by an individual said:

> I cannot but think that that must, to a great extent, depend on the purview of the legislature in the particular statute, and the language which they have there employed, and more especially when, as here, the Act with which the Court have to deal is not an Act of public and general policy, but is rather in the nature of a private legislative bargain with a body of undertakers as to the manner in which they will keep up certain public works.

It will be noted that the language above quoted is referred to and adopted in *Johnston and Toronto Type Foundry Company* v. *Consumers' Gas Company* (3). In *Milnes* v. *Mayor, etc., of Huddersfield* (4), the Earl of Selborne said (p. 523):

> It is true that this is a case of statutory obligation, not properly of contract; although Lord Eldon and other great judges regarded Acts of Parliament of this class, giving powers to promoters or undertakers who solicit them, and who are to receive remuneration in money for what under those powers they supply, as parliamentary contracts with the public, or at least with that portion of the public which might be directly interested in them.

In *La Ville de St. Jean* v. *Molleur* (5), Idington, J. referred to, without expressly approving, the finding of the Supreme Court of the United States in *Trustees of Dartmouth College* v. *Woodward* (6). In that case the college had been incorporated in the days when what became later the State of New Hampshire belonged to the British Crown and the attempted interference of that State occurred after it had become subject to the constitution of

(1) (1688) 3 Bulstrode 164.
(2) (1877) L.R. 2 Ex. D. 441.
(3) [1898] A.C. 447.
(4) (1886) 11 A.C. 511.
(5) (1908) 40 S.C.R. 629.
(6) 4 Wheat. 518.

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the United States and was thereby prohibited from enacting any "law impairing the obligation of contract": Chief Justice Marshall there said (p. 643):

> This is plainly a contract to which the donors, the trustees and the Crown (to whose rights and obligations New Hampshire succeeds) were the original parties.

In the present case we are, however, dealing with a public statute even though in large part it deals with the incorporation and powers of a company, a matter commonly dealt with by private Act. There was here no petition for incorporation nor anything corresponding to the parliamentary contract referred to by Lindley: rather was the statute enacted by the Province in pursuance of its agreement with the Dominion. I have been unable to find any evidence to support a contention that there was an agreement between the Province and the contractors, in advance of the incorporation, that the lands to be received by the company would be entitled to the exemption provided by sec. 22 and, in my opinion, the Act cannot be regarded as a contract between the company and the Crown.

This does not, however, dispose of the matter. It is common ground that following the incorporation of the railway company it proceeded forthwith to construct the railway and telegraph lines and thus became entitled to and received the lands which had been conveyed by the Province to the Dominion in trust for that express purpose. It is clear beyond question that the railway company did this relying upon the exemption held out to it by the Province in sec. 22 of the Act. In *Plimmer* v. *Mayor, etc., of Wellington* (1), the predecessor in title of the appellant had in the year 1848 erected a wharf on the bed and foreshore of Wellington Harbour for the purpose of a wharf and store, this being done by permission of the Crown: in 1855, in order to carry on his business of a wharfinger, he erected a jetty extending to a considerable distance from the shore: in 1856, at the request and for the benefit of the Government, he incurred large expenditures for the extension of his jetty and the erection of a warehouse, and in subsequent years the Crown used, paid for, and, with the consent of the lessor, improved the said land and works: it was held that while the lessor must

(1) (1884) 9 A.C. 699.

be deemed to have occupied the ground from 1848 under a revocable licence to use it for the purposes of a wharfinger, that by virtue of the transactions of 1856 such licence ceased to be revocable at the will of the Government and that the lessor had acquired an indefinite or perpetual right to the jetty for these purposes. Sir Arthur Hobhouse, after saying that the law relating to cases of this kind might be taken as stated by Lord Kingsdown in *Ramsden* v. *Dyson* (1), said in part (p. 712):

> This is a case in which the landowner has, for his own purposes, requested the tenant to make the improvements. The Government were engaged in the important work of introducing immigrants into the colony. For some reason, not now apparent, they were not prepared to make landing-places of their own, and in fact they did not do so until the year 1863. So they applied to John Plimmer to make his landing-place more commodious by a substantial extension of his jetty and the erection of a warehouse for baggage. Is it to be said that, when he had incurred the expense of doing the work asked for, the Government could turn round and revoke his licence at their will? Could they in July, 1856, have deprived him summarily of the use of the jetty? It would be in a high degree unjust that they should do so, and that the parties should have intended such a result is, in the absence of evidence, incredible.

and at p. 714:

> In this case their Lordships feel no great difficulty. In their view, the licence given by the Government to John Plimmer which was indefinite in point of duration but was revocable at will, became irrevocable by the transactions of 1856, because those transactions were sufficient to create in his mind a reasonable expectation that his occupation would not be disturbed; and because they and the subsequent dealings of the parties cannot be reasonably explained on any other supposition. Nothing was done to limit the use of the jetty in point of duration. The consequence is that Plimmer acquired an indefinite, that is practically a perpetual, right to the jetty for the purposes of the original licence, and if the ground was afterwards wanted for public purposes, it could only be taken from him by the legislature.

The decision, it appears to me, was based on the contract to be implied from the circumstances binding the Crown to permit Plimmer and his successors to occupy the lands in perpetuity. It was interpreted in this way in the judgment of Lord Russell of Killowen in *Canadian Pacific Railway* v. *The King* (2). I think the principle that was applied in Plimmer's case is applicable in the present case: here the Province by holding out the promised tax exemption as one of the inducements offered to the railway company to build, equip and work the railway and telegraph lines must, in my view, be held to have agreed with

(1) L.R. 1 H.L. 129. (2) [1931] A.C. 414 at 428.

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it that upon the performance of this work and the consequent conveyance of the lands by the Dominion they would be entitled to the exemption provided by sec. 22.

On the second branch of the first question, I am of the opinion that the Commissioner was in error in finding that there was no contract between the Province and the Esquimalt and Nanaimo Railway Company to exempt these lands from taxation in the terms of sec. 22.

The tax suggested in the report of the Commissioner is there described as a "severance tax" to be imposed upon all timber cut upon lands of the Railway Company after the same are sold or otherwise alienated by it, to be in an amount approximating prevailing rates of royalty, and not to apply to lands already sold by the company, and the taxes referred to in Questions 4, 5 and 6 are, as I understand it, alternative proposals for carrying this recommendation into effect. In British Columbia all grants of timber lands made by the Crown prior to April 7, 1887, were grants in fee without reservation of any royalty. The lands with which we are now concerned were part of the grant made by the Province to the Dominion by sec. 2 of the *Settlement Act* of 1884, and accordingly, whether in the hands of the railway company or of purchasers from the company, have been treated as exempt from liability for royalty. It appears that from 1887 to 1897 no records of the sale of timber land were kept by the railway company but from April 1898 to July 31, 1944, it disposed of 763,565 acres of land containing 7,000,000,000 feet of timber. As of April 4, 1944, there remained unsold 203,858 acres. Of the lands in the railway belt sold theretofore by the company there remained in 1938 some 336,000 acres of merchantable timber held by owners other than the company and these lands would be free of the proposed tax as well as all other Crown granted timber lands in the Province. As to Crown grants of timber lands made after that date, royalties of increasing amounts have been reserved to the Crown and at the rate fixed by the Forest Act in 1946 averaged $1.10 per thousand feet board measure while the average value of standing timber at that time was $2.00 per thousand.

The wording of sec. 22 is that the lands to be acquired by the company from the Dominion Government for the

construction of the railway "shall not be subject to taxation unless and until the same are used by the company for other than railroad purposes, or leased, occupied, sold or alienated". There are, in my opinion, two agreements in existence between the Province and the Esquimalt and Nanaimo Railway Company and the first of these obligated the Province to exempt the lands from taxation in the manner provided by the section. The agreement made between the principals on May 17, 1912, which was ratified by the *Esquimalt and Nanaimo Railway Company's Land Grant Tax Exemption Ratification Act*, provided that the leasing of the railway and the operation thereof by the Canadian Pacific Railway Company "shall not affect the exemption from taxation enacted by the said clause 22 of cap. 14 of the Statute 47 Vict. and notwithstanding such lease and operation such exemption shall remain in full force and virtue."

It, of course, cannot be suggested that either the contract between the railway company and the Crown or sec. 22 relieve these lands when they are used by the company for other than railroad purposes or leased, occupied, sold or alienated, from taxes levied generally upon other owners of Crown granted timber lands. However, that is not what is proposed here. While all other Crown granted timber lands and all such lands in the railway belt alienated by the company up to the present time are to remain exempt from the tax, the remaining fractional portion of the original grant will be affected by it. It is, of course, true that the suggested taxes will be paid directly by the purchaser from the railway company or their successors but it is nonetheless true that the money or substantially all of it will be taken from the coffers of the company. The proposal is that legislation imposing the tax in one of the various forms suggested will be enacted now, with the inevitable result that the value of the remaining stands of timber in the hands of the company will be reduced by approximately the amount of the taxes which the purchasers will be required to pay in exactly the same manner as if the Crown now imposed a lien or encumbrance upon the lands in the amount of the taxes to be paid. Thus while the railway company remains bound by the covenant given by the contractors to operate the railway and tele-

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graph lines in perpetuity by reason of sec. 27 of the *Settlement Act* and under the obligation to so operate these lines imposed by sec. 9 of that *Act*, part of the consideration which it received from assuming that and other obligations will be taken away from the Province.

As to the 1912 agreement I think otherwise: the purpose of the agreement was to ensure to the railway company that the leasing of its lines to the Canadian Pacific Railway Company should not affect the exemption provided by sec. 22. The words "and notwithstanding such lease and operation such exemption shall remain in full force and virtue" are to be construed as meaning that the continuance of the exemption should not be affected by the leasing and cannot be construed as a covenant on the part of the Province not to exercise the power to repeal or amend the section if that were "deemed by the Legislature to be required for the public good" (*The Interpretation Act*, cap. 1, R.S.B.C. 1936, sec. 23(*a*).

The tax referred to in Question 4 is one to be imposed on timber as and when cut upon lands in the Island railway belt and the learned judges of the Court of Appeal are unanimous that such a tax would be ultra vires the Province as being indirect taxation. I agree with Mr. Justice Bird that such a tax would be borne either wholly by the Esquimalt and Nanaimo Railway Company, or in part by that company and in part by the purchaser of the logs. It is, of course, obvious that as between the railway company and other owners of land in respect of which Crown grants were issued prior to April 5, 1887, and which are free both of royalty or of the proposed tax, the former will realize from its timber a lesser amount and that this amount will presumably approximate the amount of the tax to which the railway lands are subject. As between these two owners the railway company is in effect selling timber lands subject to encumbrance while the other owner sells free of encumbrance. In practice the amount of merchantable timber upon the lands offered by the railway company would be ascertained by a cruise and the amount which would become payable as tax, or an amount estimated at the time of sale to be sufficient to pay the taxes as they become due, would be deducted from the market value of the standing timber. Despite the fact that in

this manner the railway company will pay, if not all, at least much the greater part of the amount of the tax to become due, I think it would be found in practice that when the logs were thereafter sold, part at least of the tax and in any event if the tax levied was in excess of the amount estimated at the time of the purchase of the timber, the excess, would be added to the price of the logs and be passed on to the purchaser. John Stuart Mill distinguished direct and indirect taxes by saying that the former is one which is demanded from the very persons who, it is intended or desired, should pay it, while the latter are those which are demanded from one person in the expectation and intention that he shall indemnify himself at the expense of another. It appears to me to be perfectly clear that this tax would not be borne by the person who would pay it, since he would by the reduction in the purchase price have indemnified himself either wholly or in part at the expense of the railway company if he bought from them directly or, if not, at the expense of the person from whom he purchased the lands and that if not already thus fully indemnified at least the balance of the taxes would be added to the sale price of the logs and enter into the cost of products manufactured by them and thus be indirect.

I do not overlook that part of the judgment of Lord Hobhouse in *Bank of Toronto* v. *Lambe* (1), where it was said:

> The Legislature cannot possibly have meant to give the power of taxation, valid or invalid, according to its actual results in particular cases.

These remarks formed part of the passage from the judgment in *Lambe's* case quoted by Lord Warrington of Clyffe in *The King* v. *Caledonian Collieries, Ltd.* (2). In *Brewers and Maltsters' Association of Ontario* v. *Atty. Gen. for Ontario* (3), Lord Herschell, referring to the judgment in *Lambe's* case said (p. 236):

> Their Lordships pointed out that the question was not what was direct or indirect taxation according to the classification of political economists, but in what sense the words were employed by the Legislature in the British North America Act. At the same time they took the definition of John Stuart Mill as seeming to them to embody with sufficient accuracy the common understanding of the most obvious indicia of direct and indirect taxation which were likely to have been present to the minds of those who passed the Federation Act.

(1) (1887) 12 A.C. 575.
(2) [1928] A.C. 358.
(3) [1897] A.C. 231.

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He then proceeds:

> In the present case, as in Lambe's Case, their Lordships think the tax is demanded from the very person whom the Legislature intended or desired should pay it. They do not think there was either an expectation or intention that he should indemnify himself at the expense of some other person.

If legislation imposing a tax of the nature referred to in Question 4 is imposed by the Legislature, I have no doubt that it will be with the intention that the burden of it will fall if not entirely upon the railway company then partly upon it and partly upon the purchaser of the logs and subsequent users of the product and, therefore, it would be indirect taxation.

The tax proposed in Question 5 differs from that in Question 4 since it would be upon the land when used by the railway company for other than railroad purposes or when leased or otherwise disposed of, whereupon "the owner thereof shall thereupon be taxed upon such land as and when merchantable timber is cut and severed from the land".

Assuming the legislation were to impose the tax in this form, the fact that it was stated to be upon the land would not be decisive of the matter for the question of the nature of the tax is one of substance, and does not turn only on the language used by the local Legislature which imposes it, but on the provisions of the Imperial Statute of 1867 (*Atty. Gen. for Manitoba* v. *Atty. Gen. for Canada* (1), Viscount Haldane at 566). The ground for the decision in *Union Colliery* v. *Bryden* (2), was that the regulations there impeached were not really aimed at the regulation of coal mines at all, but were in truth devised to deprive the Chinese, naturalized or not, of the ordinary rights of the inhabitants of British Columbia and, in effect, to prohibit their continued residence in that Province since it prohibited their earning their living in that Province (*Cunningham* v. *Tomey Homma* (3)). Here, as was said by Lord Herschell in delivering the judgment of the Judicial Committee in the *Brewers and Maltsters Case* (4), it is necessary to ascertain whether the Provincial Legislature under the guise of imposing direct taxation is in reality imposing indirect taxation. In considering whether what

(1) [1925] A.C. 561.
(2) [1899] A.C. 577.
(3) [1903] A.C. 151.
(4) [1897] A.C. 231.

is intended is in reality a tax upon the land, it is of some importance to note that the tax is only payable when merchantable timber is cut and severed from the land and that the amount of it is to approximate the prevailing rates of royalty per thousand feet of merchantable timber. The amount of the tax bears no relation to the value of the land and would vary from year to year, depending upon the quantity of timber cut and if the timber was never cut no tax would ever become payable. The land itself, apart from the value of the merchantable timber, is largely worthless: it is a matter of common knowledge that the value of these timber lands depends almost entirely upon the merchantable timber which they contain and, in my opinion, while stated to be upon the land it is upon such timber that it is intended to levy the tax. Whether in respect to the merchantable timber upon the land when purchased from the railway company or such as may become merchantable thereafter, I am of opinion that the burden of the tax will fall upon persons other than the owner of the property from whom it will be demanded.

The tax proposed by Question 6 differs in this respect that when the land is used by the railway company for other than railroad purposes or when it is leased or otherwise alienated it is to be assessed at its fair market value and the owner taxed in a percentage of such value. This tax would be paid at the option of the taxpayer, either within a limited time after the assessment with a discount if paid within such time, or by paying each year on account of the tax a sum that bears the same ratio to the total tax as the value of the trees cut during that year bears to the assessed value of the land. I have no doubt that a calculation could be made under the first of these options which would produce a fair estimate of the present worth of the tax that might become payable under the second of these alternatives but, in view of the various dangers to which standing timber in British Columbia is subject, it seems to me highly improbable that purchasers would adopt any but the second of these optional methods. The destruction of the timber by fire would, of course, mean that, though the assessment had been made, if the owner had elected to pay the tax as and when the timber was cut, no tax would ever become payable in respect of that

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timber. The tax suggested in Question 5 would be at approximately the prevailing rates of royalty: that proposed in Question 6 would be "in a percentage of the assessed value" and under the second option the tax to be paid per thousand feet board measure as the timber is cut would presumably approximate such rates. I think this indicates clearly that what is intended is simply a tax on the timber when severed and the fact that under the first alternative the land owner may compound that tax by paying a lump sum does not alter the true character of the proposed legislation. I think this is indirect taxation for the same reasons that lead me to that conclusion in regard to the tax proposed in Questions 4 and 5.

The Forest Act, cap. 102, R.S.B.C. 1936, by sec. 123 as amended by cap. 29, Statutes of 1946, provides that from the owner of logged, unimproved and timber land there shall be payable and paid to the Crown on the 1st day of April in each year an annual tax at the rate of .06 cts for each acre, and all such payments are to be placed to the credit of the fund in the Treasury to be known as the Forest Protection Fund. Large contributions are made to this fund by the Province and its purpose, as the name implies, is the protection of forest lands in the Province from the various dangers to which they are subject. Question 7 asks whether the railway company is liable "to the tax (so-called)" imposed by this section in connection with the lands in question: the second part of the question asks whether these levies derogate from the provisions of sec. 22 of the *Settlement Act.*

Since the Esquimalt and Nanaimo Railway Company is the owner of timber land it is subject to these levies unless relieved of them by the contract made between the Province and the company when the road was constructed, or by reason of sec. 22 of the *Settlement Act.* The agreement is not in writing but as I am of the opinion that in this respect it obligated the Province to exempt the lands from taxes in the manner defined by sec. 22, the question to be decided is the meaning of that word in the section. The word is to be interpreted in its natural and ordinary sense and, this being so, I am of the opinion that these levies are properly classified as taxes. The Oxford English Dictionary defines a tax as being a compulsory contribution

to the support of the Government levied on persons, property, income, commodities or transactions. In *Lower Mainland Dairy Products Sales Adjustment Committee* v. Crystal Dairy Limited (1), the Judicial Committee held that the levies there under consideration were taxes being compulsorily imposed by a public authority for public purposes and being enforceable by law. The forest lands of British Columbia, whether in the hands of the Crown or of private owners, are one of the most valuable assets of the Province, giving employment to great numbers of persons and yielding large annual revenues for Provincial purposes. These levies are, therefore, in my opinion, made for a public purpose; they are imposed by the Crown and the payment of them is enforceable by action. I consider, therefore, that all the necessary elements of a tax are present and that the levies fall within the meaning of that term, as used in sec. 22.

To impose this tax upon the lands in question unless and until the same are used by the company for other than railroad purposes or leased, occupied, sold or alienated would, in my opinion, be contrary to the provisions of sec. 22 of the *Settlement Act*.

I would, therefore, answer the questions as follows:

1. As to the first part thereof: yes.
   As to the second part thereof: no.
2. Yes.
3. No.
4. Yes.
5. No.
6. No.
7. As to the first part thereof: no.
   As to the second part thereof: yes.

RAND J.—The events leading up to the provincial legislation of December, 1883 have been set forth in the judgments of the Court of Appeal in great detail and I shall do no more than to state the general interpretation which I give to them. Nor would it be profitable to examine the constitutional position from which in substance O'Halloran and Bird, JJ. A. proceeded, i.e. that the construction of the island railway was an obligation

(1) [1933] A.C. 168.

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of the Dominion under the terms of union: even with that as an initial assumption, the conclusions to which the questions invite us, are not, in the view I take of the settlement as a whole, materially affected.

It is evident that at the beginning the Dominion had provisionally fixed the terminus of the transcontinental railway on Vancouver Island. There was delay admittedly in proceeding with the work and it is clear that in 1875 an island terminus had become doubtful, if not ruled out. In that year to settle all matters of complaint on the main project and to assist the Province in constructing the island railway as a local work, the Dominion offered the sum of $750,000, an offer which the Province rejected. Somewhat later the terminus appears still to have been undecided, but this had disappeared when the controversy reached an acute stage in the early '80's.

At that time the Dominion had clearly settled upon the southern route through the Kicking Horse Pass as against the Yellowhead Pass in the north, with the terminus on the mainland at Port Moody: and as the Dominion then viewed the situation, the railway on the island had become a purely provincial matter. But it was recognized that, besides the general delay, the withdrawal from settlement of the railway belt lands between Esquimalt and Nanaimo, made on the request of the Dominion, had retarded the development of the island. Of this legitimate complaint on the part of the Province the Dominion was prepared to negotiate a settlement. In 1882, the Province, concluding probably that with a terminus at Port Moody, there would be difficulty in challenging fulfilment of the constitutional obligation, passed an act authorizing the construction of the Esquimalt line by a private company.

In that situation good sense as well as good faith had become necessary on both sides. The Canadian Pacific Railway Company had been organized to carry through the railway program and with that formidable work under way, it was desirable both that the new constitutional relations be not exacerbated by minor controversies and that the immediate construction of the island line be arranged. So it was then that early in 1883 the Dominion intimated what it would do to clean up the entire matter. Following this and purporting to be a legislative com-

pliance with the terms proposed, a provincial statute was passed in May of that year. But its language was taken to mean the construction of the line on the responsibility of the Dominion, and this the latter refused to accept. Negotiations continued and on August 20th, 1883 the two governments finally agreed upon modifications which were enacted by the Province in December, 1883. Later, in April, 1884, corresponding legislation was passed by the Dominion.

The settlement so far as it is material here was this: the Dominion was to facilitate the construction of the island railway by a cash subsidy of $750,000 and by exemption from customs duties of certain materials to be imported for the purposes of the railway; it was to be the party to contract for its construction; and it was to name the incorporators of the company to be formed. The Province, on its part, would provide for the incorporation of the company; and transfer to the Dominion approximately 1,900,000 acres of land, on a considerable portion of which were valuable stands of timber, which it is recited in the preamble to the statute the Dominion would "hand over" to the company.

Following the legislative confirmation, the railway was built, the construction contract fully performed, the money paid over and the lands conveyed to the company.

The provincial statute by sec. 22 provided:

> 22. The lands to be acquired by the company from the Dominion Government for the construction of the Railway shall not be subject to taxation, unless and until the same are used by the company for other than railroad purposes, or leased, occupied, sold, or alienated.

and on this section the questions raised in large measure depend.

What, then, is the effect of, or the nature of any interest or right of the company under, that section? It is contended by the Province that the provision is legislation merely, i.e. the voluntary act of the legislature, conferring from day to day or year to year a benefit which in no sense is or was intended to or does imply or constitute a contractual right in the company to the exemption according to its terms which would in whole or part be affected or destroyed by the repeal or amendment of the section; that any "right" arising is simply the present effect from

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time to time of the legislation, a benefit not different from what might be conferred by a general statute passed long after the railway had been established, a privilege existing and intended to exist, solely in the indulgence of the legislature.

The answer to that is put in several ways. It is argued that the construction contract provided that the subsidy lands were to carry with them all of the benefits of the provincial legislation including sec. 22, and that in making the contract the Dominion was acting on behalf of itself and the Province; that the Province, having stood by and allowed the Dominion to contract for the transfer of the lands with the benefit of sec. 22, cannot now be heard to say that the company has not a contractual right to the continuance of the tax exemption; that the Dominion in its agreement with the Province was acting as trustee for the promoters in relation to those features with which the provincial legislation dealt; that in the negotiations of August, 1883 when the construction contract, the statement of agreement between the Province and the Dominion, and the draft bill incorporating those changes, were completed, it was in fact, by implication or otherwise, agreed between the promoters and the Province that the tax exemption would continue according to its terms once the railway was constructed and in operation; and finally, as the acceptance of the necessary implication of the provincial legislation itself i.e. that upon performance by the company of the undertaking envisaged, certain provisions of the legislation including sec. 22, constituting inducements held out to the company, would become binding contractually upon the province.

The construction contract stipulates in paragraph 15 that the lands shall be conveyed to the company "subject in every respect to the several clauses, provisions and stipulations . . . contained in the aforesaid Act . . . as they may be amended . . . in accordance with the draft bill now prepared . . particularly to secs. 23, 24, 25 and 26 of the said Act." The question is whether the words "subject to" are appropriate to the benefit of sec. 22; and considering the language of the Dominion Act of 1884, secs. 3 and 7, and that of the conveyance of the land to the

company in 1887, I cannot think they are or that the paragraph was intended to incorporate the provision of sec. 22 as an obligation assumed by the Dominion.

There is next the question whether, apart from the legislation, a contract arose between the two governments and that in any respect or to any extent the Dominion was acting for or representing the promoters. I find myself unable to treat the negotiations as intended to effect obligations between them beyond the legislation contemplated. The fact that the memorandum stipulated for legislative confirmation by both indicates the real intention. What were being framed were political arrangements to be embodied in statutes; and the word "agreement" as used in the memorandum meant simply consensus looking to obligation on another level than that of contract.

Nor am I able to infer the intention of the promoters and the Province to create a binding obligation distinct from the effect of the legislation and much less that any such contract should thereafter coexist with the legislation. The approval of the bill containing the exemption clause by Dunsmuir on behalf of his associates would seem to put the matter beyond doubt. At the highest, any such arrangement would require legislative sanction, in which event it could scarcely be taken that the confirmation was to bind the Province apart from and in addition to the legislation. What both the promoters and the company assumed was that the tax exemption would be effective according to its terms, and they were not concerned to provide collaterally against the consequences of a legislative repudiation.

Is the act, then, of the provincial legislature of such form and matter as had they existed analogously between private persons would have given rise to contractual rights? It is conceded that sec. 22 was held out as an inducement to the company: tax exemption was to be part of the provincial contribution to the work. The legislative intent or implication from the language used can only be that if the company should fulfil the conditions of the statute, the exemption would be maintained according to its terms. Any other interpretation would be a fraud on those committing themselves in part on the strength of it. If the legislation had provided that the land grant should be made direct by

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the Province, could it have been said that the acceptance of incorporation, with the obligations of the construction contract *ipso facto* imposed upon the company, and the construction of the railway, did not draw to the company by fulfillment of the conditions of the legislative promise, a contractual right to receive the lands so held out? I should say that a statutory benefit arising through the performance of conditions laid down in the statute as the quid pro quo of the benefit, is a contractual right: and that upon performance by the company here, the engagement became binding upon the Crown.

Since the Crown, as the symbolic embodiment of the supreme power of the state can, in its executive capacity, enter into a contract with a subject, is there any obstacle to its entering into a similar contract on a higher level? If, as it is established, a "statutory" contract may arise between private persons: *Workmen's Compensation Board* v. *Canadian Pacific Ry. Co.* (1); what is there in the nature of things to exclude the Crown, in its legislative capacity, from binding itself in either capacity to the same form of obligation? That the terms of a charter constitute a contract between the state and the corporation created was held in the United States in the case of *Dartmouth College* v. *Woodward* (2), in which at p. 627 Chief Justice Marshall uses this language:

> It can require no argument to prove, that the circumstances of this case constitute a contract. An application is made to the crown for a charter to incorporate a religious and literary institution. In the application, it is stated that large contributions have been made for the object, which will be conferred on the corporation, as soon as it shall be created. The charter is granted, and on its faith the property is conveyed. Surely in this transaction every ingredient of a complete and legitimate contract is to be found.

Having found a contract, he then proceeded to consider whether it was protected by the constitution of the United States and if so whether it had been impaired by certain legislation of the State of New Hampshire; and holding for the corporation in each respect, declared the State legislation ultra vires.

No such constitutional difficulties arise here; undoubtedly the legislature could amend or repeal sec. 22 and thus modify or destroy the right of exemption: but equally so could it affect a contract made by the Crown in its

(1) [1920] A.C. 184. (2) 4 Wheaton 518 at 627.

purely executive capacity. The existence of that legislative power is not incompatible with a relation which both the legislature and the company intended to bring about; and I am unable to make any distinction in principle between the creation of contractual rights arising from incorporation by charter and by legislation. In each case it is the sovereign power acting with the same intent.

The language of Lord Macnaghten in *Davis & Sons* v. *Taff Vale Railway Company* (1), is most pertinent to the case before us:

> Ever since it has become the practice for promoters of undertakings of a public nature to apply to Parliament for exceptional powers and privileges, the Acts of Parliament by which those powers and privileges are granted have been regarded as parliamentary contracts, as bargains between the promoters on the one hand and Parliament on the other—Parliament acting on behalf of the public as well as on behalf of the persons specially affected. Those powers and privileges are only conceded on the footing that the concession is for the benefit of the public who are likely to use the railway as well as for the benefit of the promoters.

If it is to be deemed a parliamentary contract when the benefit is to the members of the public as represented by the legislature, on what ground are we to treat the correlative benefit to the promoters as being in another category? Sec. 22 restricts executive action in relation to statutory taxation; and it is within the language of Lord Macnaghten that sec. 22 should be intended by the legislature to bind the Crown: that the legislature should be taken for that purpose to be representing the Crown or any instrumentality to which taxing powers are given.

But it is said that this conclusion is negatived by clause 31 of section 7 of the *Interpretation Act,* chapter 2 of the Consolidated Statutes, 1877:

> Every act shall be construed as to reserve to the legislature the power of repealing or amending it, and of revoking, restricting, or modifying any power, privilege, or advantage thereby vested in or granted to any person or party whenever such repeal, amendment, revocation, restriction, or modification is deemed by the legislature to be required for the public good.

In 1888 the *Act* was revised, and a new clause in the same language was preceded by general words in section 8 as follows:

> In construing this or any act of the legislature of British Columbia, unless it is otherwise provided, or there be something in the context or other provisions thereof indicating a different meaning or calling for a different construction:

(1) [1895] A.C. 542 at 559.

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The present provision is to the same effect.

It is difficult to assess the significance or effect of such a clause. It seems to have been introduced into the legislation of this country in 1849 in the *Interpretation Act* of the Province of Canada. In relation to the present matter, the power would exist as fully without the reservation as with it. But what is reserved is a legislative, not a contractual, power, and I am unable to attribute any greater effect by reason of its being express than as constitutionally implied. Its exercise may modify a statutory contract, but that operation is not contractual.

So far, moreover, as it may be relevant in interpretation, only the present form is to be considered. Except in the case of temporary statutes all legislation is looked upon as perpetual and once repealed it is as if it had never existed: *Surtees* v. *Ellison* (1). As under section 22 the exemption is to continue for a specified period, a stronger case could scarcely be imagined of "something in the context indicating a different meaning or calling for a different construction".

It was argued that the contract between the parties entered into in 1912 when the railway, without the lands, was leased to the Canadian Pacific Railway Company, is to be interpreted as binding the Province to a continuance of the exemption even though no such obligation existed before; but I cannot so construe it. What the parties had in mind was an existing and binding statutory exemption: the railway company desired to avoid any question of affecting the conditions on which the exemption rested; and as a consideration for the settlement of all doubts it was agreed that the company should pay a specified annual tax and that the exemption should continue as before. I cannot view it as having added any new form or characteristic to the exemption.

The proposed taxes must next be considered. It will be observed that the legislation would be enacted while the lands are still in the ownership of the railway company and still exempt under sec. 22 although a change of ownership or use would be necessary to its effectiveness. Under question 5 the tax which it is agreed would be the equivalent of what is known as a royalty payable by certain grantees

(1) 9 B. & C. 752.

and lessees of the Crown lands on each 1,000 square feet board measure of timber cut, would arise only at the moment of severance of the trees. But that is not simply fixing the time for payment; the tax is conditioned on severance and if there are no merchantable trees there can be no severance and no tax. That the tax, so potential and contingent, should, when it emerges in esse be charged on the land, is, as to its nature, irrelevant: and I cannot view it other than a tax imposed on personal property at its initial stage of being worked into merchantable lumber.

As envisaged by question 6, the tax is declared to apply only to land and is based on the fair market value of the land. For payment, alternative modes are proposed:

(1) Within a specified limited time after the assessment with a discount if paid within the specified time;

(2) Or, at the election of the taxpayer, made within a specified time after assessment by paying each year on account of the tax a sum that bears the same ratio to the total tax as the value of the trees cut that year bears to the assessed value of the land.

I agree with Mr. Farris that the first mode must be interpreted as a substantial equivalent of the second in which the obvious risks of the latter both to the Province and to the owner are commuted in terms of money. The discount must be sufficient to induce a business judgment to accept it as fairly related to the chances of loss and benefit; and there is no more difficulty in estimating such a sum for taxes than for purchase money. In each case timber is the substance of the value; but in the case of the tax, the attention may be more specifically centered on the future fact of severed timber.

I can see no real differenc either between the second alternative and the tax as proposed in question 5. The tax depends in both cases on severance and only in relation to timber cut is it to be computed. If growing timber is destroyed, the original tax is so far reduced. Taking the assessment of the "fair market value of the land" to mean the value of standing timber at the time of assessment, the discount in the first alternative takes speculative account and the second actual account of capital losses from time to time to be written off the assessed value; and in the result the tax is intended to attach solely to severed timber in the course of commercial production of marketable lumber and the same situation as in question 5 confronts us.

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This brings us to question 4:—"Would a tax imposed by the Province on timber as and when cut upon lands in the island railway belt, the ownership of which is vested in a private individual or corporation, the tax being a fixed sum per thousand feet board measure in the timber cut, be ultra vires of the Province?"

Since in every case supposed, the tax is on severed timber, it is in reality an excise tax which, in its general tendency, is indirect; "Customs and excise duties are, in their essence, trading taxes and may be said to be more concerned with the commodity in respect of which the taxation is imposed than with the particular person from whom the tax is exacted"; *Attorney-General of British Columbia* v. *Kingcome* (1). "The word—(excise)—is usually (though by no means always) employed to indicate a duty imposed on home-manufactured articles in the course of manufacture before they reach the consumer. So regarded an excise duty is plainly indirect.": *Atlantic Smoke Shop Ltd.* v. *Conlon* (2).

I do not think this conclusion is at all affected by what I agree with the judges below would be the fact, that the tax would influence the price at which the lands could be sold: that would make it indirect in both aspects. Since the legislation would be sui generis, the incidence of the tax on the company cannot be brought within any general tendency rule except the general and indeed the only tendency of the special case. But the fact that a tax, in its nature and classification, is indirect is not taken out of that category by the further fact that in some part at least its incidence may already have been shifted from the person who actually pays it: *Rex* v. *Caledonian Collieries* (3).

I think it clear, too, that the purchaser of the land or timber is not the person intended or desired to pay the tax and that it is the intention and expectation that it will be passed on to another by him; but regardless of actual intention, where the general tendency of the tax, with or without a like effect in special circumstances, is judicially found, the imputation of the appropriate intent or expectation necessarily follows.

(1) [1934] A.C. 45 at 59.
(2) [1943] A.C. 550 at 565.
(3) [1928] A.C. 358.

As I have already intimated, I think the imposition of the proposed taxes would affect the price or the value of the use of the lands in the hands of the company; I cannot but take that to be the real object of the legislation; there would thus be an encumbrance imposed during what would otherwise be the period of and would so far derogate from the exemption.

The seventh question is whether the company is liable to the so-called tax for forest protection imposed by sec. 123 of the *Forest Act*, and if so, whether the liability derogates from the provisions of sec. 22.

The *Forest Act* enables the establishment of a comprehensive service for the conservation and development of what in British Columbia is a great natural resource. Its scope reaches to all means and measures to prevent damage and destruction by fire and by insects. Although the immediate beneficiaries are the owners or persons interested in forest lands, the interest of the public in the preservation of this vast wealth, the fullest utilization of which is of the highest public importance, is of paramount concern, and the administration provided is the only practicable method by which effective protection can be secured.

Sec. 123 as amended in 1946 provides for the creation of a forest protection fund to be raised by an annual tax of six cents for each acre from the owner of logged, unimproved and timber land as well as from the holders of timber or pulp leases, timber, pulp or resin licenses, or timber berths. To the fund there is contributed annually by the Province the sum of $1,000,000. Provision is made for the assessment of any deficiency in administration expenses and as well for the reduction of the assessment and contribution in the event of an accumulated surplus. The expenditure of these moneys is confined to the purposes of forest protection under Part II of the statute.

In *Shannon* v. *Lower Mainland Products Board* (1), a somewhat similar situation of private and public benefit existed. Under the legislation there considered, the moneys were collected as license fees and they seem to have been the only funds available to a local scheme: sec. 14, authorizing general expenses to be paid from the Consolidated Revenue Fund specifically excepts "the expenses

(1) [1938] A.C. 708.

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of administering" such a scheme. The benefit to the licensee lay in the results of the regulation of his business, and the public interest in its indirect effects. The Judicial Committee held that,

> The impugned provisions can also, in their Lordships' opinion, be supported on the ground accepted by Martin, C.J. in his judgment on the reference . . . namely, that they are fees for services rendered by the Province, or by its authorized instrumentalities, under the powers given by section 92(13) and (16).

In *City of Halifax* v. *Nova Scotia Car Works* (1), the car works company was entitled to an exemption from all "taxation", and the question was whether or not "taxation" included a capital levey on a frontage basis for a part of the cost of a sewer laid as a local improvement along a street adjacent to the company's lands. The balance of the cost as well as maintenance was borne by general taxation. Although the owner of such lands was the direct beneficiary, the public at large was afforded health protection as well as general convenience, to say nothing of esthetic returns. Lord Sumner at page 998 uses this language:

> All rates and taxes are supposed to be expended for the benefit of those who pay them, and some are really so, but the essence of taxation is that it is imposed by superior authority without the taxpayer's consent, except insofar as a representative government operates by the consent of the government. Compulsion is an essential feature of the charge in question. The respondents might have drained their factory for themselves; they might think that it needed no drainage; they might object to the municipal scheme as defective; but the city sewers would be laid and the respondents would have to pay just the same; there is not enough here to differentiate this charge from taxation.

The option to use or not to use the sewer would, in the circumstances, be quite illusory: practically the company must make use of it and necessarily receive its benefit. The same compulsion was present in the *Shannon* case (2); the producer or dealer, continuing in his business, was compelled to accept the benefit of the regulations and to pay the licence fees. The distinction between them is, I think, the fact that in *Shannon* the fund, raised by licence fees, was exclusively for and the only source of means by which the schemes could be carried out. In that sense, it was analogous to a fee for registration.

Here, there is not that sole or exclusive characteristic: general taxation furnishes a substantial portion of the required money just as it did for the sewer for which the

(1) [1914] A.C. 992. (2) [1938] A.C. 708.

company was taxed. In all three cases, there is the immediate and special interest of the owner and the general interest of the public: in two there is both special and general taxation. The compulsion, the public purpose, and the individual liability, are present in all. The language of sec. 123, "an annual tax" indicates the ordinary and I think the proper conception of what is being prescribed. The analogy of the present situation to that of payment for such a service as that of registering a deed, must, I think, be rejected. The public interest is too clearly the paramount object of the legislation, and the imposts carry too fully the indicia of taxation, to permit us to distinguish them from the generality of fiscal provisions.

I would, therefore, answer the questions as follows:

1. To the first part of the question, Yes; to the second, No.
2. Yes.
3. No.
4. Yes.
5. No.
6. No.
7. To the first part of the question, No; to the second, that the tax applied to the company would derogate from the provisions of sec. 22.

KELLOCK J.—In the Dominion Order-in-Council of June 23, 1883, forwarded to the provincial government on the 28th of that month, the following occurs:

> 2nd. That Sir Alexander Campbell should then communicate with Mr. Dunsmuir and other capitalists who are understood to be desirous of forming a company to construct the railway *under the terms of the Provincial Act.*

The "Provincial Act" was of course the *May Act* and the immediately preceding paragraph of the order refers to the necessity of amending it. So far as the exemption from taxation covered by section 22 of the *Settlement Act* is concerned, that provision was already in the *May Act* and it was on those terms that the contractors were willing to execute the contract under which the railway was to be built. Both governments therefore knew that it was on the basis that the lands should "not be subject to taxation, *unless and until* the same are used by the company for

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other than railroad purposes, or leased, occupied, sold or alienated", that the contractors were willing to undertake the works.

On August 6, 1883, the Dominion Minister of Justice, Sir Alexander Campbell, sent to the provincial Prime Minister, Mr. Smithe, a copy of the proposed contract between the Dominion and the contractors. The letter, which accompanied it, contains this sentence:

> I propose, on obtaining the approval of the Local Government to the contract, to execute it, and that Mr. Dunsmuir and his friends shall be *invited* to do so.

The letter concludes:

> I shall be glad to have your approval of the contract and of the several stipulations made in this letter in regard to it.

The contract was the subject of further correspondence between the representatives of the two governments and was ultimately settled by August 20, 1883. By the inter-governmental memorandum of arrangement executed that day, it was provided that the contract should be "provisionally signed by Sir Alexander Campbell on behalf of the Minister of Railways and Canals, but is to be deposited with Mr. Trutch, awaiting execution by delivery until the necessary Legislative authority shall have been given, as well by the Parliament of the Dominion as by the Legislature of British Columbia."

The memorandum also contains the following provision:

> 2. The Government of British Columbia will procure the assent of the Contractor for the construction of the Island Railway to the provisions of Clause F recited in the amending Bill.

The amendments were underlined in red in a copy of the proposed bill which was annexed to the memorandum. The bill by clause (*f*) of the recital, as it was therein amended, together with section 23, enlarged the burdens to which the subsidy lands were made subject by the *May Act* but the amendments did not otherwise affect the interest in the lands which would come to the company on the completion of the works. In my opinion this circumstance, viz., that the contractors' assent was required to be obtained to the change, confirms the accuracy of the statement in the Order-in-Council of June 23, 1883, that it was understood by all concerned then and subsequently that the

contractors were willing to undertake the works only upon the "terms of the Provincial Act" as it was ultimately settled.

The existence of the understanding to which I have referred is made even more clear by the terms of the testimonium of the construction contract:

> . . . and placed in the hands of the Honourable Joseph William Trutch, until the Act passed by the Legislature of The Province of British Columbia in the year 1883 (the May Act) shall have been amended by the Legislature of the Province in accordance with a Draft Bill now prepared, and which has been identified by Sir Alexander Campbell and the Honourable Mr. Smithe, and signed by them and deposited in the hands of the said Joseph William Trutch . . .

as well as by the endorsement on the draft bill produced from the files of the Department of Transport signed by Dunsmuir, which reads:

> I have read and on behalf of myself and my associates acquiesce in the *various provisions* of this Bill, so far as they relate to the Island Railway *and lands*.

The above is the only copy of the draft bill and endorsement which is produced. The note on page 148 of the printed case herein purporting to reproduce an endorsement differently worded is not proved. The case was copied from the case used in the court below which in turn was based upon a compilation of documents headed "In the Matter of Chapter 71 of the Statutes of British Columbia for 1917". That compilation does not contain either the draft bill or the alleged endorsement but there is pinned to page 35 a note in the handwriting of some unknown person, the "note" reproduced in lines 24 to 35 on page 148 of the case in this appeal. Where it came from and whether accurate or not is not shown. The note on page 148 is itself not a true copy of the manuscript note as it omits the words "It was signed" immediately before the signature "A. Campbell". I therefore take the endorsement on the bill produced from the Department of Transport as the one to be considered.

Under the arrangement made, the entire scheme was not to become operative until the legislation had been passed by both jurisdictions. The Dominion Act was last in point of time, receiving the Royal Assent on April 19, 1884. Previously on the 12th of that month by an Order-in-Council of the Dominion, Dunsmuir and his associates

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were named as the persons to be incorporated under section 8 of the Provincial Act, and therefore upon the passing of the Dominion Act the appellant company came into being. The exemption provided for by section 22 was with respect to the lands "to be" acquired by the company. This event, under the terms of the construction contract, would not take place until after the completion of the works to the satisfaction of the Governor-General. The exemption, therefore, inapplicable while the lands were held by the Dominion, could be operative only thereafter when the company had received its conveyance, from which time the lands should "not be subject to taxation, unless and until . . ." The period thereby delimited has not yet elapsed as to that part of the lands still retained by the appellant company.

I do not think that section 7 (31) of C.A. 1877, cap. 2, has the effect of reading into section 22 some such words as "unless and until the legislature otherwise determines" at the beginning thereof. In my opinion it does nothing more than provide that the legislature may do what it might do without such a provision, namely, deal by legislation with civil rights in the province.

There is set forth in the preamble of both the Dominion and provincial legislation terms of an agreement. For convenience I refer to the agreement as contained in the provincial statute. By clause (*b*) of the agreement as recited in the provincial Act the provincial government was to obtain the authority of the legislature to grant to the Government of Canada certain defined lands on the Island of Vancouver. By clause (*e*) the Dominion Government was obliged, upon the passing of the provincial statute, to seek the sanction of Parliament to enable the Dominion to contribute to the construction of the railway the sum of $750,000 and the Dominion Government agreed "to hand over to the contractors who may build such railway the lands which are or may be placed in their hands *for that purpose* by British Columbia". By clause (*f*) the Island lands to be thus conveyed, subject to certain reservations as to coal and other minerals and timber, were to be opened for settlement as therein specified.

By section 3 the lands referred to in clause (*b*) of the recital were granted to the Dominion for the purpose of

constructing and to aid in the construction of the railway and "*in trust* to be appropriated as they may deem advisable". This language followed that of section 3 of the *May Act* but the *May Act* did not contain the undertaking in clause (*e*) of the Settlement Act above referred to, for the handing over of the lands to the builders of the railway, the lands being placed in the hands of the Dominion "for that purpose". Accordingly, in my opinion, clause (*e*) and section 3 are to be read together, with the result that the lands were granted to the Dominion in trust for the company to be formed by incorporation under the same statute, subject of course to the fulfilment by the company of the conditions which would entitle it to a conveyance.

Section 8 makes provision for this incorporation and by section 10 the company thus incorporated is empowered to accept from the Government of Canada any conveyance of lands by way of subsidy or otherwise in aid of construction of the railway and to enter into any contract with that government for or respecting the use, occupation, mortgage, or sale of said lands, or any part thereof, upon such conditions as may be agreed upon between the government and the company.

By section 21 the railway with its workshops, stations, and other necessary buildings and rolling stock, as well as the capital stock of the company, was to be exempt from provincial and municipal taxation for a period of ten years after completion and by section 22 the lands "to be acquired" by the company from the Dominion for the construction of the railway were to be exempted as already mentioned.

The subject matter of these provisions was not specifically mentioned in the recited agreement but the statutory recital concludes as follows:

> And whereas it is expedient that the said agreement should be ratified and that provision should be made to *carry out the terms* thereof.

In my opinion provisions necessary to carry out the terms of an agreement form part thereof. Accordingly, it was the lands, subject to the burdens set out in the statute and with the benefit of the statutory immunity, of which, by section 3 the Dominion was constituted trustee for the appellant.

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It is quite clear to my mind from all relevant writings that all concerned understood that there were three things to be received by the appellant company in return for the execution of its obligations under the construction contract, viz., (1) the cash subsidy of $750,000; (2) the conveyance of the lands; and (3) the exemption from taxation provided by sections 21 and 22. I think all were equally, in the minds of all parties, the inducement upon which the contractors agreed to execute the works.

In my opinion the lands together with the immunity from taxation were the subject of a contractual obligation between the province and the Dominion as to which the latter was a trustee for the company upon fulfilment of the terms by the company which would entitle it to a conveyance. The company as beneficiary would accordingly be entitled to sue the province on the contract, it being necessary only that the Dominion should, in any such action, be made a party; *Vandepitte* v. *Preferred Accident Insurance Corp.* (1); *Harmer* v. *Armstrong* (2). That the agreement recited in the provincial Act was contractual is, I think, clearly established by the decision of the Privy Council in *Attorney-General of British Columbia* v. *Attorney-General of Canada* (3). In speaking of Article 11 of the Terms of Union, Lord Watson said at p. 304:

> . . . it merely embodies the terms of a commercial transaction, by which the one Government undertook to make a railway, and the other to give a subsidy by assigning part of its territorial revenues.

In my opinion if that be so of Article 11, it is equally so of the agreement by which the difficulties which had arisen between the two governments under that Article were composed. See also *Burrard* v. *Rex* (4).

It was also argued that a contract was brought about on the basis of the provincial statute being itself an offer accepted by the company by performance of the works thereby called for. Apart from any question arising from the form of the statute, I would have thought that such a contract had been made out; *La Ville de St. Jean* v. *Molleur,* (5); *Cunningham* v. *New Westminster* (6). The statutes in question in these authorities were, however,

(1) [1935] A.C. 70 at 79.
(2) [1934] 1 CH. 65.
(3) 14 A.C. 295.
(4) [1911] A.C. 87 at 95.
(5) 40 S.C.R. 629.
(6) 14 D.L.R. 918.

permissive. It is to be observed that in the present case, sections 9 and 20 of the statute, which provide for the execution of the works are imperative and the question arises as to whether there existed alongside the statutory obligation, a contractual one; *Great Western Railway* v. *The Queen* (1); *Reg.* v. *The Great Western Railway* (2); and *Reg.* v. *The York and North Midland Rly. Co.* (3); Statutes of British Columbia, 35 Vict., cap. 1, section 6 (2). In view of the conclusion to which I have come, however, it is not necessary to deal with this phase of the matter.

I would, therefore, allow the appeal as to the first question. With respect to the other questions I agree with the reasoning and conclusions of my brother Rand and have nothing to add.

ESTEY J.:—The seven questions submitted by the Lieutenant-Governor in Council arise out of a report made by The Honourable The Chief Justice of British Columbia, as Commissioner appointed under the Public Inquiries Act, 1936 R.S.B.C., c. 131, to inquire *inter alia* as to "forest finance and revenue to the Crown from forest resources."

In the course of the report it was recommended that the Courts be asked (*a*) whether section 123 of the *Forest Act* is applicable to the timber lands on Vancouver Island of the Esquimalt and Nanaimo Railway Company, known as the "Island Railway Belt;" (*b*) whether it was within the competence of the province to enact a severance tax, equal in amount to the royalty paid upon timber cut from Crown lands, to be imposed upon timber cut from these lands after the sale thereof by the railway company.

The report expressed the view that there was "no contract between the province and the company" relative to the lands in the Island Railway Belt and therefore that the imposition of a severance tax would not involve a breach of any contractual obligation.

The Lieutenant Governor in Council, under the provisions of the *Constitutional Questions Determination Act*, 1936 R.S.B.C., c. 50, by Order in Council dated the 13th

(1) 1 E. & B. 874.
(2) 62 L.J.Q.B. 572.
(3) 1 E. & B. 858.

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November, 1946, submitted the seven questions to the Court of Appeal in British Columbia for its opinion. This appeal is from the answers given by that Court.

Question One:

Was the said Commissioner right in his finding that there never was any contractual relationship between the provincial government and the contractors or the Railway Company in relation to the transfer of the Railway Belt to the Railway Company.

Between the governments of the Dominion of Canada and British Columbia in 1883 there were several matters in dispute, including the construction of the Island Railway and the delay in respect to that of the Canadian Pacific Railway. The two governments, commencing in February of that year, sought by correspondence and interviews to effect a settlement and in August The Honourable Mr. A. Campbell, Minister of Justice in the Dominion Government, went to British Columbia where on August 20, 1883, an agreement was concluded upon the matters in dispute, including the construction of the Island Railway.

It is perfectly clear that certain parties (hereinafter referred to as the Dunsmuir group) were familiar with these negotiations at least so far as the construction of the Island Railway was concerned, and on the same date agreed upon terms under which they would, and in fact did, construct that railway. The three parties, Dominion, province and the Dunsmuir group, embodied their agreements on August 20, 1883, in the following documents:

(1) The memorandum of agreement signed by Messrs. Campbell and Smithe on behalf of the respective governments.

(2) The amendments to the *May Act*.

(3) The construction contract signed by A. Campbell, Minister of Justice for the Minister of Railways and Canals in the Government of the Dominion of Canada, and by four parties, of whom Robert Dunsmuir was the first, under the terms of which Robert Dunsmuir and his associates agreed to construct the said Island Railway and telegraph line from Esquimalt to Nanaimo.

(4) Mr. Dunsmuir, on behalf of himself and his associates,

"I have read and on behalf of myself and my associates acquiesce in the various provisions of the Bill so far as they relate to the Island Railway and lands."

"Robert Dunsmuir".

(This latter document, numbered four, may not have been prepared or signed until the following day.)

The agreements would not be binding on any of the parties thereto until the Legislature of British Columbia enacted the *May Act* as amended ratifying the agreement between the Dominion and the province, which it did on December 19, 1883, by an Act entitled "An Act relating to the Island Railway, the Graving Dock, and Railway Lands of the Province," (hereinafter referred to as the Settlement Act), and the Dominion would ratify that agreement, which it did April 19, 1884, by an Act (1884 S. of C., c. 6) entitled "An Act respecting the Vancouver Island Railway, the Esquimalt Graving Dock, and certain Railway Lands of the Province of British Columbia, granted to the Dominion," (hereinafter referred to as the Dominion Act). The construction contract, numbered three above, was held as agreed in escrow by The Honourable Mr. Joseph W. Trutch. With the passage of the Dominion Act, April 19, 1884, the agreement and the construction contract became binding upon the parties.

Section 22 of the *Settlement Act* was identical with that of the *May Act* and read:

22. The lands to be acquired by the company from the Dominion Government for the construction of the Railway shall not be subject to taxation, unless and until the same are used by the company for other than railroad purposes, or leased, occupied, sold, or alienated.

It is around this particular sec. 22 that this controversy centres.

The *Settlement Act* provided that appellant company incorporated by that *Act* should be bound by the contract between the persons to be incorporated and Her Majesty, represented by the Minister of Railways and Canals. The appellant railway contends that there was a contract

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between the Province of British Columbia and the Esquimalt and Nanaimo Railway Company of which this sec. 22 is a term, while the respondent denies that any such contract ever existed, but rather it was enacted as a term of the agreement between the Dominion and the province.

The foregoing documents numbered one to four were the only documents prepared on August 20, 1883, embodying the terms of the settlement of all matters then in dispute, including some matters other than the Island Railway, between the two governments, and the construction contract. The appellant railway is therefore confronted with the fact that there is no agreement in writing between the province and the contractors, which, having regard to the fact that the other agreements were reduced to writing, would in all probability have been in writing if in fact it was made. The appellant railway, however, insists that such a contract under all circumstances should be implied. Its contention is that "the contractual relationship resulted from negotiations which commenced in February 1883 and in which the province, the Dominion and the contractors all participated." Between the period February 1883 and August 20, 1883, there were interviews and correspondence between the two governments. As early as May 5, 1883, the Government of Canada, relative to the construction of the Island Railway, offered substantially what was agreed upon on August 20, 1883. The province accepted the terms and enacted the *May Act*. Immediately the Dominion objected to certain of its provisions, in particular statements that the Government of Canada "agrees to secure the construction" of the Island Railway. This was amended as agreed on August 20, 1883, (when all the amendments thereto were agreed upon) and enacted as the *Settlement Act* to the effect that the Government of Canada would seek the sanction of Parliament to enable them to contribute to the construction of the Island Railway. There were other somewhat similar amendments. The Government of Canada had consistently refused to accede to the contention of the province that the construction of this Island Railway was a Dominion responsibility. These amendments were consistent with that view and equally consistent with the settlement made on August 20, 1883, under which both governments contributed and

the Dominion contracted for the construction thereof. These changes do not support the view that there was a contract relative to the construction of the Island Railway between the province and the contractors. In fact throughout these negotiations in 1883 there is no suggestion of a contract between the province and the contractors, while almost from the outset a contract for the construction of the Island Railway is contemplated between the Dominion and the contractors.

Moreover, in 1904 and again 1917 when the appellant railway asked the Dominion Government to disallow certain provincial legislation then enacted relative to these lands, it did not suggest that the province in passing the legislation had violated any agreement made between the appellant railway and the province. On the contrary, in their petition to the Dominion Government dated March 21, 1904, it is stated as follows:

> (20) The Esquimalt and Nanaimo Railway Company made their contract as aforesaid with the Dominion Government, and upon the due completion thereof received a grant of the said lands from the Dominion Government upon the same terms and conditions they were granted to the Dominion Government by the Provincial Government of British Columbia, by Chapter 14 of 1884.
>
> (21) The Esquimalt and Nanaimo Railway Company do not recognize the right of the Provincial Legislature to interfere with the land grant, as the company did not receive the land from the Provincial Government, nor did they enter into any contract with the Provincial Government.

The statements in these paragraphs have a special significance because this petition is signed by James Dunsmuir, who with Robert Dunsmuir, was among those who signed the construction contract of August 20, 1883. Mr. Dunsmuir would be in a position to know if in fact a contract was made on that date with the province and he and his associates in 1904 would appreciate how much of an asset such a contract would have been in their contention that the province in enacting the legislation they were then asking to be disallowed, had acted contrary to its obligations. If such a contract had existed it would no doubt have been urged at that time.

The petition presented to the Dominion Government in 1917 was not made a part of the record before this Court, perhaps because a formal hearing then took place before the Prime Minister, the Minister of Justice and the

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Minister of Public Works, when counsel appeared on behalf of the appellant railway. It may be noted, however, that in the report of the Minister of Justice in 1918 to His Excellency recommending disallowance of the provincial legislation the following is included:

> On the other hand it was urged, and in fact it was not denied, that the Company had received its land grant in pursuance of the agreement of the Government of Canada founded upon legislation sanctioned by the Dominion, and the Province . . .

These submissions made in 1904 and 1917 without any reference to the existence of a contract between the province and the contractors go far to support the contention that such a contract never did exist.

Sec. 22, as well as certain other sections of the *Settlement Act*, would undoubtedly be among the important items which induced the contractors to undertake the construction of the railway. These were embodied in the terms of their construction contract with the Dominion, and the Dominion had placed itself in a position to carry out the terms of its contract by concluding an agreement with the province. Other sections of the *Settlement Act* were referred to in which existing rights of persons or corporations as well as reservations for military and naval purposes were protected, and further provisions relative to the price of coal. These were matters which, under the circumstances, would be present to the minds of the parties and their inclusion does not point to the existence of a contract, such as is suggested, between the province and the contractors.

The document numbered four above may not have been prepared or signed before August 21, 1883. By its terms Robert Dunsmuir does not suggest the existence of any agreement between himself and the province. On the contrary, the word "acquiesce" is used. Under the circumstances, it may well be that those representing the Dominion deemed it desirable that Mr. Dunsmuir should signify his acquiescence in the terms of the *Settlement Act;* more particularly because sec. 15 of the construction contract provided that when conveyed to the company that the said lands would "be subject in every respect to the several clauses, provisions and stipulations referring to or affecting the same respectively, contained" in the *Settlement Act.*

In support of their contention the appellants refer to certain statements subsequently made. In the grant of these lands April 21, 1887, from the Dominion to the appellant railway reference is made to an agreement between the two governments and the company; also that in the recommendation by the Minister of Justice in 1918 for a disallowance of certain provincial legislation in respect to these lands he spoke of the province "as one of the parties to the tripartite agreement". These statements when read in relation to the other portions of the respective documents do not warrant a conclusion that a contract between the province and the appellant railway was made.

Nor can the appellants' contention be supported that the Dominion throughout acted as agent for the province in the negotiation and execution of the construction contract. The fact that the security given by the company had to be satisfactory to the province was pressed as indicating the existence of an agency relationship. The vital concern of the province in the completion of the Island Railway and the quantum of its contribution made it but natural that the Dominion would agree that the security taken should be satisfactory to the province. It may be noted that when the province contended: "In the event of the forfeiture of the security by the contractors, it ought to be understood that it will be handed over to the Province by the Dominion Government;" the latter replied: ". . . they would not hand over the security, but retain it for the purpose for which it was given". Such a provision does not suggest that the Dominion was an agent.

The appellants referred to a communication dated the 16th November, 1885, from The Honourable Mr. Smithe to The Honourable Mr. Trutch dealing with questions arising out of the delay in the issue of patents to the settlers. It is a long letter in which he acknowledges the Dominion to be the principal in this matter. Further on, in setting forth a contention rather than stating a fact, he says that the provincial government are the real principals. Such a statement does not point to the existence of agency in fact.

In effecting the settlement of the various disputes the respective governments were acting as principals. As part

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of that settlement the lands were transferred in trust to the Dominion. The latter as trustee appointed the province to act as agent for administering the lands for the purposes of settlement until the Island Railway would be completed. These are the only relationships existing between the parties as evidenced by the written documents.

The provisions of the *Settlement Act* were part of the terms of the settlement made between the two governments. The tax exemption in sec. 22, as well as the other provisions of the *Settlement Act,* were provided for in the settlement agreement in order that the Dominion might hold out these subsidy lands tax exempt to the Dunsmuir group as part of the consideration under which they might undertake to build the railway. It was in pursuance of that understanding of the agreement that the province transferred the lands in trust subject to those terms to the Dominion for that purpose; as stated in the *Settlement Act* "for the purpose of constructing, and to aid in the construction of a Railway between Esquimalt and Nanaimo, and in trust . . ." The construction contract provided that these lands should be conveyed by the Dominion to the contractors (Dunsmuir group) "upon the completion of the whole work to the entire satisfaction of the Governor in Council; . . . subject in every respect to the several clauses, . . . contained in the aforesaid Act," (*Settlement Act*). When the Dominion and the province by the enactment respectively of the *Dominion* and *Settlement Acts* ratified the settlement made between them, and the Dominion had ratified the construction contract, they had completed what Lord Watson referred to in *Attorney-General of British Columbia* v. *Attorney-General of Canada* (1), as a "statutory arrangement."

Upon the completion of the railway the lands were conveyed to the company by a grant dated April 21, 1887, "subject nevertheless to the several stipulations and conditions affecting the same hereinbefore recited and which are contained in the Acts of the Parliament of Canada (Dominion Act) and of the Legislature of British Columbia . . ." (Settlement Act). The position of the respondent

(1) 14 App. Cas. 295 at 303.

is therefore analogous to that described in *City of Halifax* v. *Nova Scotia Car Works* (1), where at p. 996 Lord Sumner states:

> They have performed the whole consideration on their side by establishing their works, and the consideration moving to them has been earned and ought not to be thereafter restricted.

If the province had been contracting with the Dunsmuir group for the construction of the railway a trust would not have been necessary. In order that both governments might make their respective contributions and but one government make the contract for the construction of the Island Railway, the governments with respect to these lands created a trust. The covenant of the province with the Dominion to exempt these lands when conveyed upon the completion of the railway was a term of that trust. The contractual obligations of the province with respect to the exemption provided in sec. 22 are no different from its position had it contracted direct with the railway, except as to questions of enforcement not here in issue.

Question One as framed is specifically restricted to a contract between the province and the contractors or the railway company, and in that restricted sense should be answered no; but as it is plain the province is concerned as to its contractual obligations with respect to sec. 22, associated with this answer should be an intimation of the province's obligations under the terms of the trust.

Question Two:

> If there was a contract, would any of the legislation herein outlined, if enacted, be a derogation from the provisions of the contract?

The respondent supports a negative answer on two bases, one that the exemption from taxation terminates with alienation on the part of the appellant railway and as this tax is imposed only after that alienation, it is not a derogation of the exemption provided for in sec. 22; two, that the lands are not used for railway purposes within the meaning of sec. 22.

The appellant railway acknowledges the right of the province upon alienation of these lands to impose a tax of general application. Its opposition to the present tax is founded upon the basis that the tax proposed is not of general application but imposed upon these lands only

(1) [1914] A.C. 992.

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and while imposed upon the purchaser it can only have the effect of reducing the purchase price realized by the company in competition with other timber limits not subject to the tax and therefore in effect the tax is passed backward and paid by the company.

Quite apart from whether such a tax may ultimately be determined as direct or indirect, if the imposition thereof upon these lands only and therefore not a tax of general application had in fact the effect of reducing the price, rent or other consideration to the appellant that would be a violation of the obligations under the terms of the trust with respect to these lands.

The contention that these lands were transferred for the purpose of financing the railway rather than as consideration for the construction thereof is not tenable. They were transferred in fact as part of the consideration for the railway and subject to the provisions of sec. 22. This section contemplates that so long as the lands remain the property of the appellant company and remain idle or are used for railway purposes only the exemption will obtain, but the exemption is terminated if these lands be otherwise used or alienated.

The answer to Question Two is yes.

Question Three:

Was the said Commissioner right in his finding that "There is no contract between the Province and the company", which would be breached by the imposition of the tax recommended by the Commissioner?

In 1912 the appellant railway desired to lease the Island Railway to the Canadian Pacific Railway Company. In view of the provisions of sec. 22 of the *Settlement Act* it was concerned as to what the effect of such a lease might have upon the exemption therein provided for. They interviewed the Government of the Province, as a result of which an agreement was made under date of February 17, 1912, and subsequently ratified by an enactment of the legislature of the province. This agreement provided that "notwithstanding such lease and operation such exemption shall remain in full force and virtue".

This contract assured to the appellant railway that the obligation of the province thereafter under sec. 22 remained precisely as if the lease had never been made.

The answer to Question Three is no.

Question Four:

Would a tax imposed by the Province on timber, as and when cut upon lands in the Island Railway Belt, the ownership of which is vested in a private individual or corporation, the tax being a fixed sum per thousand feet board measure in the timber cut, be *ultra vires* of the Province?

This question contemplates a sale of the standing timber by the appellant to a purchaser who will cut and market same. The entire operation contemplated is commercial in character. A tax so imposed would in the ordinary course of business enter into the cost of the purchaser's operations and into the computation of his sale price, and as a part thereof would be passed on from vendor to purchaser. It was suggested in the particular circumstances of this case that it could not be passed on but that it must be assumed by the railway because the price to the purchaser from the railway is fixed in open competition. We need not, however, consider the effect of such a contention. It may be true in particular cases. It is not, however, the facts and circumstances in particular cases that determine whether a tax is direct or indirect, but rather the incidence or effect of such a tax in the normal or ordinary transactions of business.

It is the nature and general tendency of the tax and not its incidence in particular or special cases which must determine its classification and validity; . . .

Viscount Cave, L.C., in *City of Halifax* v. *Fairbanks' Estate* (1). *City of Charlottetown* v. *Foundation Maritime Ltd.*, (2). *Bank of Toronto* v. *Lambe* (3). *Rex* v. *Caledonian Collieries* (4). *Attorney General for British Columbia* v. *McDonald Murphy Lumber Co.* (5).

The answer to Question Four is yes.

Question Five:

Is it within the competence of the Legislature of British Columbia to enact a Statute for the imposition of a tax on the land of the Island Railway Belt acquired in 1887 by the Esquimalt and Nanaimo Railway Company from Canada and containing provisions substantially as follows:

(*a*) When land in the belt is used by the railway company for other than railroad purposes, or when it is leased, occupied, sold, or alienated, the owner thereof shall thereupon be taxed upon such land as and when merchantable timber is cut and severed from the land:

(1) [1928] A.C. 117 at 126.
(2) [1932] S.C.R. 589.
(3) 12 App. Cas. 575.
(4) [1928] A.C. 358.
(5) [1930] A.C. 357.

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(b) The tax shall approximate the prevailing rates of royalty per thousand feet of merchantable timber:

(c) The owner shall be liable for payment of the tax:

(d) The tax until paid shall be a charge on the land.

This question as phrased describes the tax as "a tax on the land of the Island Railway Belt acquired in 1887". It is, however, a tax imposed only "as and when merchantable timber is cut and severed from the land". It is payable by the purchaser from the appellant of the standing timber and "shall approximate the prevailing rates of royalty per thousand feet of merchantable timber". It is then stated "the tax until paid shall be a charge on the land". In substance this tax does not materially differ from that in question four except that it creates a charge on the land. This of itself does not make the tax a land tax. In *Attorney-General for Manitoba* v. *Attorney-General for Canada* (1), it was expressly stated in the enacting statute that "the tax imposed by this Act shall be a direct tax". This was a tax upon every contract of sale of grain for future delivery with specified exemptions, and notwithstanding the express statutory provision to the contrary, was held to be an indirect tax. Viscount Haldane at p. 566 stated:

> For the question of the nature of the tax is one of substance, and does not turn only on the language used by the local Legislature which imposes it, but on the Imperial statute of 1867.

The real nature and general tendency of this tax is evidenced by its imposition only when the standing timber has been sold by the railway and the purchaser has cut and severed it from the land. There is here contemplated a series of commercial transactions in the normal course of which the purchaser of this standing timber would seek to recoup himself for the amount of the tax in the price he realizes from the timber. It is therefore a tax which comes within the description of an indirect tax as defined in the authorities.

The answer to this question should be no.

Question Six:

Is it within the competence of the Legislature of British Columbia to enact a Statute for the imposition of a tax on land of the Island Railway Belt acquired in 1887 by the Esquimalt and Nanaimo Railway Company from Canada and containing provisions substantially as follows:

(1) [1925] A.C. 561.

(a) The tax shall apply only to land in the belt when used by the railway company for other than railroad purposes, or when leased, occupied, sold, or alienated:

(b) When land in the belt is used by the railway company for other than railroad purposes, or when it is leased, occupied, sold, or alienated, it shall thereupon be assessed at its fair market value:

(c) The owner of such land shall be taxed on the land in a percentage of the assessed value, and the tax shall be a charge on the land:

(d) The time for payment of the tax shall be fixed as follows:

(i) Within a specified limited time after the assessment, with a discount if paid within the specified time;

(ii) Or at the election of the taxpayer, made within a specified time after assessment, by paying each year on account of the tax a sum that bears the same ratio to the total tax as the value of the trees cut during that year bears to the assessed value of the land.

It is here proposed the owner shall pay a tax computed on a percentage of the assessed value of the land. It is imposed as at the time of the alienation and in that sense has no relation to the actual cutting and severing of the timber. The land, however, has no value apart from the timber and a purchaser thereof contemplates the cutting and marketing of the timber. Therefore, an assessment at its fair market value is really a tax founded upon the fair market value of the timber and a tax so imposed is in reality upon the timber and not the land and would enter into the price, as in Questions Four and Five, and therefore subject to the same objection. In substance it is a commodity and not a land tax. This view is emphasized by the alternative method of payment. The cutting and marketing of the timber is subject to several hazards, including that of fire, and the annual operations are determined by market conditions. Under all the circumstances, the alternative method of payment in d(ii) would be usually adopted.

Mr. Farris pressed that this was a direct tax within the meaning of *City of Montreal* v. *Attorney-General for Canada* (1); and *City of Halifax* v. *Fairbanks' Estate* (2). In both of these cases a provincial tax upon the occupant's interest was held to be a valid direct tax. The difficulty is that this tax is not upon the occupant's interest, but rather upon the specific commodity which will be prepared for and sold upon the market in the course of normal commercial transactions.

The answer to this question is no.

(1) [1923] A.C. 136.

(2) [1928] A.C. 117.

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ESQUIMALT AND NANAIMO RAILWAY CO. AND OTHERS v. ATTORNEY-GENERAL OF BRITISH COLUMBIA

Estey J.

Question Seven:

Is the Esquimalt and Nanaimo Railway liable to the tax (so-called) for forest protection imposed by section 123 of the "Forest Act", being chapter 102 of the "Revised Statutes of British Columbia, 1936", in connection with its timber lands in the Island Railway Belt acquired from Canada in 1887? In particular does the said tax (so-called) derogate from the provisions of section 22 of the aforesaid Act of 1883?

The legislature in enacting this section described the levy as an annual tax. It is compulsorily imposed by the province upon the owner of certain lands and enforceable by law. It is therefore a tax within the meaning of *Lawson* v. *Interior Tree Fruit and Vegetable Committee of Direction* (1). The amount realized is supplemented by a further sum of one million dollars annually from the consolidated revenue of the province. The latter emphasizes what is perfectly clear, that fire protection afforded to the timber area is in the interest of the public as well as the owners of those areas. The fact that the proceeds are used for the specific purpose of fire protection does not affect the character of the imposition of a tax. As stated by Lord Thankerton:

> The fact that the moneys so recovered are distributed as a bonus among the traders in the manufactured products market does not, in their Lordships' opinion, affect the taxation character of the levies made.

Lower Mainland Dairy Products Sales Adjustment Committee v. *Crystal Dairy Ltd.* (2); Plaxton 181 at p. 188.

The circumstances of this case bring it within the principle of *City of Halifax* v. *Nova Scotia Car Works Ltd.* (3), where an exemption from taxation included exemption of an improvement tax.

The answer to the first part of this question is no; to the second part yes.

The answers to the foregoing questions are:

(1) The answer to this question as framed is no; and if the contractual position of the province be treated as a second part, the answer to this part is yes.

(2) Yes.

(3) No.

(1) [1931] S.C.R. 357.
(2) [1935] A.C. 168 at 175.
(3) [1914] A.C. 992.

(4) Yes.

(5) No.

(6) No.

(7) As to the first part, no; as to the second part, yes.

Appeal allowed and Cross-appeal dismissed.

Solicitor for the Esquimalt and Nanaimo Railway Company: *J. A. Wright.*

Solicitors for the Alpine Timber Company Limited: *Davis, Hossie, Lett, Marshall & McLorg.*

Solicitor for the Attorney-General of Canada: *F. P. Varcoe.*

Solicitor for the Attorney-General of British Columbia: *Roy S. Stultz.*