THE CALEDONIAN RAILWAY COMPANY, APPELLANTS.
SPROT (OF GARNKIRK), ... RESPONDENT.

1856.
March 4th, 6th, 7th, 8th, and 10th, June 16th.

Conveyance of land to a Railway Company, with reservation of minerals—Right of the Company to subjacent and adjacent support.—A conveyance of land to a Railway Company, for the purposes of the line, gives a right by implication to all reasonable subjacent and adjacent support connected with the subject-matter of the conveyance; and therefore, although, in the conveyance to the Railway Company, the minerals are reserved, the grantor is not entitled to work them, even under his own land, in any manner calculated to endanger the railway.

On the same principle, if the owner of a house conveys the upper story, reserving all below, the purchaser will be entitled, on general principles, without stipulation, to prevent any damage to the walls underneath.

But if I grant a meadow to A, for grazing purposes, retaining the minerals and the adjacent land, and if A, having no warranty against subsidence, thinks fit to build a house on the edge of the meadow, and the house falls, he is without remedy against me, and has himself alone to blame for the consequences.

If, however, the grant were made expressly for building purposes, there would then be an implied warranty of support, both subjacent and adjacent.

In the case of a grant to a Railway Company for the purposes of the railway, if the line which divides the land granted from the land retained traverses a quarry, it may be that no adjacent support is necessary, and that the grantor may dig or remove the whole contiguous soil.

But if the dividing line traverses a bog, or a bed of sand, it will be incumbent on the grantor to leave untouched such an intervening measure of lateral support as will prevent any part of the land granted from retreating.

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The decision appealed from was by the First Division of the Court of Session, recalling an interlocutor of the late Lord *Dundrennan*.

Sir *Fitzroy Kelly* and Mr. *Rolt* for the Appellants.

The *Solicitor General* (*a*) and Mr. *Roundell Palmer* for the Respondents.

The question was one which turned very much on the construction of special clauses in Railway Acts; which are very fully set forth in the following opinion delivered in writing by—

Lord Chancellor's opinion.

The LORD CHANCELLOR (*b*):

My Lords, it appears that Mr. Sprot, by a deed of conveyance dated the 12th of December 1834, conveyed to the original Garnkirk Company the portion of his land required for the line of the Company, in consideration of a sum of money agreed on as a price, and then paid to him. The conveyance was expressly made for the purpose of the land conveyed being used as a railway. He, however, reserved all mines under the land so conveyed, with full liberty to win and work the minerals; and independently of any Parliamentary enactment, the effect of that conveyance was to convey the land to be covered by the railway to the Company, together with a right to all reasonable subjacent and adjacent support; a right to such support being a right necessarily connected with the subject-matter of the grant.

If the owner of a house were to convey the upper story to a purchaser, reserving all below the upper story, such purchaser would on general principles have a right to prevent the owner of the lower stories from interfering with the walls and beams upon which the upper story rests, so as to prevent them from affording proper support.

(*a*) Sir R. Bethell. (*b*) Lord Cranworth.

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The same principle applies to the case of adjacent support, so far, at all events, as to prevent a person who has granted a part of his land from so dealing with that which he retains, as to cause that which he has granted to sink or fall.

How far such adjacent support must extend is a question which in each particular case will depend on its own special circumstances. If the line, dividing that which is granted from that which is retained, traverses a quarry of hard stone or marble, it may be that no adjacent support at all is necessary. If, on the other hand, it traverses a bed of sand, or a marsh, or a loose gravelly soil, it may be that a considerable breadth of support is necessary to prevent the land granted from falling away upon the soil of what is retained. Again, if the surface of the land granted is merely a common meadow, or a ploughed field, the necessity for support will probably be much less than if it were covered with buildings or trees. And it must further be observed that all which a grantor can reasonably be considered to grant, or warrant, is such a measure of support subjacent and adjacent as is necessary for the land in its condition at the time of the grant, or in the state for the purpose of putting it into which the grant is made. Thus, if I grant a meadow to another, retaining both the minerals under it and also the adjoining lands, I am bound so to work my mines and to dig my adjoining lands as not to cause the meadow to sink or to fall over. But if I do this, and the grantee thinks fit to build a house on the edge of the land he has acquired, he cannot complain of my workings or diggings, if by reason of the additional weight he has put on the land they cause his house to fall. If indeed the grant is made expressly to enable the grantee to build his house on the land granted, then there is an implied warranty of support sub-

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jacent and adjacent as if the house had already existed.

Applying these principles to the case now before your Lordships, it is clear that by the effect of the conveyance of the 12th of December 1834, the Garnkirk Company acquired a right to the surface of the ground traversed by the railway, (so far as concerns the part of it now in question,) together with a right as against Mr. Sprot to such subjacent and adjacent support as was necessary for enabling them to maintain and work a railway.

The conveyance by Mr. Sprot is in these terms :—

I, Mark Sprot, Esquire, of Garnkirk, considering that in the year 1826 by Act of Parliament 7th George 4th, chapter 103, the Garnkirk and Glasgow Railway Company was incorporated; and that it was agreed betwixt me and the Committee of Proprietors of said railway, that the value of the land belonging to me to be occupied by said railway, as well as all damages done to my property, should be ascertained by David Leighton, their factor; that the Railway Company having in the year 1827 commenced making said railway. "And in consideration of the foresaid sum of 379*l.* (*a*), being the specific and agreed on value of the land hereby conveyed, I, the said Mark Sprot, do by these presents grant and convey to the said Company of Proprietors, but always for the said railway and works thereto belonging, and no otherwise, all and whole that portion of my estate," (described so and so,) and I hereby warrant this conveyance at all hands and against all mortals as law will, reserving always to me and my heirs and successors the whole mines and minerals of whatsoever description within the said lands hereby conveyed, and full power and liberty to us or any person or persons authorized by us to search for, work, win, and carry away the same and to make aqueducts, &c.

At the time when the conveyance was made three Acts had passed, namely, the original Act 7th George the 4th, chapter 103, and two amending Acts, namely, 7th and 8th George 4th, chapter 88, and 11th George the 4th, chapter 125; the two latter, however, do not affect the present question, and may therefore be disregarded.

(*a*) The original purchase money was only 379*l.*

The 11th section of the original Act is that which relates to the conveyance of land to the Company, the reservation of mines, and the restrictions on their working. It is in these terms :—

> That all and every body or bodies politic, and any other owner or owners, and the occupier or occupiers of any lands or other heritages through, in, or upon which the said railway shall be made, may accept and receive satisfaction for the value of such lands and heritages, and for the damages to be sustained by making and completing the said works in gross sums; provided always, that notwithstanding anything herein contained, it shall be lawful and competent to any proprietor or proprietors whose lands are hereby authorized to be taken to reserve and except from the bargain or sale to the said Company the whole minerals in the said lands, for and to his or her own proper use and behoof, and the said Company shall have no right of property of or in such minerals which any proprietor or proprietors may desire to be reserved as aforesaid; but provided always further, nevertheless, that it shall on no account be lawful or in the power of any such proprietor to work, win, or away take any of the said minerals without giving previous good and sufficient security to the said Company for all damages, interruption of traffic, and other injury which may thence in any way result to the said undertaking or the said Company.

The first observation which occurs on this section is, that though under its provisions and other clauses in the Act, Mr. Sprot might have been compelled to sell the land in question to the Company, yet when by arrangement between him and the Company it was settled what should be the price paid, and the conveyance is made accordingly, the effect of the transaction, so far as relates to the conveyance of the land and the rights acquired under it, must depend on the terms of the deed, subject only to the provision in the clause regulating or restricting the right of working the mines.

By virtue of the conveyance the Company acquired by grant from Mr. Sprot an absolute right to the surface of the land, and by implication a further right to such subjacent and adjacent support as was necessary, taking into account the purpose to which the

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land was to be put. Mr. Sprot, on the other hand, retained his former right of working the mines, subject to the rights which he had impliedly granted of subjacent and adjacent support, and subject also to the statutory restriction in the eleventh clause, preventing him from working the mines under the land conveyed without first giving to the Company good and sufficient security for all damage which might accrue to it from such working.

Such would certainly have been rights of parties if no further Acts of Parliament had passed. If while these original Acts and no others were in force, Mr. Sprot had proceeded to work the mines, he might have been restrained from any working of the minerals, whether under the line of railway or under adjoining lands, which should interfere with the due support of the line, because by so working he would be acting in violation of his own implied grant, or warranty, of reasonable subjacent and adjacent support; and further, he would have been bound, before he worked at all under the land conveyed for the railway, to give the security required by the statute.

Reliance was placed in the argument on the 89th section. It was argued that the inability to win the minerals by reason of the danger which would be thereby occasioned to the railway was a damage to Mr. Sprot, for which no remedy is provided by the Act, and so was within the provisions of the 89th section, which is in these terms :—

> That if at any time or times hereafter any person shall sustain any damage in his, her, or their lands, tenements, heritages, or property, by reason of the execution of any of the powers hereby given, and for which no remedy is herein-before provided, then, and in every such case, the recompense or satisfaction for such damage *shall from time to time be settled and ascertained in such manner as herein-before directed in respect of any other recompence or satisfaction herein-before mentioned.*

I think the argument arising out of that section is untenable. The damage complained of is a damage

arising solely from the fact that Mr. Sprot, by his conveyance, impliedly bound himself to secure to the Company adequate subjacent and adjacent support. He incurred that obligation by the mere fact of the conveyance. He was not bound to convey at all till he had taken the steps pointed out by the statute for having it ascertained what was the sum which he ought to receive as the price of his conveyance, including consequential damage. In calculating that sum, the circumstance that he was to convey not merely the soil of the line upon which the railway was to be formed, but also impliedly a right in his disponees to have subjacent and adjacent support for the land disponed, must necessarily have been taken into account; and when in afterwards proceeding to work the mines, he finds that he cannot win the minerals, because in so doing he would be interfering with the necessary support of the line of railway, he has no more right to complain than he would have had, if he had found that to work the mines effectually it would be necessary to sink a shaft in some portion of the line of railway, that is, in the land actually conveyed. This conveyance operates to deprive him of his right to disturb the lateral and interior support, in the same way as it prevents him from interfering with the surface itself of the land conveyed. The 89th section therefore is inapplicable, because the damage of which Mr Sprot complains is a damage arising, not by reason of the execution by the Company of the powers given to them by the Act, but by reason of his having under his conveyance impliedly bound himself to secure to the Company adequate support to the line of railway, or rather, perhaps, having negatively undertaken not to interfere by his acts with such support.

This being so, the only further question is as to the effect of the subsequent Acts of Parliament; do they

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or do they not alter the rights which if no such Acts had passed, the Company would have possessed under the original Act? I will refer to the several Acts in the order of their dates.

The first Act which passed after the conveyance was that of the 1st and 2nd of Victoria, chapter 60. It in no respect touched the question as to the rights of Mr. Sprot and of the Company in respect of the mines.

The next Act was that passed in 1844, the 7th and 8th Victoria, chapter 87. By that Act, after reciting that the railway had been completed and opened to the public, and had proved of great public and local advantage, and that its utility would be increased if the Company were authorized to make two extensions of the railway, it is enacted that the former Acts shall be in force for carrying the provisions of that Act into execution. The name of the railway is then changed, the Act providing that it shall thereafter be called the Glasgow, Garnkirk, and Coatbridge Railway, this new name having been adopted with reference to the extension of the line then already made or in progress. The usual powers are then given for enabling the Company to purchase lands and execute the necessary works for the two new branch lines; and among the provisions relative to the mode in which the works are to be executed are five clauses having for their object the regulating of the working of mines under or contiguous to the lines. Those clauses are numbered 84, 85, 86, 87, and 88; the first of these, the 84th section, says,—

> For the purpose of protecting the railway and works from danger to be apprehended from the working of any mines, either under or closely adjoining the railway, be it enacted, that if the owner, lessee, or occupier of any mines or minerals lying under the railway or any of the works connected therewith, or within forty yards therefrom, be desirous of working the same, such owner, lessee, or occupier shall give to the Company notice in writing of his intention so to do thirty days before the commencement of working, and upon the receipt of such notice, it shall be lawful for

the Company to cause such mines to be inspected by any person appointed by them for the purpose, and if it appear to the Company that the working of such mines or minerals are likely to damage the works of the railway, and if the Company be willing to make compensation for such mines to such owner, lessee, or occupier thereof, then he shall not work or get the same; and if the Company and such owner do not agree as to the amount of such compensation, the same shall be settled as in other cases of disputed compensation.

By the 85th clause it is enacted, that if the Company be unwilling to purchase, the owner may work the mines.

By the 86th section, in order to prevent the mines being worked in such a way as to damage the railway, it is enacted, that the Railway Company may enter and inspect the mines after giving twenty-four hours notice in writing, and powers are given to enable them to make proper supports, if supports are wanted, and to make mining communications.

The object of these clauses may be stated to be, first, to compel all owners of mines near the railway to give notice to the Company before they begin to work them, and to enable the Company, if they think fit, to prevent such working by purchasing the mines from the owner, or rather by compensating him for his loss in not working them; and, secondly, to compel the owner of the mines, if the Company do not purchase, to work them in a proper manner, not to damage the railway by improper working; and the Act then gives powers to the Company, enabling them to ascertain that no improper workings are in progress.

With reference to these enactments it was contended, on the part of the Appellants, that they did not apply to the original railway, but only to the new extension lines authorized by the Act in which the clauses are found.

The Respondent, on the other hand, argued that the enactments are general and applicable to the whole

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railway, including as well the original as the branch lines.

In the view which I take of this case, it is immaterial which of these constructions is correct. For, assuming the Respondent to be right, and that these clauses apply to the whole line, and so to the mines of Mr. Sprot under and contiguous to the railway, still they cannot interfere with the pre-existing rights of the Company, which they had acquired ten years before this last Act became law.

Under the conveyance from Mr. Sprot, the Company had acquired by purchase a right as against Mr. Sprot, to have adjacent and subjacent support to their railway. The effect of the mining clauses in the Act of 1844 was not to deprive the Company of the rights they had thus purchased, but to prevent Mr. Sprot from working his mines without first giving the Company the option of stopping the working by compensating him. When they refuse to exercise that option, Mr. Sprot has the same right of working his mines which he had before; that is, a right to work them, not interfering with the support of the railway.

It is true the 85th section enacts, that if the Company do not exercise the option given by the Act, the mine-owner may work his mines in the manner proper and necessary for the beneficial working thereof. But all this must have reference to the existing rights of the mine-owner and of the Company. The legislature certainly did not intend to give to the mine-owner as against the Company rights which he had previously sold to them; and when the Act of 1844 passed, Mr. Sprot had no right to work his mines in any way which would interfere with the security of the railway.

So also as to the clause in section 11 of the original Act, whereby the owner of the reserved mines under

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the land conveyed is restrained from working at all until he has given security to the Company, I see nothing in the Act of 1844 to prejudice that right. The mining clauses in that Act must all be read with reference to the rights of the mine-owner and the Company such as they existed when the Act passed.

The only other Act affecting the railway which passed previously to the General Railway Consolidation Act was a short Act, which received the Royal Assent on the 30th of June 1845, the 8th and 9th Victoria, chapter 31, whereby the Company was empowered to alter the gauge of the railway, but it did not affect the question of mines.

Three weeks after the passing of that Act, that is, on the 21st of July 1845, the General Scotch Railway Consolidation Act, the 8th and 9th Victoria, chapter 33, received the Royal Assent. The provisions of that Act relative to the working of mines are nearly the same with those contained in the Local Act of 1844, to which I have already adverted. It is immaterial to consider them in detail. In fact, they were inapplicable to the rights of parties under prior Acts, the General Acts being expressly confined to Acts to be afterwards passed.

Ten days after the passing of the General Scotch Act, that is, on the 31st of July 1845, the Caledonian Railway Company obtained their Act, the 8th and 9th Victoria, chapter 162. The General Act was incorporated in the Caledonian Act, and would therefore regulate the mode in which mines under, or contiguous to, that line of railway should be dealt with.

The only other Act affecting the question now in discussion is the Act of 1846, under which the Glasgow, Garnkirk, and Coatbridge Railway was sold to, and became incorporated with, the Caledonian Railway. By that Act, the 9th and 10th Victoria, chapter 329,

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it was enacted that the Glasgow, Garnkirk, and Coatbridge Railway, with all its lands, powers, and privileges, with the benefit of all contracts relating thereto, should, on the execution of a deed of conveyance under the seal of the said Company, which conveyance has since been duly executed, be vested in and belong to the Caledonian Company for their absolute benefit.

The effect of this was merely to put the Caledonian Company in the place of the former company, whose interests they purchased; so that whatever had been the rights of the Glasgow, Garnkirk, and Coatbridge Company, in relation to Mr. Sprot, became, after the passing of this latter Act, the rights of the Caledonian Company.

It appears, therefore, from an examination of all these Acts, that the rights acquired by the original Company by virtue of Mr. Sprot's conveyance remained unaffected up to the time of their final transfer to the Caledonian Company; and as Mr. Sprot rests his claim to relief on the ground that he is entitled, by virtue of the reservation of mines contained in his conveyance, to work those mines and the mines adjoining the railway, without regard to the question whether by so doing he will be damaging the necessary support of the railway, and that the Company can only prevent his doing so by purchasing the mines, I have only to add, having already explained the grounds on which I conceive this view of the case to be incorrect, that I think the *Lord Ordinary* was right when he sustained the defences and assoilzied the defenders.

I am aware that I am asking your Lordships to adopt the view of the *Lord Ordinary* in opposition to the opinion of the four Judges of the First Division of the Court of Session, who concurred in reversing his decision.

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Those very able Judges seem to me to have overlooked, or not to have given due weight to, the effect of the conveyance of 1834. If I am right, which I cannot doubt, in saying that by his conveyance Mr. Sprot conveyed to the Company not only the land to be covered by the railway, but also, by implication, the right to all necessary support, then he cannot, by reason of his having reserved the mines, derogate from his own conveyance by removing that support. In reserving mines he must be understood to have reserved them so far only as he could work them consistently with the grant he had made to the Company. The learned Judges of the Court below seem to me to have overlooked this principle, and in so doing to have been led into an erroneous conclusion. All, therefore, which I can do is to move your Lordships to reverse the Interlocutors of the Court of Session, and to affirm that of the *Lord Ordinary*.

I may add that the subject of the right of the owners of the surface to adequate subjacent and adjacent support has on several recent occasions been discussed in the English Courts. The principles which there govern the decisions were not derived from any peculiarities of the English law, but rested on grounds common to the Scotch, and, as I believe, to every other system of jurisprudence. They were considered in the case of *Harris* v. *Ryding* (*a*), and very fully developed in the judgment of the Court of Queen's Bench delivered by Lord *Campbell* in the case of *Humphries* v. *Brogden* (*b*).

It may be proper that I should notice an argument relied on to some extent; namely, that the railway originally contemplated was one on which the traffic would not be equal to that which now exists, so that the support contemplated could not have been as great

(*a*) 5 Mee. & Wel. 60. (*b*) 12 Q. B. 739.

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as that which is now required. To this, I think, there are two answers. First, when Mr. Sprot granted his land for the avowed purpose of enabling the disponees to make a railway, without any limitation as to its nature, I think he must be understood to have warranted proper support, however the railway might be used, or to whatever purposes it might be applied; and, secondly, the gentlemen to whom the Court of Session referred this very question expressly say, that neither increased traffic, nor the alteration of the structure, nor uses of the railway have materially affected the practicability of working the minerals. All, therefore, that I have to do is to move your Lordships to reverse the interlocutor of the Inner House, and affirm that of the *Lord Ordinary*. I may add, that, although my noble and learned friend, Lord *Brougham*, who also heard the case, is not present, I have his full concurrence in that decision. I communicated what I have now read to his Lordship; he made a few alterations in it, and he has authorized me to say that it may be taken as his view of the case as well as my own.

Ordered and adjudged accordingly.

GRAHAME, WEEMS, AND GRAHAME—RICHARDSON, LOCH, AND M'LAURIN.