

*Judgement of the Lords of the Judicial Committee of the Privy Council on the consolidated Appeals of the Corporation of Parkdale v. West and others, from the Supreme Court of Canada; delivered 27th July 1887.*

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Present :

LORD HOBHOUSE.

LORD MACNAGHTEN.

SIR BARNES PEACOCK.

SIR RICHARD COUCH.

The facts in these consolidated appeals are few, and not in dispute.

Parkdale is the western suburb of Toronto, and a separate Municipality. The boundary between the two Municipalities is Dufferin Street, which runs north and south, and intersects at right angles a public highway called Queen Street, 66 feet wide, and one of the leading thoroughfares connecting Toronto with Parkdale. The Respondents are the owners and occupiers of property fronting Queen Street, near the point of intersection, the property in the one case being in Toronto, in the other in Parkdale.

At the date of the commencement of the operations which led to this litigation, Queen Street was crossed on the level at the point of its intersection with Dufferin Street by the main lines of four Railway Companies.

On the 1st of February 1883, on the representation of Toronto and Parkdale that this level

crossing was dangerous to public safety, an Act was passed by the Legislature of Ontario empowering the two Municipalities, by agreement with the four Railway Companies, to alter the level crossing in Queen Street by carrying the roadway under the railways, and provision was made for compensating, at the expense of the Municipalities, the owners and occupiers of property which might be taken for the purposes of the proposed alteration, or injuriously affected by the execution of the necessary works.

With regard to this statute, it is sufficient to say that, in the opinion of their Lordships, it did not empower either Municipality, without the consent of the other, to effect the proposed alterations in Queen Street.

In the result, the two Municipalities were unable to come to an agreement, and therefore it became impossible to effect the proposed alteration under the powers of the Ontario Act.

In this state of things, Parkdale applied to the Railway Committee of the Privy Council. The powers of the Railway Committee in respect of level crossings are defined by Section 4 of the Dominion Statute, 46 Vict., cap. 24, passed on the 25th of May 1883, which repealed the 48th section of the Consolidated Railway Act, 1879, substituting for it the following provision :—

“In any case where any portion of a railway is constructed or authorized or proposed to be constructed upon, along, or across any turnpike road, street, or other public highway on the level, the Railway Company before constructing or using the same, or in the case of railways already constructed within such time as the Railway Committee of the Privy Council of Canada shall direct, shall submit a plan and profile of such portion of railway for the approval of the Railway Committee, and the Railway Committee, if it appears to them necessary for the public safety, may from time to time, with the sanction of the Governor in Council, authorize and require the Company to whom such railway belongs, within such time as the said

Committee directs, to carry such road, street, or highway either over or under the said railway by means of a bridge or arch, instead of crossing the same on the level, or to execute such other works as, under the circumstances of the case, appear to the said Committee the best adapted for removing or diminishing the danger arising from the position of the railway, or to protect such road, street, or highway by a watchman, or by a watchman and gates, or other protection, and all the provisions of law at any such time applicable to the taking of land by Railway Companies, and its valuation and conveyance to them and compensation therefor, shall apply to the case of any land required for the proper carrying out of the requirements of the Railway Committee. For each and every day after the expiration of the date for the completion of the works fixed by the Railway Committee during which the works remain uncompleted, the Company shall forfeit and pay to Her Majesty a penalty of fifty dollars, to be recovered by information, with costs of suit in the Exchequer Court of Canada, by the Attorney General on behalf of Her Majesty."

Pending the application to the Railway Committee a memorandum of agreement was made between Parkdale and the four Railway Companies, to the effect that Queen Street should be carried under the line of the railway; that, in the subway, the roadway of Queen Street should be narrowed to 40 feet; that Parkdale should take the control of the proposed works, with power to let contracts; that the work should be carried out under the direction of the engineer appointed by the four Railways; and that Parkdale should bear one fifth of the cost of the proposed works, the remaining cost being borne by the four Railway Companies.

It was argued that this agreement was *ultra vires* the Municipality of Parkdale. But it has frequently been pointed out that the doctrine of *ultra vires* must be applied reasonably and not unreasonably, and it does not appear to their Lordships that, under the circumstances, there was anything *ultra vires* in the agreement in question.

On the 21st of September 1883 the Railway Committee of the Privy Council made a report in the matter, which was afterwards

duly approved by the Governor in Council. The report stated that the Committee deemed it necessary for public safety that the four Railway Companies be authorized and required to carry Queen Street under their railways by means of a bridge or subway, with the necessary approaches thereto. Other provisions of the report were in accordance with the memorandum of agreement between the Railway Companies and Parkdale, which was referred to in the report, and it was provided that the works were to be completed on or before the 1st of March 1884, and the whole were to be in accordance with plans to be approved by the Railway Committee.

The Municipality of Parkdale and the four Railway Companies then entered into a formal agreement embodying the memorandum referred to in the report of the Railway Committee. The agreement was ratified and confirmed by the ratepayers of Parkdale. Parkdale let the contract for works to one Godson, who immediately commenced operations.

The effect of lowering the roadway in front of the property belonging to the Respondents was to deprive them of the access to Queen Street which they had previously enjoyed, and to injure their property very seriously.

No notice was given to them that the works were being carried out under the order of the Railway Committee, and no compensation was offered to them by the Railway Companies or by the Municipality of Parkdale.

Being apparently under the belief, as they well might be, that the works were being carried out by the Municipalities of Toronto and Parkdale under the Ontario Act, and finding that no steps had been taken for providing compensation as required by that Act, the Respondents brought their actions against the two Municipalities,

asking for an injunction to restrain them from interfering with their rights, and also asking for a mandatory injunction and for damages.

The two Municipalities simply traversed the allegations of fact in the Respondents' statement of claim.

When the actions came on for trial the Appellants set up by way of defence that they were acting under the powers of the Railway Companies, who were set in motion by the order of the Railway Committee, and the pleadings were then amended for the purpose of bringing this defence before the Court. The Railway Companies, however, were not made parties to the action. Their Lordships regret this omission, for which, in their Lordships' opinion, both parties are equally to blame. It has probably led to unnecessary expense, and to an undue prolongation of the litigation, which certainly might have been disposed of more satisfactorily in the presence of the Railway Companies. However, the absence of the Railway Companies does not relieve the Appellants, who claim to have acted as agents, from the obligation of showing that their principals were duly authorized to do the acts complained of.

Before the Colonial Courts various points appear to have been raised and argued which led to much diversity of opinion. But before their Lordships, after some discussion, the argument was mainly confined to the question whether the Railway Companies were duly authorized to proceed with the works, a question which, unfortunately, does not appear to have been dealt with in any of the able and elaborate judgements pronounced in the Courts below.

This question in their Lordships' opinion turns upon the true construction of the 4th section of the Dominion Act of 1883.

In the opinion of their Lordships, an order of the Railway Committee under this section does not of itself, and apart from the provisions of law thereby made applicable to the case of land required for the proper carrying out of the requirements of the Railway Committee, authorize or empower the Railway Company on whom the order is made to take any person's land or to interfere with any person's rights.

The questions therefore to be considered are:—

1. What were the provisions of law applicable to the case.
2. Did the four Railway Companies duly comply with those provisions?

The provisions of law at the date of the order of the Railway Committee “applicable to the taking of land by Railway Companies and its valuation and conveyance to them and compensation therefor” are to be found in the Consolidated Railway Act, 1879.

In the opinion of their Lordships these provisions include the provisions contained in that Act for compensation in respect of land injuriously affected though not actually taken. Those provisions are so intermixed with the provisions applicable to the taking of land strictly so called, that their Lordships think they may be properly included under the head of “Provisions of Law applicable to the taking of Land.” Indeed, it would be against the interest of Railway Companies to adopt the narrow construction which was contended for at the bar, inasmuch as if their Lordships' view as to the construction of Section 4 of the Act of 1883 be correct, and the order of the Railway Committee of itself gives no power to interfere with private rights, it would be necessary for Railway Companies, if they could not agree with respect to compensation for lands

injuriously affected, to purchase those lands outright.

The provisions of the Consolidated Railway Act, 1879, which are brought into operation by the order of the Railway Committee include, in their Lordships' opinion, all the provisions in that Act contained under the headings of "Plans and Surveys" and "Lands and their Valuation" which are applicable to the case.

The provision as to the deposit of a map or plan and book of reference is, in their Lordships' opinion, undoubtedly applicable. Without such plan and book of reference, no notice whatever would be given to persons whose lands may be taken or injuriously affected in consequence of the order of the Railway Committee. By the Act, the deposit of the plan and book of reference and notice of such deposit in a newspaper is made general notice to all parties concerned, and it is the foundation of all steps for assessing compensation. Until the map or plan and book of reference are deposited it is enacted Section 8, Sub-section 8, that the execution of the railway or part of the railway in question shall not be proceeded with. It may be observed that when further space is required for station accommodation, and the provisions as to a plan and book of reference are not needed because special notice is in the first instance to be given to the parties concerned, those provisions are specially excluded, although only the section headed "Lands and their Valuation" is expressly incorporated (Sections 10, 11, 12).

In the present case it is admitted that no plan or book of reference relating to the alterations required by the Railway Committee has been deposited.

It appears to their Lordships, therefore, that the Railway Companies have not taken the

very first step required to entitle them to commence operations.

With regard to the provisions for compensation contained in Section 9 under the heading of "Lands and their Valuation," it appears to their Lordships that there is a marked difference between the provisions of the Dominion Act and those of the English Lands Clauses Consolidation Act, 1845, and that decisions upon the English Act, such as *Hutton v. the London and South-Western Railway Company*, 7 Hare, 259, which was referred to in the argument, afford little or no assistance in the present case. In the Dominion Act the taking of land, and the interference with rights over land, are placed on precisely the same footing. Compensation must be paid before the land is taken or the right interfered with. This appears to be clear from Sub-Sections 27 and 28. On payment or legal tender of compensation, which may be arrived at by arbitration or by agreement, the award or agreement vests 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 . . . "has been awarded or agreed upon," and resistance or forcible opposition is then to be put down by the strong arm of the law. But before award or agreement, although immediate possession of the lands, or of the power to do the thing which is to be the subject of compensation, may be urgently required, no warrant is to be granted for quieting possession and putting down opposition unless ten days' notice has been served on the parties interested, and the prescribed security is given for payment of the probable amount of compensation. If the contention of the Appellants were correct, that payment of compensation, or the giving of



security as prescribed by the Act, is not a condition precedent, there would be this singular result, that the Railway Company might be legally in possession of land, or legally interfering with the rights of individuals, and yet they would not be able to obtain the protection of the law unless and until they had taken certain steps which, according to the contention of the Appellants, are not required to give legal validity to their acts.

Their Lordships, therefore, are of opinion that the Railway Companies were bound to make compensation under the Act of 1879 before interfering with the Respondents' rights, and on this ground, as well as on the ground of non-compliance with the provisions of the Act as to plans and surveys, they hold that the Appellants cannot justify their acts by pleading the statutory authority of the Railway Companies.

Mr. Jeune, in his reply, referred to the case of *Jones v. the Stanstead Railroad Company*, IV. P. C., Ap. Cases, 98, which was before this Board in 1872. He pointed out that many of the provisions of the Railway Act then under consideration were identical with the provisions of the Act of 1879, and he contended that their Lordships were bound by that decision to hold that in the present case compensation was not a condition precedent.

Their Lordships consider that *Jones v. the Stanstead Railroad Company* is not an authority for that contention. The circumstances of that case were very peculiar. The Appellant, who was the Plaintiff in the action, was the owner of a bridge over the river Richelieu, which had been built under the powers of an Act of Parliament, and had certain privileges and a sort of statutory monopoly within certain defined limits. Within those

limits, under the powers of their Act, the Railroad Company constructed a railway bridge. The Plaintiff complained of the construction and use of the railway bridge as an invasion of his rights, and brought an action for the demolition of that bridge, which was said to be the proper mode of claiming damages in such a case. On appeal the Plaintiff's claim was mainly founded on the authority of *Reg. v. Cambrian Railway Company*, L.R., 6 Q.B., 422, which was supposed to be distinguishable from the case of *Hammersmith Railway Company v. Brand*, L.R., 4 H.L., 171, but which was afterwards overruled in *Hopkins v. the Great Northern Railway Company*, 2 Q. B. D., 224.

Undoubtedly the provisions of the Act of 1879 as to plans and surveys, and as to compensation for lands taken or injuriously affected, and the important provisions of Section 9, Subsections 27 and 28, are to be found in the Railway Clauses Consolidation Act of Canada, 14 and 15 Vict., cap. 51, which was incorporated in the special Act of the Stanstead Railroad Company. But it is to be observed that the Company's special Act also incorporated Clause 4 of 14 and 15 Vict., cap. 51, which is a general provision as to compensation, corresponding with Clause 6 of the English Railway Clauses Consolidation Act, 1845, and which is not to be found in the Act of 1879. This clause apparently was treated as qualifying the other clauses of the Act 14 and 15 Vict., at any rate as regards compensation for damage caused by the working of the railway, assuming that such damage could be the subject of compensation. It was pointed out in the judgment that it was not the construction of the railway bridge, but the use of it when constructed for the conveyance of traffic, which injuriously affected the privilege of the Appellant,

and gave him, if at all, the right to compensation, and their Lordships expressed their opinion that it was not a reasonable construction of the statute under consideration to imply as a condition precedent that compensation must be paid *for such consequential injuries* before doing the work. And the appeal was consequently dismissed.

Their Lordships do not consider that this decision conflicts with the opinion they have expressed in the present case.

It was urged that if compensation was to be paid in respect of rights over land interfered with by the construction of a railway as a condition precedent before doing the work, Railway Companies would be liable to be treated as wrongdoers in a variety of cases, and would be seriously hampered in exercising their statutory powers.

Their Lordships do not feel pressed by this difficulty. The cases in which Railway Companies, in the construction of their railway, unwittingly interfere with the rights of other persons must be very few. In the present case, certainly, the interference complained of is not due to any inadvertence.

If a person whose rights are injuriously affected is refused compensation, he may be compelled to bring an action for injunction. But even in that case the Court would probably not interfere with the construction of the works by an interlocutory injunction if the Railway Company acted reasonably, and were willing to put the matter in train for the assessment of compensation. As Lord Romilly pointed out in *Wood v. the Charing Cross Railway Company*, 33 Bevan, 290, the granting an injunction which stops the works of a Railway Company is not merely a question between the Plaintiff and the Company. The public have an interest in the

matter. As a general rule, it would only be right to grant an injunction where the Company was acting in a high-handed and oppressive manner, or guilty of some other misconduct.

Their Lordships were asked by the Appellants to express an opinion as to the measure of damages in case the appeal should be dismissed. It appears to their Lordships that, as the injury committed is complete and of a permanent character, the Respondents are entitled to compensation to the full extent of the injury inflicted.

Their Lordships express no opinion as to the rights of the Appellants to recover over again against the Railway Companies, either under the general law of principal and agent, or under the express provisions of their agreement with those Companies. Whatever those rights may be, they are untouched by their Lordships' judgement.

In the result, their Lordships will humbly advise Her Majesty that the appeal must be dismissed. The Appellants will pay the costs of the appeal.

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