

Judgment of the Lords of the Judicial Committee of the Privy Council on the appeal of The Palgrave Gold Mining Company v. McMillan, from the Supreme Court of Nova Scotia; delivered 23rd July 1892.

Present:

LORD HOBHOUSE.

LORD MORRIS.

LORD HANNEN.

SIR RICHARD COUCH.

LORD SHAND.

[*Delivered by Lord Hobhouse.*]

The Appellants hold a lease from the Crown of certain gold mines, which extend over the whole of a small island situate in Isaac's Harbour, and called Hurricane Point. The Respondent is the owner of a plot of land in the island. The question is as to the validity of an award made for the purpose of estimating the damages to be paid to the owners by the lessees under the provisions of the Statute, Chapter 7, of the Revised Statutes of Nova Scotia, Fifth Series.

The award embraced damages to be paid to other landowners besides the Respondent, but its validity has been challenged by the Respondent alone. For that purpose he applied in the Supreme Court for a writ of *certiorari*, and he also moved the Court to quash the award. The Appellants' Counsel have urged objections to the propriety of that procedure. But it is clear that an invalid award may be set aside in some way or other by the Supreme Court; and it is

not suggested but that the merits of this case were fully brought before the Court. Therefore, even if the Appellants could show that the proceedings were informally started, their Lordships would not on that ground be willing to reverse the judgment; and so they declined to hear the point argued.

It will be convenient to state the material provisions of the Statute which governs the case.

Section 18 is as follows:—

“When the holder of a lease of areas on private lands cannot make an agreement with the owner thereof for leave to enter and for easements, and for damage to such lands, and for the other purposes mentioned in Section 20 of this Chapter, it shall be lawful for such holder to give notice to the owner or tenant to appoint an arbitrator to act with another arbitrator named by the lessee of the areas, in order to award the amount of damages to which the owner or tenant shall be entitled, by reason of the opening and working of a mine in such lands, and the doing the acts or things contemplated by this section and the said Section 20: and if any lessee shall enter and work upon the land leased before he shall have agreed with the owner of the land, or have proceeded to have his damages appraised in accordance with this section, the owner may complain to the Supreme Court, who shall investigate the complaint, and if the same is substantiated shall declare the lease to be forfeited.”

By Section 19 it is enacted that,—

“If the proprietor refuses or declines to appoint an arbitrator, or when for any other reason no arbitrator is appointed by the proprietor in the time limited therefor in the notice provided for by the next preceding section, the warden of the municipality wherein the lands lie shall, on being satisfied by affidavit that such notice has come to the knowledge of such owner, agent, or tenant, or that such owner, agent, or tenant wilfully evades the service of such notice, or cannot be found, and that reasonable efforts have been made to effect such service, and that the notice was left at the last place of abode of such owner, agent, or tenant, appoint an arbitrator on his behalf.”

By Section 20 it is enacted that,—

“All arbitrators appointed under the authority of this Chapter shall be sworn before a justice of the peace to the impartial discharge of the duties assigned to them; and they shall forthwith proceed to estimate the reasonable damages which the owners and tenants of such lands according to their several interests therein shall sustain by reason of the opening

of necessary shafts and other excavations, the construction of roads and drains, the erection of necessary works and buildings thereon, and of the occupation of so much thereof (to be determined by the Inspector of Mines in the event of any dispute arising in respect thereof) as the lessee may require for all purposes connected with the opening and working of a mine to the most advantage thereon, including therein all such spaces as may be necessary from time to time for a dumping ground or grounds for depositing the mineral mined, as well as slate, stone, shale, screenings, waste coal, refuse, rubbish, and all other material mined or excavated by such lessee and those claiming under him."

Section 26 provides for damages ensuing subsequent to the agreement or award, and Section 44 gives protection to buildings and enclosures.

On the 23rd April 1890 the Appellants served a written notice on the Respondent and 12 other persons, being all the landowners of Hurricane Point. After describing the ambit of the Island, and referring to the Crown lease and to the Statute, the notice proceeded as follows:—

"Pursuant to the provisions of said Chapter 7 of the Revised Statutes of Nova Scotia, Fifth Series, the said the Palgrave Gold Mining Company, lessee as aforesaid of the areas and the mining rights in said areas covered by the lands above referred to, hereby notify you and each and every of you, and all persons having or claiming any right to damages for entry upon the said lands by reason of the opening of necessary shafts, and other excavations, the construction of roads and drains, the execution of necessary works and buildings thereon, and of the occupation of so much thereof as the lessees may require for all purposes connected with the opening of a mine to the most advantage thereon, including therein all such space as may be necessary from time to time as a dumping ground or grounds for depositing the mineral mined, as well as slate, stone, shale, screenings, waste coal, refuse, rubble, and all other material mined or excavated by said lessee or those claiming under said lessee, to appoint on or before the fifth day of May 1890 an arbitrator to act with Hercules Hewitt the arbitrator named by or on behalf of the said lessee, in order to award the amount of said damages to which you are or shall be entitled by reason of the opening and working of a mine in said lands and the doing the acts and things contemplated by the said Sections 18 and 20 of said Chapter 7 of the Revised Statutes of Nova Scotia, Fifth Series."

It will be observed that the notice follows the terms of Section 20 of the Statute, except that there is no mention of the Inspector of Mines.

The Respondent replied by a counter-notice, stating that he "hereby objects to the said notice, to the arbitrator Hercules Hewitt therein named as arbitrator on behalf of the said Company, and to all or any proceedings which have been or may be instituted or carried on under the said Act in pursuance of the notice, on the following among other grounds." He then sets forth 14 grounds of objection, contending that Hewitt was an improper person for arbitrator, and that the Company were not in a position to take the steps they were taking.

Upon that the Appellants made application to the Warden of the Municipality, who, after receiving the necessary affidavit, of his own authority appointed Hugh Hughes to be arbitrator on behalf of the landowners.

On the 17th May the arbitrators caused a written notice to be served on the Respondent and the 12 other landowners in the following terms:—

"Take notice that, in consequence of your not having appointed an arbitrator in compliance with the notice served upon you on the 23rd day of April last, and the Warden of the Municipality wherein the lands referred to in said notice lie being satisfied by affidavit of the due service of such notice on all the parties therein named for the period of 10 days and upwards, said parties being residents in the county wherein the lands lie, has appointed Hugh Hughes as the arbitrator on your behalf, and the arbitrator so appointed and the arbitrator appointed by the Palgrave Gold Mining Company, both of whom have been duly sworn to the impartial discharge of the duties assigned them, will meet at nine o'clock in the forenoon, on the 19th day of May instant, at Hurricane Island or Hurricane Point at Isaac's Harbour in the county of Guysborough, to estimate and award the reasonable damages which you shall sustain according to your several interests from the mining and other things to be done, and buildings and works to be erected, more particularly mentioned in said notice served upon you; and you are hereby notified to attend said assessment of damages, and, in default of your so attending, the arbitrators will proceed *ex parte* to assess and award such damages."

On the same day, after service of the notice

on the Respondent, Hughes exhibited to him his authority to act as arbitrator, whereupon the Respondent forbade him to enter the island, and said that he would not get there, and if he had attempted to do so he would have been prevented.

Nevertheless, on the 19th the two arbitrators, accompanied by Mr. Fisher on behalf of the Company, took a boat and rowed over to the island. When they neared the land they were met by the Respondent and 12 other men, some of whom were armed with guns and pistols, and who threatened the party with death if they attempted to land. The arbitrators rowed twice round the island, seeking a spot to put in at, but the Respondent and his men met them everywhere with the same threats. Even when they tried to land upon a wharf below high-water mark belonging to the Company, the 13 men came to the front of the wharf and threatened to shoot if the boat came closer.

Thus prevented from conducting the arbitration on the land which was the subject of it, the arbitrators proceeded as best they could. One of them is thoroughly acquainted with the island. The other says that he was able by rowing round the island to get a fair view of it, and to judge of its value, and to estimate the damages. The whole island is only $4\frac{1}{2}$ acres in extent. Mr. Fisher describes it as follows:—

“The land is of a flat surface and very narrow, in places not over 60 feet, and can be seen nearly as well from the water as when on its surface, and its value judged of also. It is a piece of land very rocky and barren, and, with the exception of two or three small spots, is unfit for cultivation, and is of very little value except in connection with the gold mining areas owned by the said Company.”

The arbitrators substantially agree in that description, nor is there any contradiction of it.

The award is dated the 19th May, and is as follows:—

“Award.

“To all to whom these presents shall come, greeting:—

“Whereas, the Palgrave Gold Mining Company are the lessees of certain mining leases issued by the Provincial Government of Nova Scotia, and still in force, authorizing said Company to mine, after the assessment of damages for surface rights on lands at Isaac’s Harbour, in the county of Guysborough, known as Hurricane Point or Hurricane Island, owned or claimed to be owned by Allan McMillan, Stephen McMillan, Elizabeth Giffin, John McMillan, Robert C. McMillan, Rueben McMillan, Lorinda Cox, Mary Jane Sweet, Hugh McMillan, Effie McMillan, Stephen Sweet, A. B. Cox, and Whitman Giffin.

“And whereas, the said Company having been unable to make an arrangement with such owners as to the amount to be paid them for such damages, caused a notice to be served on said parties, and each and every of them agreeably to the Statute in each case made and provided to appoint an arbitrator on a day therein named, and the said owners having failed to comply or make such appointment, and the Warden of the Municipality wherein the lands lie, having been satisfied by affidavit of the due service of said notice and of the other facts above stated, appointed the undersigned Hugh Hughes, an arbitrator, on behalf of said owners, to act with Hercules Hewitt, the other undersigned arbitrator, appointed by said Company; all of which facts above stated have been duly proved before us by sworn testimony.

“Now know ye, that we, the said arbitrators so appointed, having been duly sworn to the impartial discharge of the duties assigned to us in this behalf, and having caused notice to be served on all the parties to attend this day for the purpose of having such assessment of damages awarded, John McMillan, Stephen McMillan, Robert C. McMillan, Hugh McMillan, Whitman Giffin attended, and the President of the said Company having attended on behalf of the said Company, and the above and other facts having been established by proof to our satisfaction, do award and adjudge as follows, namely:—That the damages to be sustained and suffered by the owners, by reason of the opening of necessary shafts and other excavations, the construction of roads and drains, the erection of necessary works and buildings thereon, and of the occupation of so much thereof as the lessees may require for purposes connected with the opening and working of a mine to the most advantage thereon, including therein all such spaces as may be necessary from time to time for a dumping ground for depositing the minerals mined, as well as slate, stone, shale, screenings, waste, coal, refuse, rubbish, and all other materials mined and excavated by said Company, and those claiming under them, is fifty dollars, to be divided

into ten equal parts, one part or five dollars to be paid to each of the following parties, namely, to the said Allan McMillan, Stephen McMillan, John McMillan, Robert C. McMillan, Rueben McMillan, Hugh McMillan, and Effie McMillan, and one share of five dollars to Whitman Giffin and Elizabeth Giffin, in right of said Elizabeth Giffin wife of said Whitman Giffin, and one share or five dollars to Stephen Sweet and Mary Jane Sweet, in right of the said Mary Jane Sweet, wife of the said Stephen Sweet, and one share or five dollars to A. B. Cox and Lorinda Cox, in right of said Lorinda Cox, wife of said A. B. Cox, all of which sums shall be paid to the said parties respectively by the said The Palgrave Gold Mining Company, as directed by Chapter 7 of the Revised Statutes of Nova Scotia, Fifth Series.

“And we further award, decree, and adjudge that after such payments shall be made, or the depositing thereof, as directed by said chapter or statute in case of the same being refused, that the said The Palgrave Gold Mining Company shall be entitled to enter upon the land herein mentioned, for all or any of the purposes referred to in this award, and mine and do all other things mentioned in this award, for which such damages have been assessed and allowed.

“Dated this 19th day of May, A.D. 1890.

“HUGH HUGHES,

“HERCULES HEWITT,

“Arbitrators.”

The grounds submitted to the Supreme Court for invalidating the award are stated by Mr. Justice Weatherbe as follows:—

“1. The award was bad for uncertainty. The award does not show for what part of the lands the arbitrators have given damages. That the award should define the number and position of shafts, buildings, and everything else, including damages likely to occur to streams of water, &c.

“2. The award is bad for awarding damages in a round sum.

“3. The arbitrator was an employee of the Company.

“4. There was no notice of the application to the Warden to appoint an arbitrator.

“5. There was no notice of the appointment of arbitrator.

“After hearing Mr. Ross we considered it unnecessary to call on Mr. Wallace for the Company on the several grounds referred to, except as (1) to the uncertainty of the award; (2) want of notice of application to the Warden.”

Their Lordships state this matter in detail, because an additional ground is now taken, and has been earnestly urged at the bar. The Respondent says that the appeal should be dismissed, because the award is invalid for three

reasons, stated in his notice of motion, though not urged before the Court. They are as follows :--

“18. Because the said arbitrators did not enter upon the lands or view the same before making the said award.

“19. Because there was no evidence before the arbitrators upon which any award could be made.

“21. Because the said John McMillan received no sufficient notice of any meeting of the said arbitrators, and had no opportunity to call and examine witnesses, or give evidence before the arbitrators.”

Those grounds were abandoned in Court, and it is very easy to understand why. It is a very bold thing for one whose lawless violence has been the sole cause of preventing the ordinary and regular course of proceedings, to come forward and complain of injury because the proceedings have not been ordinary and regular. Courts of Justice are not in the habit of listening to such complaints. In fact their Lordships, on the materials before them, are of opinion that the arbitrators were quite justified in the course they took. They were forcibly prevented from entering on the lands; they were entitled to act on their knowledge and observation of the ground; the Respondent, and indeed all the other owners, had received sufficient notice of their intended meeting; and it is trifling with the case to suggest that any further notice would have been of any avail to people who had met the two former notices with defiance and menace. But even if the Respondent's case could be made to wear a more favourable aspect, their Lordships would not think it right to entertain objections to the award which must have been deliberately abandoned in the Court below, and which if urged then, and if thought of importance, might have been the object of further inquiry and explanation.

As for the two objections which were urged and were not at once overruled, Mr. Justice Weatherbe thought them insufficient, but

the rest of the Court, Mr. Justice Townsend and Mr. Justice Meagher, were of a different opinion. They considered that the Warden's appointment of an arbitrator was invalid for want of notice to the parties, and also that the award is void for uncertainty. An order thereupon was made on the 10th July 1891, having the effect of quashing the award, of dismissing a motion and appeal brought by the Appellants to quash the *certiorari*, and of throwing upon them the whole costs of the proceedings. That is the order now appealed from.

As regards the Warden's appointment of Mr. Hughes, the Court say that it is a judicial act, which in their judgment cannot be properly performed without notice to the parties. Whether there is any sense in which such an Act can be called judicial need not be discussed. It is very common in England to invest responsible public officials with the duty of appointing arbitrators under given circumstances. Such appointments should be made with integrity and impartiality, but it is new to their Lordships to hear them called judicial acts, and it is certainly not the practice to give notice or to invite discussion in any way before making such an appointment, though the appointor might in some cases think fit to do so. If it were held that notice was a condition precedent to their validity, many appointments, and consequently many awards, would be invalid in England. In the Statute now under discussion, careful provisions are made for notice to an owner at the commencement of proceedings, but when he has once failed to appoint his arbitrator, power is given to the Warden to appoint, and nothing is said about notice. For these reasons their Lordships hold that the objection to Mr. Hughes' appointment has no substance in it.

On the point of uncertainty, the Court below think, as Mr. Justice Townsend puts it,

that the intention of the Statute is to fix definitely just how much of the owner's land should be taken from him; and this, in the judgment of Mr. Justice Meagher, is to be determined by the Inspector of Mines prior to the making of the award. Otherwise, they say, the lessee's right extends to the whole property described in the notice; and that is too general and indefinite a right to be upheld. It seems however to their Lordships that this general and indefinite right is the very thing which the Statute contemplates as existing, and for the exercise of which it provides compensation to the landowner so far as the injury to him can be estimated.

Their Lordships have not the means in this case of learning the exact nature of the rights which the Crown in Nova Scotia possessed prior to the Statute in question for the purpose of getting precious metals. But they observe that the Statute does not confer any such rights. In the case of prospecting licenses, it is assumed that the licensees can make the requisite experiments. In the case of leases, it is assumed that the lessees can enter and work. In both cases, provisions for compensation to landowners are introduced by way of restrictions and conditions imposed on the rights conferred by the Crown. It was doubtless the intention of the Legislature to lay down a fairly workable system for the exercise of concurrent rights, very apt to come into conflict, and not at all easy to adjust with nicety. Probably their attempt has removed many occasions of uncertainty and quarrel; and if it has left some, that is not surprising, considering the intractability of the subject matter.

The first restriction imposed on a lessee is that of Section 18, viz. an absolute prohibition against entering and working under peril of

forfeiting the lease, if the lessee does not previously agree with the landowner or proceed to have his damages appraised. The damages are to include all the acts and things contemplated by Section 20. In the absence of agreement therefore it is necessary, before the lessee can break up a yard of ground, to estimate the damage to be done by necessary shafts and excavations, by the construction of roads and drains, by the erection of necessary works and buildings, and by the occupation of so much ground as may be required for opening and working the mine, including such spaces as may be necessary from time to time for dumping grounds. But it is impossible to specify beforehand whither the proper working of a mine may lead, or what works may become necessary; and, in the case of dumping grounds, it is expressly anticipated that the necessity may arise from time to time. As the damages are to be paid beforehand, all that can be done is to make the best estimate of them that can be made. To a certain extent, disputes are provided for by introducing the Inspector of Mines. Whether he is to be called in once for all before the award, and forecast definitely what land is to be occupied, as one of the learned Judges below thinks, or whether he is to be called in from time to time whenever the lessee alleges necessity for occupying land, and the owner denies it, is a question to be decided when it arises. It does not arise here, because there has been no dispute as to the areas proper for occupation. It is only important as showing how clearly the framers of the Statute saw the uncertainty of the subject they were dealing with.

The Statute does not in terms make it competent, but probably it is competent, to the lessee to give such a notice as would exclude portions of the demised area from the award of

damages, and from his right to use or occupy, leaving subsequent requirements to be dealt with either under Section 26 or by fresh notice under Section 18. In such case, he might have less damage to pay in the first instance. If he asks that the full rights which the Statute contemplates shall be paid for, he would have to pay damage on the basis that, subject to the control of the Inspector, there is no part of the land which may not be used by him. His discretion will be guided by the nature of the area demised. And in such a case as this, where the area is mostly barren rock, only $4\frac{1}{2}$ acres in extent, and where a nominal sum, or a mere trifle, may well be supposed to cover all damage which can reasonably be contemplated as likely to occur, the most obvious course would be to give notice in the terms of the Statute.

Here the notice is in the terms of the Statute, and the material part of the award in the same terms. Mr. Justice Weatherbe states it to be the common practice, nor is there any contradiction of that statement. Where the uncertainty comes in, except so far as it is inherent in the subject-matter, their Lordships cannot see. Lessees, landowners, and inspector, all put together, cannot tell what works or occupations will be necessary or required; but the award is to the effect that, whatever are found to be so, the damage done by them is estimated beforehand at 50 dollars (five for each share).

Their Lordships are of opinion that the judgment of the Supreme Court should be discharged, and the motion to quash the award dismissed with costs, and that the Respondent should pay the costs of this appeal. They will humbly advise Her Majesty in accordance with this opinion.
