*Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of The Calgary and Edmonton Railway Company and another* v. *The King, from the Supreme Court of Canada; delivered the 5th August* 1904.

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Present at the Hearing:
LORD MACNAGHTEN.
LORD DAVEY.
LORD ROBERTSON.
LORD LINDLEY.
SIR ARTHUR WILSON.

[*Delivered by Lord Lindley.*]

**53 Vict. cap. 84.**

The Calgary and Edmonton Railway Company was incorporated in April 1890 by a Dominion Act for the purpose of making and working a railway from Calgary to Edmonton with an extension southerly to the boundary between Canada and the United States and northerly to the Peace River. Shortly after its incorporation the Company applied to the Minister of the Interior for a grant of Dominion lands in aid of the construction of the line, and by an Order in Council dated the 5th May 1890, the Governor-General sanctioned a recommendation by the Minister that, subject to the approval of Parliament, a grant of Dominion lands should be made to the Company at the usual rate of 6,400 acres per mile of the line from Calgary to Edmonton and from Calgary southerly to the international boundary, but subject to certain conditions which it is unnecessary to refer to.

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53 Vict. cap. 4.

By a Dominion Act passed on 16th May 1890, the Governor in Council was authorised to grant subsidies in land to several companies including the Calgary and Edmonton Railway Company as above stated; and by Section 2 of that Act the grants were to be made upon the conditions fixed by the Orders in Council made in respect of them, and except as to such conditions the grant was to be a free grant subject to the payment of some expenses to which it is unnecessary to refer.

On the 22nd May 1890 the above Order in Council of the 5th May was varied in some respects which are immaterial, and on the 27th June 1890 another Order in Council was made cancelling the previous Orders, and expressing the conditions on which the lands authorised to be granted to the Company should be granted. These are set out on page 25 of the Record. Nothing is said about mines or minerals.

On the 26th December 1890 an agreement was entered into between the Crown and the Company for the construction of the railway. This agreement referred to and incorporated the terms and conditions of the above-mentioned Order in Council of the 27th June 1890, and by the eighth clause it was agreed that on the completion of the line "the railway and works appertaining "thereto, together with all the franchises, rights, "privileges, property personal and real of "every character," should be the property of the Company.

There were further agreements by which the Government undertook to assist the Company with money for the construction of the line, but nothing turns on these agreements.

The Company have completed the line, and are entitled to grants of 6,400 acres per mile. Several grants have been made from time to time, and in these grants the mines and minerals have been

reserved to the Crown. The Government are quite ready to execute further grants provided they contain a reservation to the Crown of all mines and minerals as is usual in Crown grants. The Company, however, contend that, having regard to the Special Act and the Order in Council of 27th June 1890 applicable to them, they are entitled to grants without any reservation of mines and minerals except gold and silver, as to which their Lordships understand no objection is made.

In consequence of this refusal, the Company presented a Petition of Right, which came on before Mr. Justice Burbidge, who decided it against the Company. On appeal the Supreme Court was evenly divided, and the decision appealed from was therefore affirmed. The present Appeal is by the Company from these decisions.

Grants of Dominion lands are governed by the Dominion Lands Act of 1883 and by Regulations of 1889. An earlier Order in Council of the 31st October 1887, printed on p. 52 of the Record, was never duly promulgated, and it was conceded before their Lordships that this Order should be disregarded.

In considering the Dominion Lands Act and the Regulations of 1889, the fact that the lands to be granted to the railway are to be granted as a subsidy, *i.e.* by way of bounty and not by way of sale, is all important. The enactments and regulations relating to Crown lands reserved for sale, or homesteads, have no application to the lands reserved for the totally different purpose of granting lands by way of subsidies for public works.

The Dominion Lands Act of 1886 contains provisions relating to sales and homesteads (Sections 29, 32); Section 90*b* enables the Governor in Council to reserve from general sale

and settlement Dominion lands to aid in the construction of railways and to provide for the disposal of such lands (notwithstanding anything contained in the Act) in such manner at such time and on such terms as he may deem expedient.

The only provisions as to mines and minerals which are important are Sections 47 and 48. Section 47 is to the effect that lands containing coal or other minerals shall not be subject to the provisions of the Act respecting sale or homestead entry, but shall be disposed of in such manner, and on such terms and conditions, as are from time to time fixed by the Governor in Council, by regulations made in that behalf. Section 48 enacts that no grant from the Crown shall convey gold or silver mines unless they are expressly conveyed in such grant.

Turning now to the Regulations of 17th September 1889, Counsel for the Crown rely on the fact the Regulations are for the sale, settlement, use, and occupation of Dominion lands, and they rely more particularly on Regulation 8 which says that all Patents from the Crown for lands in Manitoba and the North-West Territories shall reserve to the Crown all mines and minerals with power to work them. But general as these words are, the Regulations themselves relate only to sales of Dominion lands and to the settlement, use, and occupation of such lands. The lands in question are Dominion lands until parted with, but they cease to be so when granted to the Company; and none of the regulations relating to settlement, use, and occupation of Dominion lands have any bearing on the present controversy. If the grant to be made to the Company was a sale, which it clearly is not, another question would arise, viz., whether the grant to the Company would be regulated by the general Act and regulations, or, as the

Company contend, by the special Act 53 Vict. c. 4, and Order in Council of the 27th June 1890 already referred to.

This was the question mainly argued in Canada and on which the members of the Supreme Court were equally divided.

Upon this question their Lordships concur with the Chief Justice and Mr. Justice Girouard in thinking that the Special Act and Order in Council of 27th June 1890 are the governing documents. But it appears to their Lordships that quite apart from the Special Act and the Order of 27th June 1890, the Regulations of 1889 are themselves not so framed as to apply to such grants as have to be considered on the present occasion.

Their Lordships therefore will humbly advise His Majesty to allow the Appeal and to reverse the Judgments of the Canadian Courts with costs to be paid by the Respondent; and further to declare that all future Patents to be issued for land to be granted to the Company under the provisions of the Act 53 Vict. c. 4 and the Order in Council of 27th June 1890 are to be free from any reservation of mines or minerals except gold and silver; and so far as relates to the claim for the rectification of the Patents already granted reserving the mines and minerals, the Petition of Right be remitted to the Exchequer Court of Canada.

The Respondent must pay the costs of this Appeal.