

*Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of the Honourable Robert Jones v. The Stanstead, Shefford, and Chambly Railway Company, from Canada; delivered 3rd February, 1872.*

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Present :

SIR JAMES COLVILLE.

JUDGE OF THE HIGH COURT OF ADMIRALTY.

SIR MONTAGUE SMITH.

SIR ROBERT P. COLLIER.

THIS is an Appeal from a Judgment of the Court of Queen's Bench of Lower Canada, affirming a decision of the Superior Court of that Province, dismissing the Appellant's action.

Whatever may be the precise technical nature of this action, it is plain that both in its substance and form it is founded on a supposed wrong done by the Railway Company to the Appellant in the erection of a Railway Bridge over the River Richelieu, by which he alleges that certain rights, conferred upon him by Statute as the owner of a Bridge over that River, have been unlawfully infringed.

There can be no doubt that the Company have Legislative authority under their Act to carry their Railway over the River by a Bridge, and it was admitted by the learned Counsel for the Appellant, in the outset of his argument, that having such power, the building of the Bridge would have been lawful, and this action, therefore, not sustainable, if the Company had taken proper proceedings under their Act to assess and give compensation to the Appellant; but he contended that these proceedings were a condition

precedent to the right of the Company to exercise their Statutable powers, and that before taking them, they were in no better position than if the powers had not been granted, and they were strangers committing a wrong.

Much greater prominence has been given to this contention at their Lordship's bar than was done in the Courts below, where other important points arising in the case were more fully discussed.

The question thus raised involves the construction of the General Railway Acts of the Province, upon points of some practical importance, and if decided according to the Appellant's contention, Railway Companies would be in peril of committing, involuntarily, a variety of wrongful acts in the execution of their works.

The facts of the case are as follows :—

By a Statute of Lower Canada (6 Geo. 4, c. 20.) the Appellant was empowered to build a Bridge over the River Richelieu ; to take tolls or pontage from persons using it ; and to erect a toll-house and turnpike. He was bound by the Act to maintain the Bridge. The benefit to be derived by the Appellant from the tolls was protected by the 10th Section of the Act, which is as follows :

“As soon as the said bridge shall be passable and opened for the use of the public, no person or persons shall erect or cause to be erected any bridge or bridges, or works, or use any ferry for the carriage of any persons, cattle, or carriage whatsoever for hire, across the said River Richelieu, within one-half league below, and one league above the said bridge ; and if any person or persons shall erect a toll-bridge or toll-bridges over the said river within the said limits, he or they shall pay to the said Robert Jones, his heirs, executors, curators and assigns, treble the tolls hereby by this Act imposed for the persons, cattle and carriages which shall pass over such bridge or bridges ; and if any person or persons shall at any time for hire or gain pass or convey any person or persons, cattle or carriages, across the said river, within the limits aforesaid, such offender or offenders shall, for each carriage or person, or animal so carried across, forfeit and pay a sum not exceeding forty shillings currency.”

The Bridge was built and has been used for several years by the public on payment of toll.

By another Canadian Act, 16 Vict. c. 107, the Respondents were authorized to construct a railway from a point near Montreal to the Province Line, in Stanstead.

In making this railway it became necessary to carry it over the River Richelieu, and, accordingly, the Company built a bridge, which forms an integral part of their railway, across the river above the Appellant's bridge, and within the prohibited limit, viz., a league of it.

It is not material to go into a minute description of the line taken by the Company for the railway, because it was admitted by the Counsel for the Appellant that the act of the Company in building the bridge in this place would have been within their powers, and lawful as against the Appellant, provided that they had complied with the provisions of their Act.

Whilst the bridge was being built, the Appellant served a notice on the Company—not claiming compensation, but denouncing the work as a violation of the privilege granted to him under his Special Act, and he subsequently commenced this suit, which appears to be, in part, an *action en dénonciation de nouvel œuvre*, wherein he claims, in effect, the demolition of the bridge, an injunction, and damages.

Some evidence was given by the Appellant that people and carriages had been carried across the river by the Respondent's trains, who would otherwise have gone by the Appellant's bridge, thereby causing loss to him. It was denied by the Company that any loss was so caused.

Their Lordships do not think it necessary to go into this inquiry of fact on the present Appeal, because, assuming that the claims in the action are divisible and independent, still they are all founded on a supposed wrongful proceeding of the Respondents, and unless this is established, the suit even for damages actually sustained cannot be supported.

The claim for damages in an action in this form assumes that the acts in respect of which they are claimed are unlawful; whilst the claim for compensation, under the Railway Acts, supposes that the acts are rightfully done under statutable authority; and this distinction is one of substance, for it affects not only the nature of the proceedings, but the tribunal to which recourse should be had.

It follows from what was admitted by the

Appellant's Counsel, viz., that the building of the railway would have been lawful provided the Company had complied with the provisions of their Act, and from what has been already said, that to succeed in this action the Appellant must establish two things:—

1. That he has some right or property injuriously affected which entitled him to compensation under the Railway Statutes; and (2) that the making of such compensation was a condition precedent to the exercise of the powers granted by these Acts to the Company.

Their Lordships have come to the conclusion, for the reasons hereafter stated, that, supposing the Appellant is able to establish a right to compensation, the making of such compensation by the Company was not a condition precedent to the legality of what they have done.

Having arrived at this conclusion, it is not necessary for the decision of this suit to determine whether the right to compensation exists, but their Lordships think it desirable, in order to explain their view of the case, to consider the nature of the Appellant's right, and the manner in which it may have been injuriously affected.

The right is not that of an ancient ferry, with the incidents attached to it by the ordinary law, but a privilege created by a statute, and defined and limited by it. The right, so created, is to build the bridge over the river and to take toll. It is protected to a limited extent, and a limited extent only, by the prohibitions contained in the 10th section. If the remedies provided by this clause had been co-extensive with the prohibition, and had been all given for the benefit of the Appellant himself, it would seem that in such case no action like the present would lie at all, even against a wrong-doer, upon the principle that where a new duty or prohibition is created by statute, and the same statute gives a remedy for the breach by penalty or otherwise, for the benefit of the party grieved, he has no other. (See Lord Campbell's Judgment in *Couch v. Steel*, 3 E. and B., 412, 413.) In the present case, however, the only remedy which is plainly given to the Appellant, is the right to the treble toll, and it is by no means clear that the 40s., payable for each

person, &c., carried, is not a penalty which by Section 14 goes to the Crown and the informer. However, it is not necessary now to decide the point whether these remedies exclude the right of action; for their Lordships are not prepared to advise that the action be dismissed on that ground; and whether the right of action be so excluded or not, their Lordships consider that the Appellant has a property by virtue of his special Act, which would entitle him to compensation under the provisions of the Railway Acts, if he can show that it has been injuriously affected within the meaning of those provisions—which leads to the consideration of the next question, whether it has been so affected, and if so, in what manner by the Acts of the Company?

It has been decided by the House of Lords upon the construction of the English Railway and Lands Clauses Acts, that damage caused to property by the authorised use of a Railway, after it is made, is not damage resulting from "the construction of the Railway," or "the execution of the works," so as to entitle the sufferers to compensation, and that those who have their properties rendered unfit for habitation by vibration or noise, unavoidably caused in the proper use and working of a Railway, can neither bring an action for a nuisance, because such use and working are authorised and lawful, nor obtain compensation, because the Statutes have not in terms given it for such damage. (See *Brand v. Hammersmith Railway Co.*, Law Rep., 4 H. L., 171; *City of Glasgow Union Railway Co. v. Hunter*, Law Rep. 2, Scotch Appeals, 78.) The provisions of the Canadian General Railway Acts appear to be substantially to the same effect as the English Statutes, so far as regards the points thus decided, and it was contended by the learned Counsel for the Respondents, that the present case was within the principle of these decisions, on the ground that the injury was not caused by the construction of the bridge, but by its use. Their Lordships would certainly think it right to recognise the high authority of the above decisions in their advice to Her Majesty in any case where the circumstances were the same. But it was contended by the Appellant's Counsel that the facts of this case

were not the same. It was said that, although it may be true that the damage is not complete until the bridge is used for traffic, the injury done in the present case is not merely a nuisance incidentally affecting the enjoyment of property, but the very right of the Appellant is directly infringed and disturbed by the competing bridge of the Respondents.

To support this view, the recent case of *The Queen v. Cambrian Railway Company*, (Law Reports 6 Q B, 422) was cited, where the Court of Queen's Bench held that the owner of a ferry was entitled to compensation from a Railway Company for building a bridge which disturbed his custom. In that case the bridge not only carried the railway, but was also a foot-bridge. The distinction between the case cited and those in the House of Lords is certainly fine, and was admitted to be so by the Court; because it was not the erection of the bridge, but the use of it, when made, which really disturbed the Plaintiff's ferry. Mr. Justice Blackburn so allows when he says, "an action for the disturbance of a ferry would not have lain for merely building a bridge, but would only have lain where special damage was shown, viz., where it was shown that people used it to cross the river instead of using the ferry." The decision of the Court seems mainly to rest on the ground that the bridge built for the use of foot passengers, when so used, inevitably disturbed the ferry, and therefore was, in law, an infringement of the right. But although such use as would be made of a foot-bridge might inevitably cause a disturbance of an adjoining ferry, it by no means follows that the use of a railway bridge would do so; on the contrary, cases may be conceived where the Railway might be so worked as to cause no loss of custom or disturbance to a ferry.

If, however, it be assumed, according to the Appellant's contention, that the case cited from the Court of Queen's Bench was properly distinguished from the decisions in the House of Lords, and that the present case is within the principle of that distinction, their Lordships consider that it is not the construction of the Railway bridge, authorised by the Statute, but the use of it, when constructed, for the conveyance of traffic, which

injuriously affects the privilege of the Appellant, and gives him, if at all, the right to compensation, and that in any view of this case he would have no such right unless he is able to establish loss of custom in fact, by the making and use of the railway.

This, then, being the nature of the claim to compensation, and assuming it could be established in law and in fact, can the Appellant treat the bridge as being unlawfully built because he has not been beforehand compensated? This depends on the construction of the Acts.

The 4th Clause of the "Railway Clauses Consolidation Act" of Lower Canada (14th and 15th Vict., c. 51), gives the general right to compensation. It enacts that the power to take lands for the construction of the Railway "is to be exercised subject to the provisions and restrictions of the Act," and that compensation is to be made to the owners of lands so taken, "or injuriously affected by the construction of the Railway for the value, and for all damages sustained by reason of such exercise as regards such lands of the powers vested in the Company;" the compensation to be ascertained and determined in the manner provided by the Act. By the interpretation clause (7) "lands" are to include all real estate and hereditaments.

The 9th clause, 4th subsection, gives the Company power to make the railway upon the lands on the line of it.

By the 10th clause, subsection 1, a plan is to be prepared of the lands "to be passed over and taken for the railway," and also a Book of Reference, with names of the owners; and by subsection 4, it is provided that until such plan and book are deposited in manner provided, "the execution of the railway shall not be proceeded with."

Then the 11th clause enacts "that the conveyance of lands, their valuation, and the compensation therefore," shall be made in the manner therein mentioned. This procedure provides for a notice to be given by the Company to the owner, which, in case no agreement is come to, forms the basis of an arbitration.

The 19th subsection provides that upon pay-

ment or tender of the compensation awarded or agreed upon, "the award or agreement shall vest in the Company the power forthwith to take possession of the lands, or to exercise the right, or to do the thing for which such compensation shall have been awarded or agreed upon, and, if resistance is offered, a Judge may issue a warrant to put the Company into possession, and to put down the resistance."

There is also a proviso that such possession may be given, where it is necessary to proceed with the railway, without such award or agreement, upon security being given.

It was contended for the Appellant that upon these clauses, and especially subsection 19 of clause 11, the powers of the Act could not be exercised until compensation was made.

Their Lordships consider that this might be so held with regard to the taking of lands for making the railway,—a question which does not now arise. But it is a different question whether this is so in the case of lands or easements which are not taken, but only injuriously affected by the railway. It is obvious that cases must frequently occur where injuries may happen subsequently to the building of the railway, and as an unforeseen consequence of the works, such as damage to buildings having a right of support from the adjacent land, appearing only when the excavations for the railway are made, owing to some unknown state of the soil; or injury done to drains, or to rights of passage and communication, and to other non-apparent easements, of which the Company may have had no notice. It is not reasonable to suppose that when the Legislature gave powers to the Company to make the railway on the lands indicated on their plan, it intended that the Company should, in cases like these, be subject to actions as wrongdoers, and to the legal liability of having their works stopped, because compensation had not been first made to all persons injuriously affected by the consequences of their operations.

Coming then to the Appellant's case, and assuming that he may be able to establish a right which has been injuriously affected, his claim would be



founded on this, that his statutable right was disturbed by the railway bridge, carrying passengers and traffic, which would otherwise have crossed the Richelieu by his bridge. It has been already pointed out that this injurious effect does not arise necessarily from the construction of the bridge, but may do so from the use of it; and it is apparent that if the railway had never been completed, or if no disturbance had taken place by its carrying traffic, which would have otherwise come to his bridge, the Appellant would not have been injuriously affected, or entitled to compensation at all.

The powers of the later Canadian Act (22 Vict. c. 66.) appear to be substantially to the same effect as the earlier Act.

The practice under the English Acts has been, that possession of lands cannot be taken until the purchase-money has been paid or secured, but the making compensation for injuriously affecting lands has not been considered to be a condition precedent, so as to leave the Company open to actions, if it has not been made.

In the above case cited to support the claim of the Appellant, the remedy was not an action, but proceedings by arbitration, under the Compensation Clauses (Reg. v. Cambrian Railway Company).

It is true the English Acts differ in some respects from the Canadian Statute, and it was pointed out by the Appellant's counsel that the prohibition of the 84th section of the English Lands Clauses Act, is confined in terms to the entry upon lands; and that there is no clause in the Canadian Act, equivalent to the 68th Clause of the English Act, which provides a mode in which compensation, when not made by the Company, may be enforced.

But it is to be observed, that there are no prohibitory words against entering on lands or exercising the powers of the Act before payment, in the Canadian Act. The words of the 19th sub-section are affirmative, that upon payment or tender, the award or agreement shall vest the power in the Company. It is not enacted that until this is done the authorised works shall not be executed. It is said that this is implied. But when an implication is made, it should be reason-

able; and in construing these Acts, it may properly be made according to the subject-matter. Their Lordships are not now dealing with the lands taken for the railway, but with an interest injuriously affected, if at all, by matters arising subsequent, not only to the taking of the lands, but to the construction of the railway bridge. It is not a reasonable construction of the Statute to imply, as a condition precedent, that compensation must be paid for such consequential injuries before doing the work.

It was contended that no machinery was provided by the Act by which compensation can now be assessed, for it was said that unless the notice mentioned in the 7th subsection of the 11th Clause was given, none of the machinery provided by the Act could be put in motion. If this is so, it might afford an argument against the right of the Appellant to compensation at all, and it might be inferred from it that cases like the present, depending on the use of the Railway, were not contemplated.

But it is obvious, as already pointed out, that there may be many cases of damage to property arising during or after the construction of the Railway from the works themselves, which would certainly fall within the general obligation to make compensation imposed on Companies by the 4th Clause. Their Lordships consider that if in such cases the Company did not, on application, take steps to appoint an arbitrator and proceed to arbitration, the claimant might take proceedings by way of mandamus to compel them to give the notice provided by the 7th sub-section of the 11th Clause, or to appoint an arbitrator. In such proceedings the Court would determine whether the claimant was entitled to compensation before issuing a peremptory mandamus, as in the case of *Reg. v. the Cambrian Railway Company*.

If the Appellant's contention is allowed to prevail, Railway Companies would, in all cases of possible contingent claims, however doubtful, be obliged to give notices declaring their readiness to pay compensation (in fact admitting the right to it) at the hazard, if they omitted such

notices, of being treated as wrongdoers, and of having their works demolished or stopped.

Their Lordships, for the above reasons, have come to the conclusion that this suit cannot be maintained, and they will therefore humbly advise Her Majesty to dismiss the Appeal, and to affirm the Judgments of the Canadian Courts with costs.

