Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of David Hoggan v. *The Esquimalt and Nanaimo Railway Company, from the Supreme Court of Canada; delivered 3rd May* 1894.

Present:

THE LORD CHANCELLOR.
LORD HOBHOUSE.
LORD MACNAGHTEN.
LORD SHAND.
SIR RICHARD COUCH.

[*Delivered by the Lord Chancellor.*]

THIS is an appeal from a judgment of the Supreme Court of Canada, affirming a judgment of the Full Court of British Columbia, which had affirmed a judgment of Mr. Justice Walkem.

The Appellant commenced an action against the Respondents in the Supreme Court of British Columbia, whereby he claimed a declaration that he was entitled under the British Columbia Act, 47 Victoria, cap. 14, entitled "An Act "relating to the Island Railway, the Graving "Dock, and Railway Lands of the Province," to acquire and purchase from the Respondents a certain parcel or tract of land of 160 acres, at the price of 160 dollars. The claim was founded upon section 23 of the Act, which provides that "The Company shall be governed by sub-section "(*f*) of the herein-before recited agreement." The Agreement referred to was one which had been entered into in 1883 between the Government of Canada and the Government of British Columbia respecting the railway of the

a 81943. 100.—6/94. Wt. 4305. E. & S. A

respondents, and which provided amongst other things for the grant of certain lands by the Provincial to the Dominion Government for the purposes of that railway. Sub-sect. (f) is in the following terms:

"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 for four years after 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."

The lands on Vancouver Island referred to in the sub-section include the land which is the subject of this action.

The case on behalf of the appellant was that he was an actual settler for agricultural purposes; that he claimed the land within four years from the passing of the Act—the Act being passed on the 19th of December, 1883, and his claim being made before the 19th of December, 1887—and that he was therefore entitled to a conveyance of the land to him by the respondents. He founded his claim to be a settler for agricultural purposes upon the fact that he had occupied the land in question, or a portion of it, by erecting buildings thereon, by sowing with vegetables four or five acres of it, and by clearing and preparing for agricultural use some five acres more.

Prior to the Act under which the appellant claims, the Government had reserved a certain tract of land, including the 160 acres in question, as a town site. That is found as a fact, and is not now contested. They had sold off some plots of it to purchasers who were desirous of acquiring land of that description, but it had not been thrown open by them for purchase.

The contention on the part of the appellant is, that whatever might have been the case at the time when this land was Crown property, as

soon as the Act to which reference has been made was passed, and at all events, as soon as the land had been conveyed to the Respondents, it became open to any settler for agricultural purposes to acquire 160 acres of it, on payment of one dollar an acre.

The Appellant had, on two occasions before this action was brought, applied to have his right of pre-emption to the land in question recorded by the Commissioners appointed by Statute for that purpose. The application had been twice rejected, and there had been no appeal by him from that rejection. He bases his claim entirely upon the right which he alleges is given by the 23rd section of the Act, incorporating as it does sub-section (*f*) of the Agreement; and there can be no doubt that, unless he can show that he is an actual settler for agricultural purposes, entitled to the rights conferred by that sub-section, he has no case at all against the Respondents.

Sub-section (*f*) uses the term "actual settlers " for agricultural purposes," and in considering what is the meaning of the language used, it is necessary to look at the whole of the sub-section (*f*).

The lands were to be open for four years from the passing of the Act to actual settlers for agricultural purposes, and in the meantime and until the railway was completed—that is to say, the railway which was in contemplation at the time, and for the purpose of the construction of which lands were conveyed by the Provincial Government to the Dominion Government—the Government of British Columbia were to be the agents of the Government of Canada for administering, for the purposes of settlement, the lands conveyed, and for such purpose the Government of British Columbia were to make and issue pre-emption records to actual settlers.

Neither the agreement, nor the Act itself, contains any definition of the expression "actual settlers for agricultural purposes." But it is important to notice that by the same 23rd section, which by incorporation gives rights to actual settlers for agricultural purposes, rights are given to bonâ fide squatters who have continuously occupied and improved lands within the area acquired by the company, but, in order to give a squatter a right, that land must have been continuously occupied and improved by him for one year prior to the 1st of January, 1883. The term "squatter" is of course well known, and commonly used. It refers to a person who has taken possession of a piece of land and occupied it by buildings or by cultivation, and has by so taking possession of it asserted a right to it; and in the present case, where the possession has been exercised continuously for the period named in the section, the Act converts the possession into a right.

The question now arises, what is a "settler" as distinguished from a "squatter"? It is obvious that the term "settler" found in the agreement means something different from the term "squatter" in the 23rd section of the Act, because the rights which are given to the "squatter" are confined to the case of continuous occupation and improvement of the land for one year prior to the 1st of January, 1883, whilst as regards "settlers" rights may be acquired for four years from the passing of the Act.

The Government of British Columbia are by the terms of sub-sect. (f) to issue "pre-emption records to actual settlers;" and in order to understand what is meant by that expression recourse must be had to certain prior legislation in the Colony.

When the Land Act of 1875 (38 Vict. No. 5) is examined, which was in force in British

Columbia until a consolidating Act was passed on the 18th February 1884, the meaning of the word "settler" becomes sufficiently obvious. By Section 3 of this Act any person therein specified "may record any tract of unoccupied, "unsurveyed, and unreserved Crown lands "* * * not exceeding three hundred and "twenty acres in extent in that portion of the "Province situate to the northward and "eastward of the Cascade or Coast Range of "mountains, and one hundred and sixty acres "in extent in the rest of the Province." By Section 5 a person desirous of recording such land must stake it out. Section 9 provides that upon the applicant for such land complying with certain provisions specified in the Act, and on paying the sum of two dollars to the Commissioner, the Commissioner shall record such land in his favour as a pre-emption claim, "and "shall give to such applicant, herein-after called "a 'settler,' a certificate of such record, according "to the form No. 3 in the Schedule hereto." Section 10 enacts as follows: "The settler shall "within thirty days thereafter enter into "occupation of the land so recorded; and if he "shall cease to occupy such land save as is "herein-after provided, the Commissioner may, "in a summary way, upon being satisfied of "such cessation of occupation cancel the record "of the settler so ceasing to occupy the same, "and also improvements and buildings made "and erected on such land shall be absolutely "forfeited to the Crown, and such settler shall "have no further right therein or thereto." Section 11 provides that "the occupation "required shall mean a continuous *bonâ fide* "personal residence of the settler, his agent, "or family on the land recorded by such "settler." A settler, therefore, is obviously defined by this Act by implication as a person

who has complied with its requirements, and so obtained a right to record land under its provisions. Unless he occupies land recorded in the manner provided by the Act it appears clear that he is not a settler within its meaning and obtains no right under it.

Now it is only in respect of unoccupied, unsurveyed, and unreserved Crown lands under that Act that there can be any right of settlement obtained, because the Act only applies to such lands. Inasmuch, therefore, as the land in question in the appeal had been reserved as a town site, it could not be affected by any claim of any person as a settler under the Land Act. Is there anything in the Island Railway Act of 1883 which enables a person to become a settler, or gives him any right of preemption as a settler in respect of any lands which, being reserved lands, were not capable of being settled in that sense under the Land Act? Their Lordships are unable to find anything in the Island Railway Act to indicate that there was any such intention; that any lands which down to that time were not capable of being occupied by a settler within the meaning of the Land Act, and in the manner prescribed by the Land Act, became by reason of the Island Railway Act capable of such occupation. When the language of the latter Act is examined, it obviously contemplates that in the case of settlers there shall be a preemption record, and that a settler is only a person who has obtained that record by pursuing the means prescribed by the statute.

The object of sub-sect. (f) in the Island Railway Act appears to have been this—that it was not desirable that while the railway was in course of construction the lands should be incapable of any settlement, and inasmuch as being destined ultimately to be the property of the railway, there would be no one who could during

the period of construction provide the requisite machinery for transferring the lands, or putting the lands into the possession of persons who were desirous of occupying and cultivating them, the Provincial Government was, during that period, to deal with these lands (though ultimately they were to become the lands of the Railway Company), just as it had dealt with them prior to the passing of the Island Railway Act, the Commissioner receiving the necessary documents, and giving the necessary records then as before.

It is quite true that in the present instance, as events have turned out, and it is said as contemplated by the Island Railway Act, a short period elapsed between the completion of the railway by the Respondents, and the expiry of the four years; but there is certainly no machinery contained in that Act which provides for the Respondents during any such interval occupying the position of the Provincial Government, and doing that which certain officials of the Provincial Government were to do in a certain prescribed manner. Whatever may have been the cause which led to that interval being possible, their Lordships are of opinion that it was not the intention of the Legislature that any new right of pre-emption should be given; that the word "settler" should be used in any new sense; or that any one should be capable of being a settler who had not been capable of being a settler in respect of those lands under the pre-existing law.

The contention, therefore, on behalf of the Appellant appears to their Lordships to fail. The truth is that, unless it be by reason of a compliance with the provisions of the Land Act, there seems to be no distinction between a "squatter" and a "settler." Their Lordships inquired of the learned Counsel for the Appellant how they distinguished between the two terms.

It was suggested that a settler under the Act must be a settler for agricultural purposes; but a person settling or occupying for agricultural purposes may be as much a squatter as a person occupying for other purposes. Indeed the learned counsel for the appellant entirely failed to suggest any distinction between the case of the squatter and the case of the settler, unless by the word "settler" were meant a person capable of and entitled to settle under and in pursuance of the provisions of the Land Act. It being clear that the appellant was not in that position, their Lordships are of opinion that the judgment appealed from must be affirmed, and the appeal dismissed with costs; and they will humbly advise Her Majesty accordingly.