1934
*Oct. 10.
*Nov. 20.

ELIZABETH BERG AND PENN COALS LTD. ..... } APPELLANTS;

AND

NORTHERN ALBERTA RAILWAYS COMPANY. ..... } RESPONDENT.

ON APPEAL FROM THE BOARD OF RAILWAY COMMISSIONERS FOR CANADA

Railways—Jurisidiction of Board of Railway Commissioners for Canada—Coal lying under right of way—Fixing amount of compensation—Transfer of land—Agreement between parties—Railway Act, R.S.C., 1927, c. 170, s. 197—Applicability of judicial decision to the case.

The appellant Berg, as owner, and the appellant Penn Coals Ltd., as lessee from her, of certain quarter section situated in Alberta, presented an application to the Board of Railway Commissioners under section 197 of the *Railway Act*, asking the Board to fix the amount of compensation payable to the appellants in respect of coal lying under the right of way of the respondent railway. The latter alleged that, in 1914, it purchased the right of way from the then owner, predecessor in title of the appellants, paid him in full for all the coal required to be left for the support of the right of way and that by virtue of the transfer itself, it was entitled to such support.

Held that the judgment of the Board dismissing the appellants' application (40 Can. Ry. Cas. 361) should be affirmed.

In the absence of some plain language in the contrary sense, of which there is none, section 197 of the *Railway Act*, which was not enacted until 1919, cannot be so construed as to prejudice the rights of the parties as settled by the transaction between them in 1914.

Also, the agreement between the former owner and the railway company, dated the 5th March, 1914, but not finally completed by transfer until the 28th September, 1914, should be construed and interpreted in the light of a decision of the Judicial Committee of the Privy Council given on the 6th July, 1914.

APPEAL by leave of the Board of Railway Commissioners for Canada, from an order of that Board (No. 49760, of April 20, 1933) (1), dismissing the appellants' application to fix the amount of compensation payable to them in respect of coal lying under the right of way of the respondent railway.

The questions upon which leave to appeal was granted by the Board are stated in the judgment now reported.

*PRESENT:—Duff C.J. and Cannon, Crocket and Hughes JJ. and Maclean J. *ad hoc*.

(1) [1933] 40 Can. Ry. Cas. 361.

Section 197 of the *Railway Act*, R.S.C., 1927, c. 170, reads as follows:

> The company shall, from time to time, pay to the owner, lessee, or occupier of any such mines such compensation as the Board shall fix and order to be paid, for or by reason of any severance by the railway of the land lying over such mines, or because of the working of such mines being prevented, stopped or interrupted, or of the same having to be worked in such manner and under such restrictions as not to injure or be detrimental to the railway, and also for any minerals not purchased by the company which cannot be obtained by reason of the construction and operation of the railway.

The appeal was dismissed with costs, and the questions answered in the affirmative.

O. M. Biggar K.C. for the appellant.

Geo. A. Walker K.C. for the respondent.

The judgment of the Court was delivered by

DUFF, C.J.—This is an appeal from the Board of Railway Commissioners. By order of the Board dated 2nd June, 1933, leave was granted to appeal upon two questions which are stated thus:

> 1. Whether the Board's judgment is correct in holding that section 197 of the Canadian *Railway Act* has no bearing on the application of the applicants; and that the applicants cannot invoke its provisions in support of their application?
>
> 2. Was the legal effect of the transfer from Robert Kelly to the Edmonton, Dunvegan and British Columbia Railway Company, dated 28th September, 1914, to vest in the railway company not only the right of way thereby transferred, but the right to subjacent and adjacent support?

It will be convenient first of all to give very briefly the material facts:

In 1914, Robert Kelly, the predecessor in title of the appellants, was the owner of the quarter-section now in question with the mines and minerals thereunder. On the 28th of September that year, Kelly transferred to the Edmonton, Dunvegan and British Columbia Railway Company, the predecessor in title of the respondents, 8·64 acres required for company's right of way through this quarter-section by a transfer which reserved all mines and minerals. Before the execution of this transfer by Kelly, the railway company had taken all the proceedings required by the *Railway Act* then in force for the expropriation of the land. Notice of expropriation had been served upon Kelly, by which the company offered to pay him $3,769; this

1934

BERG AND PENN COALS LTD. v. NORTHERN ALBERTA RYS. CO.

Duff C.J.

amount including compensation at the rate of $50 per acre for the injurious affection of 27·85 acres of coal rights.

An order for immediate possession had been granted on the 6th September, 1912, which provided that the railway company should make application upon four days' clear notice to determine what, if any, amount should be paid into court, as security for the payment of any compensation to which the parties entitled to the mineral rights might be found entitled. A further order was made on the 6th September, 1912, directing the sheriff to put the railway company in possession of the right of way, on the company's undertaking to pay into Court as security for compensation such sum as might be fixed by a judge, after determination by the Board of a pending application for permission to work the minerals under the railway right of way. Upon the 20th March, 1913, upon the application of Robert Kelly and others, the Board made the following order:

> That the applicants be, and they are hereby granted leave to work and excavate the coal lying under the right of way of the railway company on section 8, township 55, range 24, west of the 4th meridian, in the province of Alberta, as shown on the plan on file with the Board under file Nos. 20827 and 20827·1, subject to and upon the following conditions, namely:—
>
> 1. The coal not already mined under the right of way of the railway company to be left in place; and in the Kelly mine the coal to be left in place under the right of way and under additional strips fifteen and twenty-five feet in width outside the right of way on the northwest and southeast sides respectively.
>
> 2. Two levels, eight feet wide, and seven feet high, to be constructed to each mine, the levels to be seventy feet apart and the timbers to be placed inside this measurement.
>
> 3. The posts and timbers under the right of way to be of tamarack posts to be seven inches in diameter and the roof timbers eight inches by five inches, and placed on edge.
>
> 4. All work within the limits set forth in paragraph 1 to be done under the supervision of an engineer of the railway company, who shall have the right of access to the mine at any time in order to examine timbers in the levels under the right of way.
>
> 5. Where the coal has already been taken out under the right of way the applicants shall notify the railway company of the true position of the levels abandoned.

It is admitted that the effect of the Board's order, as regards the quarter-section in question, was to reduce the area injuriously affected in respect of right to coal from 27·85 acres to 8·64 acres.

In April, 1913, an order was made fixing an amount payable into court under the previous order at the sum of $4,000.

On the 5th March, 1914, Robert Kelly and the railway company entered into an agreement which, in part, is as follows:

> That the proceedings taken by the Railway Company for the expropriation of its right of way over the land above set out and as described in the notice to treat served in respect thereof are settled by the railway company agreeing to pay, and it hereby agrees to pay to Robert Kelly the sum of two thousand nine hundred and twenty-two dollars and sixteen cents ($2,922.16) and by Robert Kelly transferring and he hereby agrees to transfer free from encumbrance in fee simple but reserving the mines and minerals (the land in question).

This agreement was carried out by a transfer dated September 28th, 1914. The rights of Robert Kelly to the coal now in question were afterwards acquired by the appellant Elizabeth Berg, and the undertaking of the Edmonton, Dunvegan and British Columbia Railway subsequently became vested in the respondent company.

The first question with which we have to deal is whether or not section 197 of the *Railway Act,* that was passed after the transfer of September, 1914, applies to such a case.

Now, the reciprocal rights of the parties were determined by the transfer of September, 1914. The obligation of the railway company to compensate Kelly for land taken, as well as for injurious affection in respect of coal rights and otherwise, was discharged by payment of the sum named, while the railway company received title to the land subject to the reservation of the mines and minerals, including the right to vertical and lateral support for the railway. The Board has so decided, and, even if the Board's decision on this point were open to review before us, we should not disagree with it (*Davies* v. *James Bay Railway Co.*) (1). In the absence of some plain language in the contrary sense, of which there is none, section 197, which was not enacted until 1919, cannot be so construed as to prejudice the rights of the parties as settled by the transaction between them in 1914.

It was also pressed upon us with a great deal of vigour that the transaction between Kelly and the railway company must be interpreted in the light of a decision of the

(1) (1914) 19 C.R.C. 86.

1934

BERG AND PENN COALS LTD. v. NORTHERN ALBERTA RYS. CO.

Duff C.J.

Supreme Court of Ontario which was afterwards held by the Privy Council to be erroneous. The agreement between Kelly and the railway company, as already observed, was dated the 5th March, 1914. The decision of the Privy Council was given on the 6th July. The agreement between Kelly and the railway company was not finally completed by transfer until September 28th, 1914. I do not know on what grounds we should be justified in holding, for the purposes of this appeal, that the agreement should not be construed according to law.

I think the learned Chief Commissioner was right in his view upon this point.

It would not be competent to us to find that the learned Chief Commissioner ought to have held on the evidence before him that the parties were dealing on some other basis and, indeed, on the interrogatories as framed, no such question is before us.

In the result, both interrogatories ought to be answered in the affirmative.

The appeal is dismissed with costs.

Appeal dismissed with costs.

Solicitors for the appellants: *Woods, Field, Craig & Hyndman.*

Solicitor for the respondent: *George A. Walker.*