Privy Council Appeal No. 117 *of* 1916.

The Dominion Iron and Steel Company (Limited) - - - - - - *Appellants,*

v.

(1.) C. W. Burt - - - - - - - }
(2.) George C. Topshee - - - - - }
(3.) Mrs. Emily Burns - - - - - - } *Respondents,*
(4.) Joseph Jamael - - - - - - }
(5.) John Kattar - - - - - - - }

Five Appeals Consolidated

FROM

THE SUPREME COURT OF NOVA SCOTIA.

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 25TH JANUARY, 1917.

Present at the Hearing:

THE LORD CHANCELLOR (LORD BUCKMASTER).
VISCOUNT HALDANE.
LORD DUNEDIN.
LORD PARKER OF WADDINGTON.
SIR ARTHUR CHANNELL.

[*Delivered by* LORD PARKER OF WADDINGTON.]

The question arising for decision on this appeal is whethe the appellant railway company in carrying out certain works in Victoria Road in the City of Sydney (Nova Scotia) acted illegally so as to be liable to a common law action of nuisance at the suit of the respondents, who have admittedly suffered special damage, or whether it acted legally under its statutory powers, so that the respondents' remedy is by way of compensation under the provisions of the Nova Scotia Railways Act (C. 99 of the Revised Statutes of Nova Scotia, 1900). The question for determination depends entirely on the construction to be placed on the Act to which their Lordships have referred. This Act confers certain general powers on railway companies in Nova Scotia. In the construction of railways it is almost invariably necessary not only to take land, but to do acts which may injuriously affect land not actually taken for the purpose of the railway. The Act

accordingly defines the mode in which and the conditions subject to which lands may be so taken or injuriously affected. The scheme of the Act in this connection is reasonably clear. The expression "railway" is by Section 2 (*q*) defined to include not only the actual line but all works connected therewith, and by Section 117 a map or plan and profile of the railway and of its course and direction has to be prepared and (Section 118) deposited with the Commissioner. By Section 159 it is only on payment or legal tender of compensation in respect of lands to be taken or injuriously affected by the company that the company can take any land it requires for the works, or exercise any power which must injuriously affect other land. The method by which the compensation payable can be ascertained is provided for by the Act, the proceedings to ascertain the compensation being originated by a notice from the company to the parties interested, served not less than ten days after the deposit of the map or plan. It is obviously contemplated that the lands which will be injuriously affected by the construction of the works, as well as the lands which will be required for such construction, will be apparent from the map or plan itself. The result of these provisions is that the deposit of the map or plan and the payment or tender of compensation become conditions precedent not only to the taking of land but to the exercise of any power which must necessarily injuriously affect land.

By Section 124, if any alterations from the original plan are intended to be made, a map or plan and profile of such alterations is to be made and deposited in the same manner as the original map or plan and profile, and the alterations are not to be carried out until such map or plan and profile have been deposited, nor until the compensation payable in respect of lands which have to be taken for or, must be injuriously affected by, such alterations, has been actually paid or tendered.

It was argued that Section 88 is inconsistent with the provisions of the Act being construed as above suggested, but in their Lordships' opinion, this is not really so. Section 88 provides that the company shall, in the exercise of its powers, do as little damage as possible, and make full compensation to all persons interested for all damage by them sustained by reason of the exercise of such powers. It contemplates cases in which a company may, if it act reasonably, avoid altogether, or at any rate minimise, any damage. If, for example, the works include the making of a sunken way in the neighbourhood of houses, the company must, if it can, avoid causing subsidence in such houses, and if, in spite of proper care and caution, subsidence takes place, it must compensate all parties injured thereby.

It would, however be quite impossible, from a practical standpoint, to make the tender of such compensation a condition precedent to the execution of the works. Until such execution it would be impossible to ascertain whether there would be any

damage for which compensation could be awarded. Such a case is not *in pari materia* with cases in which it appears from the deposited map or plan that land not taken for the purposes of the works must nevertheless be injuriously affected, for example, where the map or plan shows that some landowner will be deprived of access to a public highway.

The works which the appellant company have carried out in the present case consist of alterations in Victoria Road, designed with the object of carrying such road under the railway and getting rid of the dangerous level crossing which had previously existed. They were carried out pursuant to a direction of the Governor in Council under the provisions of Section 178. Such a direction cannot of itself confer on the company any power to interfere with the rights of others, but there can be no question that the company had, under Section 85, general powers wide enough to enable them to carry out the works. Nevertheless these works, in their Lordships' opinion, constituted an alteration from the original map or plan within the meaning of Section 124, and it follows that a new map or plan thereof ought to have been made and deposited in manner by that section provided before the company commenced the work. This was not done. It further appears that if such map or plan had been deposited, it could not have failed to show that the access of the respondents to Victoria Road from their adjoining lands must necessarily be interfered with, so that the alterations could not be properly commenced until compensation for such interference had been paid or tendered under Section 159. No such compensation was, in fact, paid or tendered. The result is that, in executing the works directed by the Governor in Council, the company acted illegally, not because they had no power to carry out the alterations, but because they did not trouble to observe the conditions precedent upon which alone their powers could be exercised. What they have done in Victoria Road constitutes, therefore, a nuisance in the highway, for which the respondents, who undoubtedly suffered special damage, had their common law remedy.

Their Lordships have arrived at the above conclusion quite independently of what was said by Lord Macnaghten in the case of the *Corporation of Parkdale* v. *West* (12 A. C. 602). Nevertheless, if the 88th Section of the Act be construed as above suggested, there is much to be said for the Board being bound by that decision, so far as it bears upon the true construction to be placed on the concluding paragraph of Section 178. Their Lordships, however, do not rely on such concluding paragraph, and it is therefore unnecessary to deal further with this point.

For the reasons above mentioned, their Lordships are of opinion that the orders appealed from were right in so far as they recognised that the appellant company had acted illegally, and that the respondents were entitled to damages. Indeed,

the respondents might, strictly speaking, also claim a mandatory order for the restoration of Victoria Road to its former condition. It is suggested that, inasmuch as this Act contains what is sometimes known as a betterment clause, the measure of damage in an action of nuisance is not necessarily the same as the measure of compensation payable under the Act. It is, however, difficult to see how the amount of damages to which the respondents are entitled can in any event exceed the amount which would have been payable to them by way of compensation if the appellant company had proceeded lawfully. The fact that it could have proceeded lawfully and that had it done so the betterment clause of the Act would have applied, is not without materiality in assessing the damage.

Moreover, it is, in their Lordships' opinion, still open to the appellant company to deposit a map or plan of the works and to take the necessary proceedings for ascertaining the compensation payable under the Act, and, if they do so, the Court in its discretion would be entitled to refuse to make or to postpone the making of any mandatory order. Further, though it is a matter of indifference to the respondents whether what they will receive in respect of any injury to their land be by way of damage or by way of compensation, this is not necessarily so with regard to the appellant company, for in the one case it may have, and in the other it may not have, some remedy over against the Corporation of Sydney under the order of the Governor in Council. Under these circumstances it appears to their Lordships that while the orders below ought to be affirmed, any proceedings thereunder for ascertaining the amount of the damage sustained by the respondents ought to be stayed so as to give the appellant company an opportunity of doing what they ought to have done in the first instance. For this purpose a reasonable interval, say, two months, ought to be allowed. If within these two months the company deposit a proper map or plan and proceed, with due diligence, to have the compensation payable to the respondents ascertained in accordance with the provisions of the Act the stay will become absolute. If within the two months the company do not deposit a proper map or plan and take the necessary proceedings to ascertain the compensation, the stay will be removed. Subject to the above, their Lordships will humbly advise His Majesty to dismiss the appeal with costs.

In the Privy Council.

THE DOMINION IRON AND STEEL COMPANY (LIMITED)

v.

(1.) C. W. BURT,
(2.) GEORGE C. TOPSHEE,
(3.) MRS. EMILY BURN S
(4.) JOSEPH JAMAEL,
(5.) JOHN KATTAR.

DELIVERED BY
LORD PARKER OF WADDINGTON.

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1917.