Reasons for the Report of the Lords of the Judicial Committee of the Privy Council on the Appeal of The Attorney-General for the Province of British Columbia v. *The Attorney-General for the Dominion of Canada, from the Supreme Court of British Columbia; delivered 2nd August* 1906.

Present at the Hearing:

LORD MACNAGHTEN.
LORD DUNEDIN.
LORD ATKINSON.
SIR ARTHUR WILSON.
SIR HENRI ELZÉAR TASCHEREAU.

[*Delivered by Lord Dunedin.*]

The question here to be decided is as to the property of a small island called Deadman's Island, lying near the entrance to Burrard Inlet in the Harbour of Vancouver. It is admitted that no private individual has a right of property thereto, and the competition is as to whether the property of the Crown is here held for behoof of the Province of British Columbia, within whose territorial bounds it is situate, or for behoof of the Dominion of Canada.

The island in question lies about 130 yards from the adjacent peninsula — from which indeed it is only separated at certain states of the tide — which is commonly known as Stanley Park. From its physical configuration, and from other circumstances afterwards to be mentioned, their Lordships think that it is impossible to consider the history of the island except in conjunction with the history of the land of which it truly forms a part.

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Now Stanley Park is a tract of land forming a peninsula at the entrance of Burrard Inlet, known in the older maps as the First Narrows, and is presently leased or otherwise demised as a park for the City of Vancouver. It might have been expected that evidence would have been led as to who were the authors of the title under which the City of Vancouver has possession. None such however was led, and as learned Counsel could not agree as to any statement on the matter, their Lordships have not thought it right to make any assumption thereupon. It is, however, common ground between the parties, and, if not categorically stated, at least transpires through all the evidence, that Stanley Park and Deadman's Island have never been given in title to a private person, but have ever since the initiation of Government been treated as a "reserve."

At this point an explanation seems necessary as to the import of the word "reserve," and it will, it is thought, be found that it is here that the opposing contentions of the parties really emerge.

There have been produced in the case a very interesting set of letters, despatches, and maps, which although necessarily imperfect in detail, yet provide a clear picture of the early land history of the colony. Matters had begun by the indiscriminate squatting of adventurous settlers in a wild country. The initiation of the reign of law may be taken to date from the advent of Governor Douglas in 1858. By an Act of Parliament passed in that year British Columbia was erected into a separate territory, and power was given to Her Majesty by Order in Council to appoint a Governor and make such provisions for the laws and administration of the new Colony as to Her should seem fit.

Accordingly Sir James Douglas was in 1858 appointed Governor by letters patent, and an

Order in Council was made defining his powers and duties. As to his powers it may be said at once that they were absolutely autocratic; he represented the Crown in every particular, and was in fact the law. At the same time careful despatches were sent to him by the Colonial Minister of the day laying down in explicit terms the methods of administration which it was desired he should follow.

One of the earliest subjects to engage the attention of the Home Government and the Governor was the question of the giving out of land to settlers. In order to assist the Governor in these matters a party of Royal Engineers was despatched to the Colony under the command of Colonel Moody, R.E., who was at the same time created head of the Lands Department, and, in the absence of the Governor, Vice-Governor of the Colony.

Accordingly we find that early in 1859—that is to say, a few months after his arrival—Governor Douglas issued a proclamation in the Colony dealing with the subject of land. Beginning with the assertion and declaration of the right of the Crown to the whole land of the Colony, it proceeded to state the terms on which the Crown would give grants to the settlers, and then in paragraph 3 the following announcement is made: "It shall also be competent to the "Executive at any time to reserve such portions "of the unoccupied Crown lands and for such "purposes as the Executive shall deem "advisable."

It does not seem open to doubt that in so reserving land the Governor might be acting with a view to various objects. He was there with autocratic power to act in the interests alike of the Imperial Government and of the nascent Colony. Accordingly it was equally within his province to reserve such land as

he might consider advisable for purposes of Imperial strategy or defence, or to reserve such land as the future development of the Colony might suggest was inadvisable to part with. The purposes might be various, but town sites and mineral lands may be taken as a sample. Nay more, reservations might even be temporary, and mean no more than that the survey, which was the usual preliminary to sale to the individual, was not yet sufficiently advanced in the neighbourhood in question.

It is here that the rival contentions emerge. The Respondent contends that the reservation of the land in question was either Imperial, and transferred to the Dominion by special grant which will be mentioned; or, if not, was Colonial for a public purpose, in which case it is transferred to the Dominion by virtue of the 108th Section of the British North America Act, 1867, and relative Schedule.

The Appellants contend that the reservation was of the latter character, and that the purpose was not public, and that consequently the land falls to the Colony in virtue of Section 117 of the British North America Act.

Their Lordships agree that this is a fair statement of the question. Something was said in the Court below and in argument as to onus. It seems, however, to their Lordships that once it is admitted that the land in question is *de facto* a reserve, there is no onus on one side or the other. It becomes a pure question of fact to determine what class of reserve it is.

Viewed as a question of fact their Lordships have come to the conclusion, without difficulty, that the land in question was originally, and subsequently was maintained, as a military reserve; that accordingly it remained Imperial property at the time of the British North America Act, and fell neither to the Colony, in virtue of Section

117, nor to the Dominion in virtue of Section 108, but that it was transferred to the Dominion by the Imperial Government in virtue of a despatch. In other words they agree with the conclusion in fact reached by Drake and Irvine JJ. in the Supreme Court; and they will state shortly their reasons for so doing.

Among the first of Governor Douglas' duties was the selection of a capital for the new Colony. This capital was to be chosen for strategical as well as other reasons; and there is a long and reasoned report from Colonel Moody as to the selection of a site on the Fraser River upon a spot which afterwards became the site of New Westminster. Among other subjects he specially discusses the case of protecting the rear of the position by means of fortifying Burrard Inlet, and there is a reference which cannot be mistaken to the ground at the Narrows. This choice was approved by the Home Government after the communication had been laid before both the Admiralty and the War Office. It is certain that thereafter portions of land were set aside as military and naval reserves. This is admitted by the Appellant in the case of the naval reserves, but the difference is said to consist in the fact that there is extant distinct evidence of the Admiralty having approved of certain portions of land while no such evidence is adduced as to the War Office. This, however, seems to their Lordships a misunderstanding of the position. There was no question of contract. Governor Douglas, acting through Colonel Moody, had power to reserve what he chose, and it needed no adhesion on the part of the Admiralty or the War Office to make the reservation effectual. All that such adhesion can do is to afford more or less evidence of identification. Nor, if it were permissible

to speculate, would it be difficult to surmise the reason for the difference. Governor Douglas had with him no representative of the Admiralty. But Colonel Moody was in direct communication with the War Office.

Turning now to identification, there is a plan known as Exhibit 4, produced out of the Land Office, admittedly made at an early period, and purporting to be a plan of reserves. It contains the known naval reserves. It also contains Stanley Park and Deadman's Island marked as a reserve and embraced in the same colouring. By itself that is not conclusive, for there are other reserves marked which are certainly not military reserves. But it is important as showing that this land was *de facto* reserved at a very early period, and it is known that it has remained reserved ever since.

Their Lordships have already pointed out the probability of its reservation for military purposes in Colonel Moody's original report, but the evidence is far from stopping there.

First, there is the marking in Corporal Turner's field notes. Corporal Turner was under Colonel Moody, and was engaged in 1861–63 to survey the coast line at this place. Corporal Turner is still alive, and was examined, and he produced the field notes he made at the time. On these field notes Stanley Park is marked as "military reserve." Their Lordships must here remark that they think an entirely erroneous view of this evidence was pressed on the Trial Judge in argument and accepted by him. It being admitted that Corporal Turner had no power to make a reserve it was contended that such evidence was secondary and inadmissible. This seems a misapprehension. The evidence is not evidence of the actual marking of the reserve; but it is perfectly good *valeat quantum* as serving to refresh Corporal Turner's recollection,

and as showing that a man then on the spot put down military reserve as the then existing designation of the land in question.

Secondly, in December 1872, soon after the Colony received a legislature, an address was moved for in the Legislative Assembly for a Return of Government Reserves. This was made up in the Land Office, and gives as one of the reserves a piece of land south of the First Narrows reserved for military purposes. This again by itself would not be conclusive, but goes far to show the office idea at the time.

Thirdly, in 1883-84 a proposal was mooted from the Home Government to transfer to the Dominion such Naval and Military Reserves as it had in British Columbia. In order to do so the Home Government (Colonial Office) consulted the Admiralty and War Office, and from the War Office they received a schedule of reserved lands which they were willing should be so transferred. Amongst them were two parcels of land "on the south shore of Burrard Inlet near "Coal Harbour," and on "south shore of First "Narrows," which between them seem entirely to include the land in question. Now it is certain that the information of the War Office could only be derived from communications made long before by Colonel Moody.

These lands were accordingly transferred to the Dominion by despatch of 27th March 1884. That despatch with its enclosure seems to their Lordships at once to complete the identification and to transfer the title to the Dominion Government.

For these reasons their Lordships thought it their duty, as they stated on the 27th July last, humbly to advise His Majesty to dismiss the Appeal and affirm the Judgment complained of.

There will be no Order as to costs.