Privy Council Appeals Nos. 74 and 107 of 1913.

Robert Davies - - - - *Appellant,*

v.

The James Bay Railway Company - - *Respondents.*

AND

The James Bay Railway Company - *Appellants,*

v.

Robert Davies - - - - *Respondent.*

(Consolidated Appeals.)

FROM

THE COURT OF APPEAL FOR ONTARIO.

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 6TH JULY 1914.

Present at the Hearing:

THE LORD CHANCELLOR.
EARL LOREBURN.
LORD MOULTON.
LORD SUMNER.
SIR GEORGE FARWELL.

[*Delivered by* THE LORD CHANCELLOR.]

This appeal raises a question of importance as to the interpretation of the Railway Act of Canada. The case has been twice argued before the Judicial Committee. At the conclusion of the first argument it became clear that, of several points at first raised, the real one on which the parties had been so divided as to be unable to come to a settlement, was the point which became by agreement the exclusive subject of argument on the second hearing.

The relevant facts may be stated very briefly. The appellant claimed compensation from the respondents for the compulsory taking of part of

[60] J. 346. 90.—7/1914. E. & S. A

the land owned by him in the Don Valley near Toronto. His claim related to several pieces of this land, and included compensation for damage sustained by the exercise of the powers of the Railway Company. The claim was referred to the arbitration of three arbitrators, who awarded in satisfaction a total sum of 238,583 dollars. On appeal to the Court of Appeal of Ontario this sum was reduced to 122,171 dollars. Both parties have appealed to His Majesty in Council from this decision. The cross appeal of the respondents related to a claim in respect of a small piece of land which, as the result of arrangements come to after the first hearing, is not now in controversy. The case of the appellant on the second hearing was exclusively concerned with his rights as regards the minerals lying under the railway track over the land taken, and with certain minor matters which, including a question as to adjacent minerals, have been disposed of by the agreement of counsel. The remaining issue was, at the close of the first hearing, reduced to one of principle determining the compensation to be made. If the appellant is not to be paid for shale under the right of way (meaning the track of the railway), the award is to be for 119,831 dollars, while if he is to be so paid, the award is to be for 230,820 dollars.

The question which thus arises for decision relates to the basis of compensation, and depends on the construction of the Railway Act of Canada. Under this Act the respondents took such land of the appellant as was required for the purposes of the track. Under it is shale of considerable value. It is agreed that this shale can only be got by surface working, and in addition must be left practically entirely unworked in order that the surface occupied by the railway may be supported. Because the appellant was practically deprived of his right to mine for this shale the

arbitrators agreed that he was entitled to be compensated for the injury thus inflicted on him. The Court of Appeal, on the other hand, took the view that as the respondents had not bought the minerals their value could not be taken into account in the present proceedings, but ought to be taken into account if the appellant applied hereafter to the Board of Commissioners established under the Railway Act for permission to work the shale. The reasons for this divergence of view will appear when their Lordships refer to the provisions of the Railway Act.

Before doing so it will be convenient, as the analogy of the law of England, and particularly of the Railways Clauses Act, has been much referred to in the arguments, both in the Court below and before the Judicial Committee, to state what that law is, not only apart from, but as affected by, the English Railways Clauses Act. It is the more desirable to do so because the Railway Act of Canada is framed on a scheme which is in many respects different from the scheme adopted in England. In Canada the conditions to which railway construction is subject are different from those which prevail here, and the differences appear to have been carefully kept in view by the Dominion Parliament when deciding on the scheme of the Railway Act.

Apart from the English Railways Clauses Act, when land is sold with a reservation of the minerals to the vendor, he cannot, in the absence of special bargain, work them so as to let down the surface which he has sold. The reason is that there is a natural right of support for the surface which passes to the purchaser when he buys it. Although the vendor retains the minerals and the right to work them, he can exercise this right only at his own risk. It is

inaccurate to say that the purchaser buys, in addition to the surface, an easement of support for that surface. He acquires the right of support, not as a separate easement, but as a natural feature of the title to his land. The value of this necessary right, which is incident to his ownership, is thus *primâ facie* included in the price which he has paid.

Such is the common law both in England and Ontario, but in England it has been completely altered in the cases to which they apply by Sections 77 to 85 of the Railways Clauses Act, 1845. Under these sections, so far as concerns mines and minerals under the railway, or within the prescribed distance, which is normally forty yards on each side, the Company is deprived of the natural right to support which it would have under an ordinary conveyance. Unless it has expressly purchased the minerals, the owner may work them in the fashion which is usual in the district, and even by open working in a way which may destroy the railway. He may let down the surface, for the natural right of support has been taken from its owner. But he must before working give the Company thirty days' notice of his intention, and the Company may, then or thereafter, if it is willing to pay compensation, give him a counter notice, and so, on paying compensation, stop the working. These provisions are valuable to the Company, for they enable it to defer finding capital for the purchase of the minerals under the land until, for the sake of safety, it becomes necessary to do so. On the other hand, the mine owner is, for a time at least, free to work, though the amount he receives as the price of the surface is diminished by the taking away from it of the incidental and natural right to support. If the owner claims on a compulsory sale of the surface for injurious affection of his title to the minerals, the answer

to him is that his title is not at present injuriously affected inasmuch as he can work freely until he receives a counter-notice, after which he may be able to claim full compensation for the minerals themselves.

In the Dominion of Canada the law has been differently moulded. Their Lordships have given much consideration to the group of clauses in the Railway Act which deal with the policy adopted, and they think that their effect is as follows:—The Company which acquired the surface was not, as by the English Act, deprived of the natural right to support from subjacent and adjacent minerals. It was, on the other hand, put on terms to compensate the mineral owner at once for loss of value arising from the liability to support which rested on him after severance of the titles to the minerals and to the surface. This compensation having been paid, the mineral owner was, by sections which have a separate and distinct purpose, restrained from working his minerals excepting under such conditions as might be imposed by the Railway Board in the interest of the safety of the public. These conditions, in the case of adjacent minerals, might be very easy. In such a case, just because the Board was likely to leave him comparatively free to work his mines, the initial compensation would be small. And where the minerals lay under the railway, and especially where they could only be won by surface working destroying the railway track, the compensation awarded initially would be heavy, inasmuch as the title to the minerals and their present value for working or for sale, would be materially impaired. Their Lordships recognise that considerations may have presented themselves to the Parliament of Canada quite different from those which presented themselves to the Parliament of Great Britain. In the latter country

comparatively little land was available, and a different scheme from that adopted might have placed a heavy burden of finding immediate capital on the railway companies, and might also have unnecessarily interfered with the liberties of many mineral owners in the comparatively small areas dealt with. In Canada, on the other hand, where the railways were likely to extend over great stretches of undeveloped country, it may well have been wisest to proceed on the footing that mineral rights were likely to be less frequently of immediate practical importance and would be less often asserted. It would, in this view, be natural to let the railway companies assume at once under such circumstances liability to compensate for injurious affection of title to minerals, while, on the other hand, the mineral owner, whose title had been so affected, was placed under restrictions to be imposed when he, if he ever should, desired to proceed to work. The discretion was intrusted to the Railway Board, a judicial body intended to be presided over by a Judge and to have the assistance of experts.

If this be the result of the Canadian legislation it was proper to take the course which the arbitrators took in the present case, and to award compensation for injurious affection.

Their Lordships now turn to the sections on which their view of the question of principle is founded. Section 26 defines the jurisdiction of the Commission. It is to decide on complaints that any company or person has failed to do any act, matter, or thing required to be done by the Act or the special Act, or by regulations, orders, or directions made under the Act, or that any act, matter, or thing has been done in violation thereof. By Section 151 the company may purchase any land or other property necessary for the construction, operation, or

maintenance of the railway. Section 177 enacts restrictions on the quantity of land so to be taken. Sections 169 to 171 relate to mines and minerals. The company is not (Section 169), without the authority of the Board, to locate the line of its proposed railway or construct the same so as to obstruct or interfere with or injuriously affect the working of or the access to any mine then open, or for the opening of which preparations are being lawfully made. The company is not (Section 170), unless the same have been expressly purchased, to be entitled to any mines or minerals under lands purchased or taken by it under the Act, except such parts as are necessary to be dug, carried away or used in construction. No owner, lessee, or occupier (Section 171) of any such mines or minerals lying under the railway or its works, or within forty yards from them, is to work the same unless leave has been obtained from the Board. On any application to the Board for leave to work, the applicant is to submit full plans. The Board may grant such application upon such terms and conditions for the protection and safety of the public as to the Board seems expedient, and may order that such other works be executed or measures be taken as under the circumstances appear to the Board best adapted to remove or diminish the danger arising or likely to arise from such mining operations. The provisions as to compensation are to be found in Section 191 and the following sections. Plans, profiles, and books of reference are to be deposited, and then application may be made to the persons who are owners of, or interested in lands (which by the definition section are defined in terms wide enough to include mines) to be taken, or which may suffer damage from the taking of materials, or the exercise of any of the powers granted for the railway, and

thereupon agreements may be made touching the lands or the compensation to be paid for the same, or the damages, or as to the mode in which such compensation is to be ascertained, and there may be a reference to arbitration. The amount of compensation or damage is, by Section 192, to be ascertained as at the date of the deposit. By Section 193 the notice served is to contain a description of the lands to be taken or of the powers intended to be exercised in regard to them, and a declaration of readiness to pay a certain sum or rent as compensation for the lands or the damages.

The sections referred to are those which appear to be most important for the purposes of the present question. Their Lordships interpret them as meaning that there is to be an immediate claim for compensation for the value of the lands taken and for injurious affection of any other hereditaments the title to which is affected, such as subjacent or adjacent mines and minerals. In default of agreement they think that the entire amount of compensation is to be ascertained by the arbitrators as at the date of the deposit of the plans and once for all. For the rest the mine owner remains entitled to his minerals but subject to any obligation of natural support which attaches on severance. The Board is to regulate the exercise by him of his remaining rights in the future, and the primary purpose of the intervention of the Board is to be the protection, not of the mineral owner or of the railway, but of the public. If the Board refuse him leave to work, his grievance is against the Board, to whom, and not to the railway company his application is to be made. The principle on which the legislature has proceeded is apparently to dispose of the claim against the company once for all on the occasion of taking the land. Their Lordships do not think it

necessary to decide whether, either in Section 26, or in Section 59, which relate to the powers of the Board to direct the construction of buildings and works on proper terms as to compensation, or in Section 171, or elsewhere in the Act, any power can be found which enables the Board to award to the owner of mines and minerals who has applied to it for leave to work, compensation by reason of the Board having restricted his liberty in the interest of the public. It may be that the legislature has thought it right to give no such power. The only point which it is either necessary or proper to decide now is that power to award compensation as between the Railway Company and the owner of subjacent or adjacent mines for injurious affection of the title to the minerals has been intrusted to the arbitrators. The principle adopted is, as has been already observed, one which in the case of a country of great extent, with its minerals widely scattered, might not improbably commend itself as more adapted to the circumstances than the principle of the English Statute. At all events this is the principle which the language of the Statute appears to lay down.

Their Lordships have examined the reasoning of the careful judgment of Hodgins, J., as delivered on behalf of the Court of Appeal, in which the decision of the arbitrators was reversed. There are two main grounds on which, after consideration, they find themselves unable to concur in his reasoning. They think that the arbitrators were right in holding that the mineral owner suffered immediate damage as the consequence of the duty of support which on severance the law imposed on him, and that so far as the shale under the railway track was concerned, he substantially lost the value of his shale, the more plainly so because it could only be worked from the surface. It is no answer that

the owner probably did not desire to get at his minerals at once. His title to them was practically, so far as it was possible to foresee, destroyed, and he suffered immediate loss accordingly. They are further, for the reasons already given, of opinion that even if they were satisfied of the correctness of the view of the learned Judge on the other point, they ought not to treat it as arising at present. That view was that the Board has the power, upon the application of the mineral owner, to order the railway company to "acquire such part of the minerals "as in England would be covered by the "counter-notice of the railway company; or "to put it in another form, to so support and "and maintain their line, and to acquire the "necessary land and minerals for that purpose." They are not, as at present advised, prepared to express the opinion that the Canadian Act has substituted for the English system of notice, counter-notice and compensation, the interposition of the Board, and that the latter has jurisdiction to protect the mine owner and the railway company by its order. It appears to their Lordships that it may well be that the powers of the Board to impose conditions on the action of the mineral owner are conferred for a wholly different purpose, and do not extend to the making of any such order. But they hold that the question does not arise for immediate decision if it is once established that injurious affection has occurred to the extent of depriving the mineral owner of the present value of his subjacent minerals by the imposition of the duty of support and the taking away of the right of surface working. They think that the arbitrators in substance dealt with the question of compensation on a proper principle. As to adjacent minerals no controversy arises.

In the result their Lordships think that the appellant was entitled to be awarded compensation for loss of title, a loss substantially equivalent under the circumstances to the value of the shale. They hold that the arbitrators were bound to take this loss into account in assessing the compensation to be paid, and that the respondents must therefore pay to the appellant the agreed sum of 230,820 dollars, and they will humbly advise His Majesty accordingly.

As the appeal has resulted in a settlement of other questions in dispute, and as the victory in the litigation is a divided one, they think that the proper mode of dealing with the costs will be analogous to that adopted in the Court of Appeal, and that there should be no costs either of the first hearing of this appeal or of the cross appeal, or of the hearing in the Court below. The respondents ought, however, to pay to the appellant the further costs limited to those occasioned by the attendance of Counsel and Solicitors at the second hearing before this Board.

In the Privy Council.

ROBERT DAVIES

v.

THE JAMES BAY RAILWAY COMPANY.

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[DELIVERED BY

THE LORD CHANCELLOR.]

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