Privy Council Appeal No. 47 of 1915.

Ernest Holditch - - - - - - *Appellant,*

v.

The Canadian Northern Ontario Railway Company - - - - - - *Respondents,*

FROM

THE SUPREME COURT OF CANADA.

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 7TH FEBRUARY, 1916.

Present at the Hearing:

VISCOUNT HALDANE.
LORD PARKER OF WADDINGTON.
LORD SUMNER.

[*Delivered by* LORD SUMNER.]

The Appellant owns a considerable area of building land near Sudbury, Ontario, part of which the Respondent Railway Company desired to take for the purposes of their line. The property had been marked out in numbered lots, and the Railway Company's notice specified twenty of these lots by their numbers as the land to be taken. The sum offered was 3,300 dollars. It was unsatisfactory to Mr. Holditch, and this claim accordingly went to arbitration.

Although the notice served referred only to the twenty lots which were to be taken out and out, and contained no reference to any other lands or to the exercise of any other powers, the arbitration took a wide scope, and in the result the award dealt with three subjects: (*a*) lots taken; (*b*) severance and access; (*c*) vibration, noise, and smoke.

For the lots taken 5,315 dollars were awarded, and upon this no question now arises. The award then found that forty-nine other lots were impaired in value by being severed from the Appellant's other lands and being rendered more difficult of access, and found that they were injuriously affected to the extent of 4,800 dollars. No award, however, was made under this head, as the Arbitrators thought that the law did not warrant any. Lastly, they declared that they could not,

and did not, award anything for injurious affection by vibration from trains and by noise and smoke. Their Lordships take it that the Arbitrators considered this head of claim inadmissible in law. In fact, there was some evidence that a few lots were actually depreciated in selling value by the likelihood of noise, vibration, and smoke in the future operation of the line, and the award does not seem to have been meant as a finding against the existence of such injury or depreciation.

An Appeal was taken to the Appellate Division of the Supreme Court of Ontario, and that Court unanimously allowed the Appeal as to 4,800 dollars, directing that Mr. Holditch should recover that sum, but referred the matter for the Arbitrators to ascertain the damage caused or to be caused to forty lots (specified by their numbers) by the construction of the railway, with a declaration that the Appellant was entitled to recover all damages sustained by him to the said property by reason of the construction of the railway. The forty lots so dealt with were entirely different from the forty-nine lots, in respect of which 4,800 dollars were awarded. Reasons for this decision were not given in writing, and their Lordships have not the advantage of knowing the grounds upon which the Appellate Division allowed Mr. Holditch's Appeal. Upon further Appeal to the Supreme Court of Canada this decision was reversed and the original award was restored, but Anglin, J., and Duff, J., dissented, holding with the Appellate Division that the claimant was entitled to recover all damages sustained by him to the said property by reason of the construction of the said railway.

There may be several questions of procedure in this case, of which no doubt the most important is that of the alleged power to refer the case to the Arbitrators after completion of their award. Their Lordships, however, are of opinion that it is not now necessary to determine or to discuss any of them, as the Appeal may be decided upon the substantial questions of the Claimant's rights in respect (*a*) of severance and access, and (*b*) of vibration, noise, and smoke injuriously affecting his property.

It is necessary to describe the property somewhat particularly. There was originally one large tract of land of very irregular contours, intersected by a winding creek and broken in places by an outcrop of rock. Some time ago the Manitoulin and North Shore Railway was constructed roughly following the direction of this creek, and only a little further off a portion of the Canadian Pacific Railway approached and eventually joined the Manitoulin and North Shore Line. The Respondents' railway was plotted to cut across the bend formed by the latter line and would also run in the neighbourhood of the creek. Independently of the Respondents' line the land suffered some of the disadvantages of the proximity of railways.

The whole property had been surveyed and divided into

building lots, and a plan showing the lay-out had been duly registered. The roads and streets had thus become public highways by force of the Surveys and Registry statutes applicable, but had of been made up. The total number of building lots was great, and many, if not all of them, had been staked out on the ground. The streets were numerous; they all intersected at right angles and the several lots were nearly always of the same dimensions.

With one or two exceptions they were all rectangular parallelograms. All had access to a street, some to two streets. In the area in question there was no land not subdivided into lots of this kind, none consisting of fields or market-gardens or agricultural back-land. From time to time a great many lots had been sold by Mr. Holditch or his father, his predecessor in title, but they were scattered all over the property at haphazard. They had been bought for speculation. They had little individuality. They were chiefly distinguished by the numbers assigned to them and the name of the street on which they fronted. They were sold out and out. No restrictive covenants were taken. There was no building scheme, other than the lay-out shown on the registered plan, and this derived its fixity from the legislation affecting it, and not from any notice to the purchaser or any private obligation entered into by him. It is plain that, so far as in them lay, the proprietors of this building estate had parcelled it out in lots, made an end of its unity (other than bare unity of ownership) and elected once for all to treat this multitude of lots as a commodity to trade in.

The basis of a claim to compensation for lands injuriously affected by severance must be that the lands taken are so connected with or related to the lands left that the owner of the latter is prejudiced in his ability to use or dispose of them to advantage by reason of the severance. The bare fact that before the exercise of the compulsory power to take land he was the common owner of both parcels is insufficient, for in such a case taking some of his land does no more harm to the rest than would have been done if the land taken had belonged to his neighbour. Compensation for severance therefore turns ultimately on the circumstances of the case. The Appellant contended that the present case was governed by the decision in Cowper Essex *v.* Acton (14 A.C., 153), and it was so held in the minority judgments in the Supreme Court of Canada. Their Lordships are unable to agree in this view. In that case the building owner retained such control over the development and use alike of the parcels sold and of the parcels unsold as made a real and prejudicial difference between his ability to deal with what remained to him after the compulsory taking of land and his ability to deal as a whole with both it and the land taken before such compulsory taking. In the present case the Appellant's relation to the property had been definitely fixed before any notice to take land was served at all. He had

parcelled out the entirety of his estate and stereotyped the scheme, parted with numerous plots in all parts of it without retaining any hold over the use to be made of them, and converted what had been one large holding into a large number of small and separate holdings with no common connection except that he owned them all. There was one owner of many holdings, but there was not one holding, nor did his unity of ownership "conduce to the advantage or protection" of them all as one holding.

This being so, there is really but little left in the case. If the claim for severance fails it seems that, apart from the question of jurisdiction to send the Award back to the Arbitrators, the claim for loss of access must fall with it, for both are included in the one sum of 4,800 dollars adjudged by the Appellate Division, and there are no materials on which separate compensation for loss of access can be assessed. Their Lordships, however, think that, the claim for severance failing, this further claim fails upon a broader ground.

Under the Dominion Railway Acts, which are the legislation applicable, it is from an order made by the Railway Board that the Respondents must get power to take their line along or across the streets laid out by the Appellant. Whether any order has as yet been obtained for this purpose does not appear, but the awarding of compensation to adjacent or abutting land-owners, or the direction of alterations of levels, or other works in order to prevent injury to them, rests with the Board. The case is a most ordinary one. The contours of the ground crossed are not particularly steep. The streets need be made up to a height of a few feet at most in order to enable the traffic to cross the line. There are but few lots for which any relief works or compensation at all could be required. Their Lordships think that the Arbitrators were right in rejecting claims in respect of difficulty of access to the Appellant's land by reason of the railway's future user of the streets.

The claim for depreciation by the prospective annoyance from noise, smoke, and vibration was put thus. § 155 of the Railway Act of Canada requires the Company to "make full compensation . . . to all persons interested for all damage by them sustained by reason of the exercise of" the powers granted to them by this or by their special Act, and §§ 191 and 193 use language which draws a distinction between compensation for land taken and for damage suffered from the exercise of any of the powers granted for the railway. It was argued that the interference with convenient access to some of the lots by reason of the line being taken across the streets and the annoyance to be expected from the noise, smoke, and vibration of passing trains alike constituted damage suffered from the exercise of the powers granted for the railway.

Their Lordships are unable to adopt this view. The substantive obligation upon the Railway Company to make compensation is derived from § 155, and the other two

sections are only concerned with the procedure by which this obligation is to be enforced. The language of section 155 is taken, with modifications to which in this case no importance can be attached, from the proviso to section 16 of "The Railways Clauses Consolidation Act, 1845," and it is well settled by decisions of the highest authority that land so taken "cannot by its mere use, as distinguished from the construction of works upon it, give rise to a claim for compensation." The decisions on this construction of "The Railways Clauses Consolidation Act" have been applied to the Canadian legislation many years ago.

As soon as it is decided that the lands taken and the lands, in respect of which the claims in question arise, are in fact separate and disjoined properties, so that these claims have no connection with the lands taken, it follows upon authority which cannot now be questioned that the Arbitrators were right in holding that the claims in respect of noise, smoke, and vibration were beyond their jurisdiction. Their Lordships will accordingly humbly advise His Majesty that this Appeal should be dismissed with costs.

In the Privy Council.

HOLDITCH

v.

THE CANADIAN NORTHERN ONTARIO RAILWAY COMPANY.

DELIVERED BY LORD SUMNER.

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