DAVID HOGGAN (PLAINTIFF).....APPELLANT; 1891

AND *June 16,17.

THE ESQUIMALT AND NANAIMO RAILWAY CO. (DEFENDANTS)..... RESPONDENTS. 1892 *April 14.

SAMUEL WADDINGTON (PLAINTIFF)...APPELLANT;

AND

THE ESQUIMALT AND NANAIMO RAILWAY CO. (DEFENDANTS).... RESPONDENTS.

ON APPEAL FROM THE SUPREME COURT OF BRITISH COLUMBIA.

Public lands—Right of pre-emption—Lands reserved—Agricultural settlers —47 Vic. c. 14 (B.C.)

By 47 Vic. c. 14 subsec. *f.* (B.C.) certain land conveyed to the E. & N. Ry. Co. was, for four years from the date of the act, thrown open to actual "settlers for agricultural purposes,"—coal and timber land excepted. H. and W. respectively claimed a right of pre-emption under this act.

Held, affirming the decision of the court below, that the act did not confer a right of pre-emption to lands not within the pre-emption laws of the province; that only "unreserved and unoccupied lands" came within those laws and the lands claimed had long before been reserved for a town site; and that the claimants were not upon the lands as "actual settlers for agricultural purposes," but had entered with express notice that the lands were not open for settlement.

APPEALS from decisions of the Supreme Court of British Columbia affirming the judgment at the trial for the defendants in each case respectively.

In each of these cases the respective parties were represented by the same solicitors and counsel; the

* PRESENT :—Sir W. J. Ritchie C.J., and Strong, Fournier, Gwynne and Patterson JJ.

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cases were argued together and one judgment was given as deciding both. The following statement of facts from one of the cases will suffice to explain the position of them both before this court.

This is an action brought by the appellant for a declaration that he is entitled under the act chapter 14 of the Provincial Legislature of British Columbia passed on the 19th day of December, 1883, section 23 and sub-section *f*, therein mentioned, and under the act chapter 6 of the Parliament of the Dominion of Canada, passed on the 19th day of April, 1884, section 7, subsection 1, to acquire and purchase from the respondents a certain parcel or tract of land for the sum of $160, and that the respondents may be decreed to convey, &c., or for a declaration that the appellant is entitled under said section 23 of the said chapter 14 and section 7 subsection 2 of said act chapter 6, to acquire and purchase from the respondents the freehold of the surface rights of the said parcel of land on payment to the respondents of the sum of $160, and that the respondents may be decreed to convey.

47 Vic. ch. 14 subsec. *f*, one of the acts referred to, contains the following provision, the prior sections providing for a conveyance of certain lands from the crown to the defendant company in consideration of their having constructed a railway from Esquimalt to Nanaimo in the said province:

"(*f*.) The lands on Vancouver Island to be so conveyed shall, except as to coal and other minerals, and also except as to timber lands as hereinafter mentioned, be open from four years from the passing of this 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 in any grants to settlers the right to cut timber for railway purposes and rights of way for the railway and stations and workshops, shall

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be reserved. In the meantime and until the railway from Esquimalt to Nanaimo shall have been completed the Government of British Columbia shall be the agents of the Government of Canada for administering for the purposes of settlement, the lands in this subsection mentioned; and for such purposes the Government of British Columbia may make and issue, subject as aforesaid, pre-emption records to actual settlers of the said lands."

The plaintiffs respectively claim the right to have a conveyance from the defendant company of a piece of land, for many years prior to said act known as the Newcastle town site reserve, lying within the land conveyed by said act. They first applied for them under the pre-emption laws of the province, but their applications were refused and no appeal from such refusal was taken to the Supreme Court of the province, as such laws allow. They then brought these actions.

The actions were dismissed by the trial judge on the grounds that the cases were *res adjudicata* by the refusal for pre-emption without appeal; that the lands in question were reserved lands, being reserved for a town site, and so not subject to pre-emption; and that plaintiffs never were "settlers for agricultural purposes" under clause *f* of 47 Vic ch. 14. The decision of the trial judge was affirmed by the full court. The plaintiff appealed.

S. H. Blake Q.C. for appellant.

Davie, Attorney-General of British Columbia, and *Moss* Q.C. for respondents.

Sir W. J. RITCHIE C.J.—I agree with the court below that the plaintiffs in this case and in that of Waddington against the same defendants have shown no claim whatever to the lands in question in this case, and that the decision of the trial judge and that

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of the full court were correct and the actions were properly dismissed.

STRONG J.—I intimated at the conclusion of the argument of this case that the appeal should be dismissed, and on considering the case since I adhere to that opinion.

FOURNIER J. concurred in the appeal being dismissed.

GWYNNE J.—These appeals must, in my opinion, be dismissed. I cannot entertain a doubt that the Dominion Government, as trustees for the Esquimalt and Nanaimo Railway Company, took the lands vested in them by the provincial act, 47 Vic. ch. 14, in the character in which those lands then were, namely, as lands set apart for suburban park lots of from 3 to 5 acres each, and that such lands were not open for settlement as agricultural lands, nor did they become so by anything which took place subsequently. It is also, in my opinion, free from doubt that when the Dominion act, 47 Vic. ch. 6, placed the lands vested in the Dominion Government by the provincial act in the hands of the Provincial Government, as agents of the Dominion, for purposes of settlement, the effect and intent of the Dominion act was to place the lands for disposition under the laws of the province, and that no claim against the railway company could be maintained, except in right of a title, which would have been good against the Provincial Government, under the laws of the province, if the lands had not become the property of the railway company. The evidence clearly shows that the lands were never open for settlement by actual settlers as agricultural lands at all, and that the plaintiffs did not enter upon the

lands as actual settlers upon agricultural lands, believing themselves entitled to acquire 160 acres in virtue of the laws in force in the province, but on the contrary that they entered against express notice given to them, that the lands were not open for settlement as agricultural lands, or so as to enable the plaintiffs to acquire any claim by possession.

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PATTERSON J. concurred.

Appeals dismissed with costs.

Solicitor for appellants : *S. Perry Mills.*

Solicitor for respondents : *C. E. Pooley.*