

Privy Council Appeal No. 111 of 1916.

**The Minister of Railways and Harbours of the
Union of South Africa** - - - - *Appellant,*

v.

**The Simmer and Jack Proprietary Mines
(Limited)** - - - - *Respondents.*

FROM

THE SUPREME COURT OF SOUTH AFRICA.

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF
THE PRIVY COUNCIL, DELIVERED THE 23RD APRIL, 1918.

Present at the Hearing :

EARL LOREBURN.
LORD SUMNER.
LORD PARMOOR.

[*Delivered by* LORD SUMNER.]

The first question in this appeal concerns the validity and effect of Regulation No. 2 of the Mines and Works Regulations, 1909. The Ordinances under which this Regulation was made were two, the Mines, Works and Machinery Regulations Ordinance, 1903 (No. 54 of 1903), and the Mines, Works and Machinery Regulations (Amendment) Ordinance, 1905 (No. 31 of 1905). The latter amended the former, and is to be read as one with it. So reading them, and omitting immaterial and unimportant words, the enactment may in effect and for present purposes be stated as follows :—

“The supervision of all mines and works and machinery shall be exercised by the Government Mining Engineer, the Inspectors of Mines, the Inspectors of Machinery, and other officers appointed by the Government in that behalf. It shall be lawful for the Lieutenant-Governor to make regulations in respect of mines (including all excavations for the purpose of winning minerals, whether abandoned or actually being worked, on the surface and underground) for the protection and preservation of the surface of mines and works and of railways, and for laying down conditions under which such railways may be undermined.”

It should be added that all the other powers conferred on the Lieutenant-Governor under these Ordinances seem to contemplate that the subject-matter of his regulations shall be

concerns which are under active management, and, as such, require that their operations should be regulated by authority.

The cavities, which have been filled with sand and are the subject of the present litigation, are excavations underground, made for the purpose of winning minerals before the passing of either ordinance, and then abandoned. Many of them undermine the railway in question. Till recently they were believed by the Government officers concerned not to endanger the protection or preservation of the railway, and, although a different opinion is now entertained, this rests on apprehension or caution, and not on any actual damage done or sign of the likelihood of damage. A large part of them was legal when made. These cavities are not themselves a mine, but form a part of the mine, which belongs to the respondents.

If the regulations now in question have the effect for which the appellant contends, they authorise the Inspector of Mines to require the respondents to fill up these cavities at their own expense, because in his opinion it is necessary to protect the surface of the Simmer and Jack Mines at and near the place where the railway runs. Is a regulation, which has such an effect, *pro tanto* within the authority of the powers above stated?

If it is, this regulation is the one instance among the powers above stated, in which the subject-matter is not a concern under active management and a site of current operations, but at most is within the ambit of such a concern, and is the abandoned site of operations long spent and brought to an end. Under the principal law the regulation could not have been made, since the protection of railways was beyond its purview, and the very section of the amending law, which extends it to railways at all, provides for the first time for the prescription of conditions under which a railway might thereafter be undermined. This in the case of this railway had already been done long before by these excavations or parts of them.

In the opinion of their Lordships, it is not a legitimate interpretation of mere amending provisions to hold that they completely alter the character of the principal law, unless clear language is found indicating such an intention. The amending words, wide as they are, do not evince any intention to make so radical a change as would be involved if there were thrust into powers to regulate future operations, a solitary power to order a mine-owner to undo the result of a past operation, long completed, which, when it took place, involved no breach of the law and lay within the rights of those who carried it out. Adequate effect can be given to the words in question, consistently with the general prospective scope of the ordinance, by holding that the Lieutenant-Governor is authorised in respect of abandoned excavations to make regulations for the protection and preservation of railways against future operations, which may so affect those excavations as to endanger the railways.

In the Courts below attention appears to have been principally directed to the effect and scope of the Ordinances, and it was assumed, with little scrutiny, that the language of the Regulations would truly bear the meaning which the appellant puts upon them. Their Lordships think that, before these Regulations are condemned as *ultra vires*, it is proper to examine them more closely, to see whether they cannot justly be construed so as to keep them strictly within the Lieutenant-Governor's power.

The Regulations in question consist of Articles 2 and 3 of section II of the Mines and Works Regulations of 1903, for Article 2 of which an enlarged and altered Article was substituted by the amended Regulations of 1909.

When consolidated and omitting words not essential to the present purpose they would run as follows:—

"2 Whenever, in the opinion of the Inspector of Mines, it may be necessary to protect the surface of a mine or to protect railways situated thereon, it shall be lawful for such Inspector to prohibit the owner from mining in any portion of such mine, save under such restrictions as such Inspector may determine. No owner shall in any case carry on any mining operations under or near railways without first having given notice to the Inspector. Where mining operations have already taken place, and where, in the opinion of the Inspector of Mines, it is necessary to protect the surface of a mine, some adequate means of support shall be provided of such extent as the Inspector may direct.

"3 All excavations made contrary to the provisions of the preceding regulation shall be immediately filled up by the person responsible for such excavations."

It will be noticed here that the principal provision is that the Inspector may in certain cases prohibit future mining in any part of the mine, either absolutely or *sub modo*. Next, passing from this, "mining operations," not throughout the mine and in any part of it, but under railways particularly, are dealt with. Here the owner before operating must first give notice, and if, contrary to this provision, mining operations have already taken place, *scilicet* before the Inspector is made aware of them or of the intention to carry them out and on getting to know of them he thinks that the surface of the mine must be protected, the regulation itself imperatively requires adequate means of support to be provided, thus taking the matter out of the Inspector's hands, except as to the extent of the remedy so provided.

Thus read, the words about mining operations, like the provisions about mining, refer to things to be done after the date of the regulation. The case for prohibition is clearly prospective, and so is the provision for giving notice before undermining a railway, and the mining operations, which "have already taken place," being in antithesis to the notice to be given before they take place, must equally be prospective.

It is said that to read the words, "where mining operations

have already taken place," as merely providing the remedy for non-compliance with the previous requirement of prior notice to the Inspector, leaves Article 3 without operation, and that a construction which provides a remedy twice over for the same thing is illegitimate. Their Lordships think that the above construction is not truly liable to this stricture. First of all, abundant effect is given to Article 3 by applying it to infractions of the first and principal part of Article 2, which otherwise would be provided for only by penal provisions *in personam*, without providing for the equally necessary *restitutio in integrum* required for the safety of the railway. Secondly, it provides for the immediate filling up of an unauthorised excavation, which is something distinct from and more special than "provision of adequate means of support." Thirdly, in Article 3 it is the person responsible for such excavations, who has to fill them up. If, however, Article 2 were read as applicable to excavations anterior to the regulation itself, changes of ownership might have made it impossible to carry out the directions of the article. On all grounds Article 3 stands clear of the latter part of Article 2, which falls to be construed by itself as a full and self-contained provision for the double case of an intention to undermine a railway notified beforehand and an undermining of a railway subsequently notified and ordered to be supported adequately. Their Lordships are accordingly of opinion that the letter from the Acting Inspector of Mines, dated the 20th July, 1911, which required the respondents to pack the stopes above the seventh level, was not warranted by the regulation under which it purported to be written, and was *ultra vires*.

The appellant further contends that a limited portion of the area in question, which lies vertically below the railway, was expropriated by the Transvaal Government in 1889. If this is so, he says, the respondents' subsequent workings under the railway in this area were acts of trespass on Government property. In the proceedings, as they stand, no claim has been made for damages for trespass, nor has any evidence of the amount of such damage been given. Indeed, if the effect of the Besluit is to leave the prior "mynpacht" right standing, notwithstanding that it transferred the entire *dominium* in the soil and not the surface only, trespass would not be the word to use in the case of an irregular exercise of existing rights to mine in this property, nor would the remedy necessarily be the same as that for trespass. From several passages in the judgments, however, there is good reason to think that the proceedings in the Courts below were conducted on the agreed footing, that, if on any ground it should be held that any part of the respondents' workings was wrongful, the cost of filling that part with sand should be borne by them, and their Lordships entertain no doubt, after the statements of the respondents' counsel, that, if this should prove to be so, the respondents will be advised to accept responsibility, if established, independently of any question arising on the form of the proceedings.

The question is one of the true construction of the Raadsbesluit, dated the 8th January, 1889, and approved on the 13th May following. By that instrument it was resolved (in the terms of the translation from the Dutch, which has been agreed between the parties):—

“I. The ground required for the tram line, . . . which has been marked and beacons off so far as possible by beacons and cuttings, . . . is hereby entirely withdrawn from the control of the previous owners and all other persons, who hitherto . . . could exercise any sort of right whatsoever, thereover or thereto.

“II. From this date the ground referred to in Art. I shall be wholly and unconditionally at the disposal of the same Company for the purposes of the contract.

“IV. The ground referred to in Art. I shall be transferred to the name of the Government.”

The actual transfer provided for in Article IV does not seem to have been made, but the effect of the Besluit does not depend on the performance of this act. (*Central South African Railways v. Geldenhuys Main Reef G. M. Co.* 1907 T.H. 270.) The words used are wide; indeed, though general in form, they could hardly have been wider. It is common ground that in themselves they are wide enough to vest in the Government the *dominium* of the *solum* along which the railway runs. This, however, is not enough. It is not a question of granting the surface with a reservation of the subjacent strata, so that the latter are not conveyed but remain in the former possessors by title of ownership. “Mynpacht” rights are *sui generis* and are the creature of statutes, which have conferred on the State the right to dispose of precious metals and invest the State’s grantees with the right to win and get them, the ownership rights of the *dominium* notwithstanding. (*Neebe v. Registrar of Mining Rights*, 1902. T. S. 65.) Hence words of transfer adequate to cover the general ownership right in the land may or may not also cover any “mynpacht” rights in the land, which have been already created and are in existence, according to the true intent of the instrument to be gathered from its terms generally. The question is whether the effect of this instrument is to vest in the Government the “mynpacht” rights therein, and *pro tanto* to extinguish those rights vested in the respondents’ predecessors in title, or to leave those rights standing, as they then stood, vesting in the Government the *dominium*, but subject to such rights. In the Supreme Court de Villiers, J., agreeing with the trial Judge, came to the conclusion that, there being no express words of reservation, the general words did not raise the inference of an intention to make a reservation sufficiently clearly. The majority of the Judges in the Supreme Court came to the conclusion that the general language of the instrument, taken in conjunction with the existing law, sufficiently showed that the Besluit was not intended to deal with the mining rights of the respondents’ predecessors.

The ordinances passed from time to time before 1889 to regulate mining on the Witwatersrand and elsewhere, commonly called the "Gold Laws," show that the scheme of the legislation was to create or recognise mining rights, exercisable under a system of licence and control, which were not dependent on the possession of full rights of ownership in the ground worked, but were to be reconciled with the concurrent ownership rights of others. By the Mining Law, No. 8, of 1885, which was in force in 1889, it was provided that the right to mine and dispose of all precious metals belonged to the State, the owner of private ground, proclaimed as a public digging, being entitled to share in the proceeds of diggers' licences. Article 59 provided, "whenever it may be found necessary in the general interest for public purposes, such as for railways . . . to withdraw, in whole or in part, rights already granted, the Government shall have the right so to do upon payment of compensation." Now, when the Besluit was passed, mining rights in the whole of the ground affected had been already granted to the respondents' predecessors, partly in the form of a "mynpacht brief," partly of diggers' licences, all of which had been duly kept alive. Until the site for the railway was taken there was no reason why, subject to the necessary formalities, these rights should not in due course be exercised and enjoyed in the ground in question. If the language of Article I of the Besluit be taken in its widest sense, then, if Article 59 of Law No. 8 of 1885 applied, as it would do if nothing was provided to the contrary, the Government would come under a substantial obligation to compensate the owners of the mining rights for their withdrawal, in respect of their prospective value, measured chiefly by anticipated profits.

The Besluit does make provision to the contrary. By Article IV "any person, who considers himself entitled to compensation by reason of the expropriation of his property or other rights," shall take certain steps, and by Article V—

"in estimating the amount of compensation to be paid . . . (a) Compensation shall only be given for direct damage actually sustained, and in no case for loss of profit. . . . (c) No compensation shall be given for expropriating the ground required for the railway lines . . . but only for the removal, destruction, or damage of or to anything which owes its existence to manual labour."

These provisions are sufficiently plain. There is also a statement in the Besluit that the Executive Council "considering Article 59 of the law regulating the digging for precious metals, resolves as follows," &c. There has been a difference of opinion as to the sense in which the Executive Council had considered Article 59, whether it was for the purpose of applying it with an expressed limitation, or for the purpose of disregarding it with the substitution of a different scheme of compensation. Their Lordships think that the important point is that the Besluit draws attention to the

Article, and they agree with the majority of the Judges in the Supreme Court that there may and should be inferred from the language of the Besluit, taken as a whole, the intention that the mining rights of the respondents' predecessors were not to be interfered with or allowed to become the subject of expropriation. As the law then stood, by Article 21 of the Law of 1885, digging under railways was prohibited, though it is not quite clear that this would extend to deep workings such as those in question, some hundreds of feet below the surface. It was, however, possible, as indeed not long after took place, that the law might be amended by permitting railways to be undermined under sufficient precautions for their safety, and if the Government decided not to expropriate the mining rights, in order to avoid payment of compensation for them, such a policy is intelligible enough. The contrary view would involve the conclusion that, without explanation, the general policy of the Gold Law was abandoned in this instance in the Government's own favour, and that rights already granted, but not yet exercised, were deprived of all effectual compensation for their withdrawal by the device of excluding profits from the scheme of compensation, leaving nothing else to be paid for.

In the Geldenhuis case this aspect of the matter does not appear to have been brought to the attention of the learned Judge, Wessels, J., and he expressed no opinion upon it. Counsel seem to have assumed that actual transfer into the name of the Government, in pursuance of Article IV, would put an end to "mynpacht" rights, previously granted, and placed reliance on the fact that no transfer had taken place. The Besluit itself is admittedly a somewhat artless piece of legislation. If the form of a regular conveyance had been in question, the use of words of the widest generality in describing the subject-matter, without any words of limitation or reservation following immediately afterwards, would be significant to show what the intention was, and inferences from other parts of the instrument or provisions contained in other parts of the scheme would hardly have sufficed to outweigh or modify that generality. The case is different when the question is how a piece of legislation should be construed, which does not profess to have been reduced into an accepted conventional form, and the meaning must be gathered from the instrument as a whole. Furthermore, it is to be recollected that this Raadsbesluit was in substance a special law passed by the Legislature in derogation of the rights of a subject and for the Government's own benefit or for the benefit of a company, which it was concerned in promoting, the Nederlandsche Zuid - Africaansche Spoorweg Maatschappij. Under these circumstances their Lordships think that the construction ought to be in favour of the subject, in the sense that general or ambiguous words should not be used to take away legitimate and valuable rights from the subject without compensation, if they are reasonably capable of being construed so as to avoid

such a result consistently with the general purpose of the transaction, a canon formulated by Lord Davey in delivering the judgment of this Board as long ago as the case of *The Commissioner of Public Works for Cape Colony v. Logan* (1903. A.C., at pp. 363, 364). They accordingly apply this construction to the Besluit in question, and come to the conclusion that the judgment appealed against was right in deciding that the mining rights in ground vertically under the railway were not expropriated.

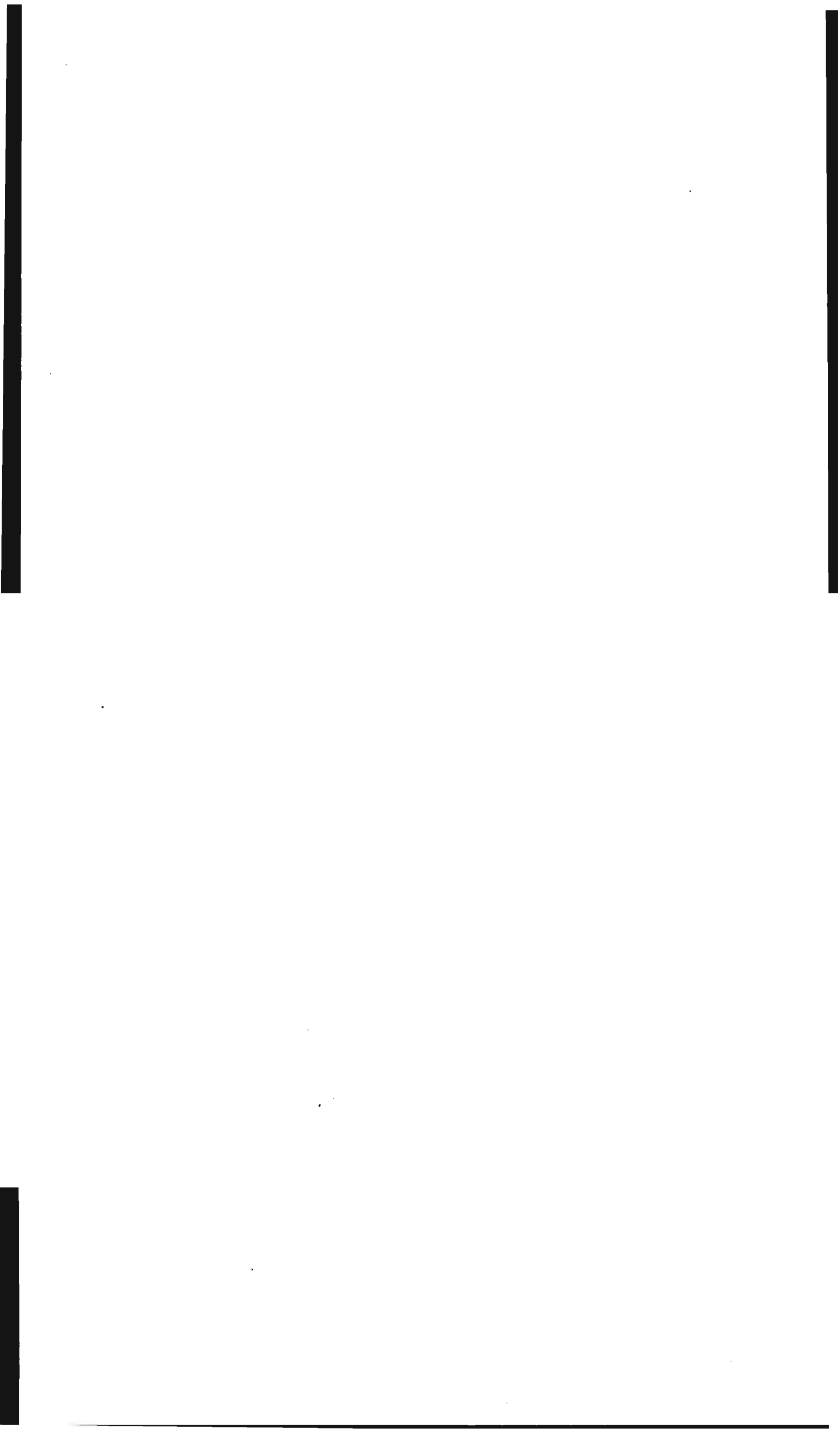
It is, however, admitted that, as the mining laws stood, without the permission of the proper authority, excavations made vertically under the railway line after the date of the Raadsbesluit, which was the case in the more limited area in question, could not be justified.

The engineer's letter of permission, dated the 18th July, 1905, on which the respondents rely, clearly went beyond any powers which he then possessed. At that date the Executive itself had no power to make general regulations providing for the grant of particular permissions to work under a railway. This defect in its powers was made good by an Ordinance passed in the following September. It amended the prior legislation, which empowered the Lieutenant-Governor to make regulations in respect of the working of mines by extending his powers to the making of regulations for laying down the conditions under which railways might be undermined. This new power was not exercised until 1909, by which time the respondents had completed the workings now in dispute.

It is not a question whether the provisions of the amending Ordinance can be read as incorporated with the principal Ordinance, so as to relate back to its date. Even if that be so, the result merely is that under the amended Ordinance the old regulation might have been justified if its terms had applied to mining under railways. The only regulation under which the engineer's permission could have been, or professed to have been, issued was one which was silent as to railways, and accordingly the permission gave the respondents no valid authority to undermine, because, even if the Lieutenant-Governor be deemed to have had the power to issue a regulation which would have covered the permission, in fact he had not exercised that power.

In their Lordships' opinion it should be declared that the mining rights in the area under the railway, which lies between the green lines on the plan forming part of the record and is coloured pink thereon, were not expropriated in favour of the appellant, but that the ground was excavated by the respondents without proper authority, and that otherwise the appeal should be dismissed with costs. This very limited success ought not to affect the costs of the appeal, especially as the respondents acted on the faith of a Government official's permission, which he ought not to have given.

Their Lordships will humbly advise His Majesty accordingly.



In the Privy Council.

THE MINISTER OF RAILWAYS AND
HARBOURS OF THE UNION OF
SOUTH AFRICA

2.

THE SIMMER AND JACK PROPRIE-
TARY MINES (LIMITED).

DELIVERED BY LORD SUMNER.

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