

*Judgement of the Lords of the Judicial Committee
of the Privy Council on the Appeal of
Thomas v. Sherwood and another, from the
Supreme Court of Western Australia, delivered
24th November 1883.*

Present :

LORD FITZGERALD.

SIR BARNES PEACOCK.

SIR ROBERT P. COLLIER.

SIR RICHARD COUCH.

SIR ARTHUR HOBHOUSE.

The question in this Appeal is whether, some land of the Plaintiffs having been taken by the Commissioner of Railways for Western Australia for the purposes of a railway, the Plaintiffs are or are not entitled to compensation.

The land in question is parcel of an estate of 968 acres, granted by the Crown to Mary Hutton, the predecessor in title of the Plaintiffs, in fee at a peppercorn rent, on the 5th of March 1844. This grant was subject to a proviso which, so far as is material in the present case, is as follows :—

“ Provided, nevertheless, that it shall at all times be lawful for Us, Our heirs and successors, or for any person or persons acting in that behalf, by Our or their authority, to resume and enter upon possession of any part of the said lands, which it may at any time by Us, Our heirs or successors, be deemed necessary to resume, for making roads, canals, bridges, towing paths, or other works of public utility or convenience, and such lands so resumed to hold to Us, Our heirs and successors, as of Our or their former estate, without making to the said Mary Hutton, her heirs or assigns, any compensation in respect thereof,

Q 9419. 100.— 11/83.

A

so nevertheless that the lands to be resumed shall not exceed one twentieth part in the whole of the lands aforesaid, and that no such resumption be made of any lands in which any buildings may have been erected, or which may be used as gardens or otherwise for the more convenient occupation of any such buildings."

On the 24th of July 1878 an Act was passed authorizing the construction of a railway from Freemantle to Guildford in the colony.

On the same day a general Act was passed consolidating and amending previous Acts relating to railways, which Act was to be deemed incorporated with and form part of any special Railway Act.

The following are the sections of the latter Act material to the present case:—

Sec. 5 gives the Government power to appoint a Commissioner of Railways.

Sec. 6 authorizes the Commissioner, with the approval and consent of the Governor testified in writing, to enter into all contracts relative to the railway, and to do all other acts which he is authorized by the Act to perform.

Sec. 12 authorizes the Commissioner, or any person acting under his authority, to enter upon and take, for the purpose of the railway, "any land along the line, or within any lawful deviation from such line, over which the railway is authorized to be constructed as may, in the judgement of the Commissioner, be necessary for the purpose." At the end of the section is this proviso:—

"That nothing in this section contained shall be deemed to apply to the waste lands of the Crown, or to in any way affect any right as to any land heretofore granted or otherwise disposed of by the Crown, reserved to Her Majesty the Queen, her heirs and successors, or any person or persons acting in that behalf, by her or their authority to do any of the acts ~~and~~ things by this section authorized to be ~~done~~, and *nothing shall be deemed to be done in pursuance of and by virtue of the powers by this section conferred which, if this Act had not been passed, might lawfully have been done by Her Majesty the Queen, her heirs and successors, or any person or persons*

or done/

acting in that behalf, by her or their authority, under any such reservation as aforesaid."

Sec. 13 provides for notice being given when land is taken under the preceding section.

Sec. 14 runs thus:—

"In all cases in which any land is taken, entered upon, or used in pursuance or by virtue of the powers by the 12th section conferred, full compensation shall be made to the owner or owners of such land."

Sec. 16 is in these terms:—

"16. Any person whose land is taken, entered upon, or used in pursuance and by virtue of the provisions of this Act, or whose land is resumed, entered upon, or used for the purpose of a railway, by Her Majesty, her heirs or successors or any person acting under her or their authority, under any reservation of right as aforesaid, and who shall consider himself entitled to compensation in respect of such land being taken or resumed, entered upon, or used (such person being hereinafter referred to as "the claimant"), shall send in to the Commissioner a notice in writing according to Form B in the schedule, setting forth the nature of his interest in such land and the amount of compensation which he claims in respect of the premises, and accompanied by all deeds and documents necessary to establish his title to such land. If the Commissioner shall be satisfied as to the title of the claimant to such land, and as to his right to recover compensation in respect of such land being taken or resumed, entered upon, or used as aforesaid, and as to the amount of compensation claimed by him as aforesaid, he shall, with the approval of the Governor in Executive Council, pay such amount to the claimant; if he shall be satisfied as to the title and right to compensation as aforesaid, but thinks the amount of compensation claimed excessive, he shall with the approval of the Governor in Executive Council, send him a written notice according to Form C in the schedule, offering such amount of compensation as he may think sufficient and such proceedings shall thereupon be taken as in the next section set forth. If the Commissioner shall not be satisfied as to the title of the claimant to such land or as to his right to compensation in respect of the same being taken, or resumed, entered upon, or used as aforesaid, he shall give notice to such person according to Form D in the schedule that he repudiates his claim; but before giving such notice of repudiation, it shall be lawful for any Judge of the Supreme Court in Chambers, on the application of the Commissioner, to order the claimant to produce such further evidence of title as the Commissioner may require."

Sec. 31 enables the claimant to bring an action to recover compensation if the Commissioner repudiates his claim.

The Defendant, who has been duly appointed Commissioner of Railways, gave to the Plaintiff the following notice:—

“In the matter of ‘The Railways Act, 1878,’ and of certain
“land intended to be taken and resumed for the purposes
“of the Eastern Railway.

“To Messrs. F. & H. Sherwood, of Perth, in the Colony of West Australia.

“Take notice that it is the intention to take for the purposes of the Eastern Railway the following land in the Swan District, whereof you are the owners:—

Number.		Quantity intended to be taken.
On Plan and Book of Reference.	In the Survey Office.	
No. 150.	Location X - -	A. 4 R. 3 P. 27

“Dated this seventh day of May 1879.

“J. H. THOMAS, Commissioner of Railways.”

The Plaintiff gave to the Commissioner the following notice, in accordance with Form B, given in the Schedule to the Act:—

“Form B.

“In the matter of ‘The Railways Act, 1878,’ and of ‘certain land’ *taken for the purposes of the Eastern Railway.

“To the Commissioner of Railways, Western Australia,
&c., &c., &c.

“Sir,—We have the honour to inform you that we are the owners of certain land, † described in the Schedule ‘A’ as Swan Location X, situate on the West Guildford Road, which has been taken § for the purposes of the Eastern Railway.

“We enclose the following title deeds, showing our interest in the said lands. ||

“We consider that we are entitled to compensation in respect of the said land, and we claim as full compensation for taking of the same, and including all buildings and fences thereon, and as damages for all injury done to the adjoining land belonging to us, by severance or otherwise, the sum of $\frac{480l. 0s. 3d.}{408l. 7s. 9d.}$, which sum we hereby declare to be our full claim in respect of matters aforesaid.

“We have the honour, Sir,

“Your obedient servants,

“F. and H. SHERWOOD.”

The Commissioner thereupon gave to the

* “Here insert ‘taken,’ or ‘resumed,’ or ‘entered upon,’ or ‘used,’ as the case may be.”

† “Here describe ‘nature of interest.’”

‡ “Here describe the same.”

§ “Here insert ‘taken,’ or ‘resumed,’ or ‘entered upon,’ or ‘used,’ as the case may be.”

|| “Here set out a list of deeds.”

to give some of the reasons for his judgement. This extract and "the points" of the respective parties are the only materials from which their Lordships are able to conjecture how the case was presented to the Court, and how the Court dealt with it.

They understand the Chief Justice to state that there was no question of the right of the Crown to resume the land, if that right was properly exercised; but that, in his opinion, it was not properly exercised, and that the notice given by the Commissioner must be taken to have been given under the 12th section of the Act.

No mode of procedure appears to be prescribed by the law of the Colony for the taking by way of resumption of lands granted by the Crown, but, whether a notice previous to the taking them of the intention to do so be or be not strictly necessary, it is manifestly proper and convenient.

The notice of the 7th of May 1879 appears to their Lordships a notice which might lawfully and properly have been given by the Crown or its agent in the exercise of the power of resumption if the Act had not been passed, not the less so because it may also be a good notice under the Act; if this is so, the words of the proviso to the 12th section are express, that the giving it shall not be deemed to be done in pursuance of or by virtue of the powers conferred by that section. If it is not a notice under Sec. 12, Sec. 14, the only section giving compensation, does not apply. Nor does Sec. 16 help the Plaintiffs. That section was manifestly necessary in contemplation of two possible cases,—1st, where the land, or a portion of it, claimed in the notice, should be town land, whereupon there would be a right to compensation, not under the Railway Act, but by virtue of the terms of the grant applicable to town lands; 2nd, where

the land, or a portion of it, should not be resumable for any reason, either because it had been built upon, or was used as garden for the more convenient occupation of buildings, or because one twentieth of the land had been before resumed; in either of which cases the notice could not have been lawfully given if the Act had not passed, and would, therefore, properly be treated as a notice under the Act.

But the land in question is not town, or even suburban land, nor has it been built upon or occupied as gardens attached to buildings. It is true that the notice following Form B claims compensation for the land "including all buildings and fences thereon," but in the special case there is no allegation of its having been built upon, and no inference that it has been can be drawn from the description "country land and not town or suburban land;" there is no trace of any claim to compensation on this ground in the Plaintiffs' "points," and so much of the reasons of the judgement which was read to their Lordships intimated that the right of the Crown to resume, if properly exercised, was not questioned.

Further, it is stated in the special case that the quantity now resumed, added to that resumed before, is less than one twentieth of the whole. There is no ground for a contention raised in the Plaintiffs' points that by the taking any portion, however small, the power of the Crown to resume is exhausted,—it is a power to be exercised from time to time as occasion arises.

From these considerations it results—

1. That the land in question was land which the Crown had power to resume.
2. That the notice given was one which might lawfully have been given, by or on behalf of the Crown, in exercise of its powers of resumption.

3. That if so, such notice must not be deemed to have been given under Sec. 12 of the Railway Act, the proviso of which has some appearance of being enacted for the express purpose of preventing claims such as the present being made.
4. That if so, the Plaintiffs have no right to compensation.

The judgement was therefore wrong. Their Lordships will humbly advise Her Majesty that the judgement appealed against be reversed, and that judgement with costs of the defence in the Court below should be entered up for the Defendant. There will be no costs of this appeal.
