*418 Emsley v North Eastern Railway Company

Court of Appeal

Chancery Division

20 February 1896

[1895 E. 1248]

[1896] 1 Ch. 418

Lindley L.J. , Kay L.J. and A. L. Smith L.J.

North J.

1896 Jan. 30, 31; Feb. 20

1895 Dec. 14, 17, 18

Railway—Statutory Powers—Expiration of Period for Completion of Works— Railways Clauses Consolidation Act, 1845(8 & 9 Vict. c. 20), s. 16 .

Sect. 16 of the Railways Clauses Consolidation Act, 1845 , empowers a railway company, subject to the provisions of the special Act, to execute various works and “from time to time” to alter, repair, or discontinue the before-mentioned works and substitute others in their stead:—

Held, (by Lindley and A. L. Smith L.JJ., affirming North J., Kay L.J. deciding upon other grounds), that the powers of this last clause were not subject to a restriction in the special Act as to the time for the completion of the railway.

THIS was a motion for an injunction to restrain the defendants the North Eastern Railway Company until the trial of the action from building so as to interfere with the plaintiffs' ancient lights. The defendants were making certain alterations at their station at Leeds, including the removal of a parcels office and the erection on a different site of a new parcels office. This was the building of which the plaintiffs complained.

By the Leeds New Railway Station Act, 1865(28 & 29 Vict. c. cclxvii.) , which incorporated the Lands Clauses and Railways Clauses Consolidation Acts, 1845 (s. 2) [1] , and provided that the interpretation clauses in the incorporated Acts should apply to that Act (s. 5), the North Eastern Railway Company and the *419 London and North Western Railway Company were empowered to make a new station at Leeds and a railway connecting it with the Midland Railway (s. 13).

Sect. 14 enacted that “The powers for the compulsory purchase or taking of lands for the purposes or objects of this Act shall not be exercised after the expiration of three years from the passing thereof.”

[2]

Under the Act of 1865 the defendants built a new station and constructed the railway there contemplated, but the station becoming inconveniently small the defendants, in 1891 and 1894, obtained further special Acts enabling them to enlarge their station.

Under the Act of 1891 the defendants acquired land adjoining that which they had previously acquired under the Act of 1865. They pulled down the greater part of the station and offices (including the parcels office) which had been constructed under the powers of the Act of 1865, and rebuilt and enlarged the old station and offices, using for that purpose land acquired under the Act of 1865, and the additional lands acquired under the Act of 1891.

The greater portion of the site of the new parcels office was acquired in 1868 under the Act of 1865, within the period limited by that Act for the acquisition of land. The rest was acquired in 1895 under the Act of 1891.

The motion came on for hearing before North J. on December 14, 1895.

Henry Terrell , for the plaintiffs, in support of the motion. The power of the railway company to construct the works ***420** complained of, if it could have been done under their Act of 1865, expired at the end of the five years within which, under s. 36 of that Act, the railway authorized by the Act was to be completed. The interpretation clause, s. 3 of the Railways Clauses Consolidation Act, 1845 , makes the word “railway” in the special Act include all the works authorized by the special Act; nor does s. 16 of the Railways Clauses Consolidation Act confer power to do the work at this late period, for the powers of that section are controlled by s. 36 of the special Act.

After the time limited for the completion of the works a railway company will be prohibited from exercising their extraordinary powers: *Richmond v. North London Ry. Co.*[3] ; *Loosemore v. Tiverton and North Devon Ry. Co.* [4] The railway company will not be allowed to interfere with the rights of others for the mere purpose of saving expense; the buildings complained of could be erected elsewhere: *Pugh v. Golden Valley Ry. Co.* [5]

Swinfen Eady, Q.C. , and *Butcher* , for the defendant company. If the defendants are acting within their powers, it cannot be questioned that the only remedy the plaintiffs have for loss of access of light is by way of compensation under the Lands Clauses Act, 1845: *Duke of Bedford v. Dawson* . [6]

Sect. 36 of the special Act of 1865 only applies to the railway authorized by the Act; it does not limit the time for constructing the station and works connected with it. By sect. 14 , where the limit of time for the compulsory purchase of land is fixed, that limit of time is made applicable to all the objects of the Act; in many other provisions in the Act, also, the railway is treated as a separate thing from the station; so that the context is repugnant to the extended construction sought to be put upon the word “railway,” and the interpretation clause in the Consolidation Act does not apply.

Supposing the defendants have not power to do what they are doing by their special Act of 1865, they have power under s. 16 of the Railways Clauses Consolidation Act, 1845 , among other things, from time to time to pull down and substitute ***421** a new building such as a parcels warehouse. It would be repugnant to the nature and object of this provision to make the words from time to time mean within five years: *Attorney-General v. Metropolitan Ry. Co.*[7] The company are authorized by Act of Parliament to use this land in the way proposed; the interference with the plaintiffs' lights alleged is necessary to that use, and the company are not bound for the convenience of the plaintiffs to choose a different site: *London, Brighton and South Coast Ry. Co. v. Truman* . [8]

Henry Terrell , in reply.

NORTH J.

In the present case the plaintiffs complain of the interference with the ancient lights of their building by reason of certain acts which the defendants are doing. I think they have proved their case, that there is an injury that will arise to their building, and I think it follows that the plaintiffs are right unless it can be shewn that the defendants are in some way executing the works under statutory powers which they have acquired. If they have statutory authority to do the works, then the plaintiffs must fail in this action, although it is conceded that they would, if they have sustained damage, be entitled to compensation, and, so far as the evidence before me goes, I think there is a case of such damage made out. The question, therefore, is whether the defendants can justify what they are doing on the ground that they are authorized to construct such building as they are erecting upon the site in question.

[After referring to certain sections of the defendants' special Act of 1865, and the mode in which the defendant company had acquired the land on which they were intending to erect the building objected to, and saying that the defendants' later Acts did not, in his opinion, apply, his Lordship proceeded:—]

It is clear from the facts proved before me that the defendant company have power to build upon the piece of land in dispute, and, in fact, it is not contended now by Mr. Terrell that they have not the power to do so; but he says the only right they have is the common law right of owners to do so, and therefore ***422** they can only do it in such a way as not to interfere with their neighbours' lights. That is the whole question: whether their power of building on this land is limited to a building which must be built on the terms on which an owner of land must build, having regard to the lights of his neighbours, or whether they may build irrespective of the plaintiffs' rights of light, but subject always to their right of compensation. I think that the railway company have a right to build as they are doing,

and that the application by the plaintiffs for an injunction must fail.

As the later special Acts do not apply, we must go back to the old Act of 1865, with which the Railways Clauses Consolidation Act is incorporated; and the question is whether there is power to do it under that Act. I think there is. It is said there is not for this reason: first, that the railway and the works authorized by that Act were bound to be built within five years from the passing of the Act, and that anything completed by that time might be authorized; but nothing commenced now, for the first time, can be authorized by that Act. Now there are two difficulties in the way of the plaintiffs on that point. I am not quite satisfied that the plaintiffs are right in the construction which Mr. Terrell put on s. 36 of the Act of 1865 when he says that the period for completing this station was limited to five years. It is true that the Railways Clauses Consolidation Act uses the word “railway” as meaning railway and works, but that is subject to this, that it provides “The following words and expressions, both in this and the special Act, shall have the meanings hereby assigned to them, unless there be something in the subject or context repugnant to such construction.” Then, what is important here is the definition, and it says: “The expression ‘the railway’ shall mean the railway and works by the special Act authorized to be constructed.” I am not quite satisfied that there is not something in the present Act which is inconsistent with the meaning attaching to the word “railway” by the definition in s. 3 of the general Act.

[His Lordship considered some of the sections of the special Act of 1865 as bearing on this point, and proceeded:—]

But I do not intend to decide this case upon that point. I ***423*** am prepared, for the purpose of my decision, to assume that “railway” in the 36th section of the Act does include a railway station and works. I still think the railway company have power to do what they are doing under the Act of 1865, and the Act incorporated therewith—that is to say, s. 16 of the Railways Clauses Act . Now s. 16 says: “Subject to the provisions and restrictions in this and the special Act, and any Act incorporated therewith, it shall be lawful for the company, for the purpose of constructing the railway, or the accommodation works connected therewith, hereinafter mentioned, to execute any of the following works.” Then there are six separate clauses saying what may be done. The first is constructing tunnels, embankments, bridges, roads, and so on; the second is that they may alter the course of any rivers; and the third is that they may make drains or conduits. Then the fourth is this: “They may erect and construct such houses, warehouses, offices, and other buildings, yards, stations, wharfs … and other works and conveniences as they think proper.” Those four clauses say what may be done. Those are for the purpose of constructing the railway. Then we come to the 5th clause: “They may from time to time alter, repair or discontinue the before-mentioned works, or any of them, and substitute others in their stead.” Now, pausing there for a moment, I see nothing whatever to shew that any buildings erected during the period which the company have for constructing the railway are to be taken away at the end of the time. I find nothing indicating anything of that kind. I cannot imagine any reason, either upon the face of the Act or otherwise, why it should have said, if the company have erected a warehouse, for instance, for the purpose of the construction and completion of the station, that they should take it away at the end of that period; and if they are not bound to take it away, I do not see why they should not alter or repair it after that period; in fact, the Act says they may from time to time do so. I find no reference whatever, whether direct or implied, indicating that from time to time is before the expiration of the period for the completion of the works. I take it, therefore, that the provision is that they may from time to time alter, repair, or ***424*** discontinue any of these works, and substitute others in their stead. Therefore, if they have a warehouse that has been built as part of the construction of the works, they may from time to time, even after the period fixed for completion, take away that warehouse and substitute another in its stead. Then comes the 6th clause, which I will read, and that says: “They may do all other acts necessary for making, maintaining, altering or repairing and using the railway.” Now the railway company have made this warehouse, and they have used it down to the present time; but, in the exercise of their powers contained in the original Act and in later Acts, they have had to increase and alter their station. The evidence, as I read it, with respect to which there is no dispute (and it has not been attempted to cross-examine the witnesses), is, that it is necessary to remove the existing warehouse for the purpose of alterations that have to be made; and that being so, it is necessary to substitute another for it. Then Mr. Terrell says that it is not necessary to put one in its place, or that it is not necessary, if they do put one in its place, to build it to such a height that it will interfere with the lights of the plaintiffs' warehouses. But I do not think it is for the plaintiffs to dictate to the railway company where they shall put their building, or the height to which they shall build. It seems to me to be necessary for the purpose of a station that they should have a warehouse somewhere. They have power, as I read s. 16 of the Railways Clauses Act , to discontinue their present warehouse and substitute another in

its stead; and I do not read the sub-section to mean that they are to rebuild in the same place what is taken away. Then that being so, it is essential and necessary that they should have a warehouse. It is necessary, according to the evidence, that they should alter their station by the removal of the existing warehouse. That being so, it seems to me to be necessary, within the meaning of the Act, that they should build another in its place. Mr. Terrell says that they need not build another at all, that they may go somewhere else, and that they may get premises elsewhere for the purpose. No doubt, if you go to a distance, you may find accommodation; but the question is, what is necessary for the convenient use of ***425** the railway? It is not a mere question of saving expense, but a question of concentrating their works. It seems to me idle to suggest that they might cross the street possibly, or some of the streets, and find convenient buildings elsewhere. I do not think they are bound to do anything of the sort. It is not suggested that the railway company are not acting in good faith in building this warehouse where they are, and to the height to which they intend building it. That being so, it seems to me they have powers under the Act to do what they are doing.

(D. P.)

The plaintiffs appealed. The appeal came on for hearing on January 30, 1896.

Balfour Browne, Q.C. , and *H. Terrell* , for the plaintiffs. If the defendants were executing works under their statutory powers, no doubt the plaintiffs would be restricted to compensation under s. 6 of the Railways Clauses Consolidation Act , and s. 68 of the Lands Clauses Consolidation Act ; but the powers conferred by the Act of 1865 have long since expired, and although the defendants could still continue their works on land acquired within the prescribed period, subject to their not affecting the rights of third parties— *Tiverton and North Devon Ry. Co. v. Loosemore*[9] —for the present purpose they are in the same position as an ordinary landowner building on his own land: *Caledonian Ry. Co. v. Colt* [10] ; *Richmond v. North London Ry. Co.* [11]

[LINDLEY L.J. referred to *Great Northern Ry. Co. v. East and West India Docks and Birmingham Junction Ry. Co.*[12]

A. L. SMITH L.J. referred to *Attorney-General v. Metropolitan Ry. Co.*[13]]

That case does not apply, because there the damage was caused, not by the execution of the works, but by the working of the railway. Sect. 16 of the Railways Clauses Consolidation Act is subject to three restrictions. The powers thereby ***426** conferred are subject to the provisions of the special Act; they are conferred for the purpose of constructing the railway, and the works must be necessary. By s. 36 of the special Act of 1865, the time for constructing the railway—which by the Railways Clauses Consolidation Act includes all the works authorized by the special Act, and therefore includes the station: *Cother v. Midland Ry. Co.*[14] —is limited to five years, and after the expiration of that time s. 16 of the Railways Clauses Consolidation Act has no application. North J. has proceeded upon the words “from time to time” in the fifth heading in s. 16, but all the headings are governed by the language of the first part of the section. Even if the powers in the fifth heading are still alive, the new office is on a different site, and cannot be treated as a substitute for the old one. Lastly, the powers are confined to acts done in the construction of the railway and necessary for its construction, for it has been held that the word “necessary” in the last heading governs the whole section: *Reg. v. Wycombe Ry. Co.* [15] This new office is not a necessary work within the strict meaning assigned to that term by the authorities: *Fenwick v. East London Ry. Co.* [16] ; *Pugh v. Golden Valley Ry. Co.* [17] ; *Simpson v. South Staffordshire Ry. Co.* [18] ; *Morris v. Tottenham and Forest Gate Ry. Co.* [19]

[LINDLEY L.J. referred to *Sadd v. Maldon, Witham, and Braintree Ry. Co.*[20]]

That case can no longer be treated as an authority on this point.

Swinfen Eady, Q.C. , and *Butcher* , for the defendants. The parcels office is a necessary consequence of the enlargement of the station, and, having regard to the exigencies of the public, it is a necessary work. The language of the fifth heading of s. 16 of the Railways Clauses Consolidation Act shews that the powers therein comprised were not intended to be exercised within the limit of time prescribed by the special Act, although it may well be that the first four headings, which ***427** deal with the construction of the railway, may be subject to such restriction as to time. We submit, therefore, that this power of substitution is one of those powers which is expressly reserved by s. 36 of the Act of 1865. There is no ground for saying that the substituted building must necessarily be upon the same site as the old one.

[They cited *London, Brighton and South Coast Ry. Co. v. Truman*[21] and *Hutton v. London and South*

Western Ry. Co. [22]]

Balfour Browne, Q.C. , in reply.

Cur. adv. vult.

Feb. 20. LINDLEY L.J.

This is an appeal by the plaintiffs from an order of North J. refusing to restrain the defendants from interfering with the plaintiffs' ancient lights. The lights are ancient. The defendants are building a parcels office at Leeds, and this building will to some material extent darken the ancient light of the plaintiffs. The new building was nearly completed before the action was commenced, and was carried up to its full height, or nearly so, when the notice of motion for an injunction was served. North J. did not, however, refuse the injunction upon the ground that it would be useless as regards future building, nor upon the ground that it was too late to order the building to be pulled down. The learned judge decided against the plaintiffs upon the ground that the company was entitled to erect the new building under statutory powers, and that the plaintiffs' remedy was not by an action but to obtain compensation under the Lands Clauses and Railways Clauses Consolidation Act, 1845. The appellants contend that this view of the case is wrong, and that, even if they are not entitled to an injunction, at all events they will be entitled to damages in the action when it comes on for trial. The question thus raised is of very great and general importance. [His Lordship stated the circumstances under which the new office was built, referred to the Acts of 1865 and 1891, and he continued as follows:—]

The plaintiffs, by their counsel, contended that the new ***428** parcels office was not necessary for altering or using the railway and works authorized by the special Acts within the meaning of s. 16 of the Railways Clauses Consolidation Act, 1845 , even if it applied to the case, which I will consider presently. But the uncontradicted evidence filed by the company proves the contrary, and is really quite conclusive on this head. [His Lordship discussed the evidence on this point, and continued:—]

The plaintiffs also contended that as the new parcels office is not on the site of the old one, the new one cannot be regarded as a substitution for the old one within the meaning of the same s. 16. But here, again, the evidence and the plans dispose of the contention. Whether one building can be fairly regarded as a substitute for another, in my opinion, must depend not only on its exact locality, but on a consideration of locality and connection with other works and mode of user. I cannot bring myself to say, either as a matter of law or of fact, that one parcels office cannot be a substitute for another parcels office, because, although wanted at the same station, the first is situate a few yards from the place where the second formerly stood.

I now come to the real and only difficulty in the case, which is to determine whether in building the new parcels office the company ought to be regarded as exercising statutory powers or only the ordinary rights of a landowner. If the former, this action cannot be supported, and the plaintiffs' remedy will be to seek compensation under the Lands Clauses and Railways Clauses Consolidation Acts; if the latter, although they may fail in obtaining a mandatory injunction, they will be entitled to damages at the trial. A statutory power is, I apprehend, a power conferred by statute to do something which could not be lawfully done without it. A statute is not wanted to enable even a company to build on land which is its own if the company has capital properly applicable to the purpose. Herein lies the strength of the plaintiffs' case. They contend that what the company is doing it is doing as landowner and not under statutory powers at all, for they say: first, such powers are not wanted, and ought not, therefore, to be held to exist; and, secondly, that if statutory powers are wanted, the time for ***429** their exercise under the Act of 1865 has long since expired, and that the Act of 1891 gave the company no further time for their exercise over land which belonged to the company before that Act passed. I will consider each of these contentions in turn.

The first contention—namely, that statutory powers are not wanted to enable the company to build on its own land, and ought not, therefore, to be treated as existing—appears to me to beg the question and to go too far. Statutory powers are not wanted simply to enable the company to build on its own land, but statutory powers are wanted to enable the company to build even on its own land so as to infringe other persons' rights on the terms of compensating them in the manner prescribed by the Consolidation Acts. A railway company, when it has acquired the land on which its rails are laid, requires no statutory power to run trains over it; but the company does want statutory power to do so in such a way as to commit an unavoidable nuisance without being exposed to actions for damages, and the company has such a power accordingly: *Vaughan v. Taff Vale Ry. Co.*[23] ; *Hammersmith and City Ry. Co. v. Brand* . [24] Here is one instance in which a railway company exercises statutory powers

over its own land and not merely the ordinary rights of a landowner. In this particular instance, moreover, the person injured has no remedy either by action or by compensation under the Consolidation Acts. Again, no one denies, and it is common knowledge, that within the time limited by a special Act for the construction of a railway and the works connected with it, a railway company can construct the authorized works on its own lands after it has acquired the ownership of them without being liable to actions for infringing the rights of other persons. In the absence of negligence, persons injured by the construction of such works within the prescribed limits of time have a remedy, but their remedy is to obtain compensation under the Consolidation Acts, and not by an action for an injunction or damages. The mere fact, therefore, that the company is building on its own land does not shew that it cannot be exercising statutory ***430*** powers and cannot claim the benefit of the compensation clause, instead of exposing itself to actions on the part of those who may be unavoidably injured by the construction of authorized works.

There remains the second point—namely, whether the time within which the statutory powers conferred on the company by s. 16 of the Railways Clauses Consolidation Act, 1845 , has expired. That section, if applicable, clearly applies to this case. It must be taken in connection with s. 36 of the Act of 1865. [His Lordship read the section.] The last words of this section which at first seemed important really are not so, for they have no operation until the powers which can be lawfully exercised for a longer period have been ascertained. That, however, is the difficulty in the present case; and s. 36 of the Act of 1865 is of no assistance in solving this difficulty. Sect. 16 of the Railways Clauses Consolidation Act, 1845 , empowers the company to do various things, and it is remarkable that the clause which relates to repairs and substitution enables the company to do those things “from time to time.” It has never yet been decided that this power cannot be exercised after the period for completing the works has expired, and I am not prepared to be the first to hold that it cannot. The reason of the thing and the expression “from time to time” lead me to think that it can. It is said that this construction will lead to great abuse, but persons unavoidably injured are sufficiently protected by the compensation clauses and by the conditions with which the company must comply; for the section only protects the company when what it is doing is necessary for the purpose of constructing the railway and other authorized works: see *Reg. v. Wycombe Ry. Co.*[25] [His Lordship held further that the special Act of 1891 applied to the case, and that on that ground also the defendants were acting within their statutory powers.] This appeal, therefore, must be dismissed with costs.

KAY L.J.

The plaintiffs seek an injunction on interlocutory motion to restrain the defendants from building so as to obscure ancient lights in the plaintiffs' house. The learned judge ***431*** declined to make any order. The plaintiffs appeal. The defendants' building is now carried to its full height, and it is hardly a case in which a mandatory injunction would be granted before the trial of the action. But some important questions have been argued, and probably it will be convenient to all parties to have the decision of this Court upon them. At the time when the notice of motion for an injunction was given the building had not been carried up to its full height, and therefore strictly the plaintiffs have a right to ask for the decision of the Court as though that were the state of the facts. The defendants' building complained of is a goods or parcels warehouse in Leeds, connected with the defendants' railway station there by a subway and in close proximity to such station.

The land on which it was built was acquired as to the larger portion under a notice to treat dated June 23, 1868, and as to the rest under a notice given in 1895.

It is argued that as to this land, or at all events the portion acquired under the notice in 1868, the statutory powers of the company to construct railway works expired long ago, and that the railway company in executing this building are only exercising the powers of ordinary landowners, and are subject to injunction. The contention of the defendants is that as to the whole of the building they are acting under a statutory power of constructing it, and therefore the only remedy of the plaintiffs is under s. 68 of the Lands Clauses Act to obtain compensation as persons whose land is injuriously affected by the execution of the defendants' works.

The notice to treat in 1868 was given under a special Act of the railway company obtained in 1865, which incorporated the Lands Clauses Act and Railways Clauses Act , and authorized the making of the railway and station. Sect. 36 of this Act provided that the railway thereby authorized should be completed within five years, and that on the expiration of that period the powers thereby or by the Acts incorporated therewith granted “for executing the same or otherwise in relation thereto shall cease to be exercised except as to so much of that railway as shall then have been completed, and also except ***432*** those powers by the same Acts or any of them declared to be continued or which

may lawfully be exercised for a longer period."

Much argument has been addressed to the meaning and effect of those exceptions. It is urged that as to a completed railway or station, the power of adding to or enlarging a station, or even building a new station upon a site used for that purpose for the first time, is continued by the first words of the exception as a statutory power; and secondly, if that were not so the company rely on s. 16 of the Railways Clauses Consolidation Act, 1845, which authorizes a railway company, "subject to the provisions and restrictions in this and the special Act … for the purpose of constructing the railway, or the accommodation works connected therewith, hereinafter mentioned," among other things to erect warehouses and stations, and "from time to time alter, repair, or discontinue the before-mentioned works or any of them, and substitute others in their stead," and "do all other acts necessary for maintaining, altering, or repairing and using the railway." This section, it is argued, is not restricted to the time fixed by the special Act for completion of the works. On the other hand, it is pointed out that the section relates to the construction of the railway, and is subject to the provisions of the special Act which include the restriction as to time for completion, and also the before-mentioned works include tunnels, embankments, aqueducts, bridges, roads, &c., and it could hardly mean that any of such works might be discontinued and others substituted at any time under statutory powers. The question involves considerable difficulties, and I should like to consider it further before expressing an opinion upon it if it were necessary to decide it. But in this case it does not seem to me to arise by reason of the subsequent Acts of Parliament obtained by the company to which I proceed to refer.

[His Lordship then referred to the Acts of 1891 and 1894, and held that the building complained of was erected under the statutory power given by the Act of 1891 to extend the Leeds new station, and that the interference with the plaintiffs' easement of light was a matter for which they might obtain compensation ***433*** under s. 68 of the Lands Clauses Act , and that their remedy by injunction was taken away.]

A. L. SMITH L.J.

after stating the facts and referring to the Acts of 1865 and 1891, continued:—The point taken by the plaintiffs is that the company have no statutory power to erect the parcels office upon any part of the land taken under the Act of 1865, because the five years' limit prescribed by that Act for the completion of the railway had expired, although it had not expired as regards the completion of the railway upon the small piece of land acquired under the Act of 1891.

[His Lordship referred to the Act of 1891, and expressed a doubt whether it applied, and continued as follows:—]

Sect. 36 of the Act of 1865 enacts that "the railway by this Act authorized shall be completed within five years from the passing thereof, and on the expiration of that period the powers by this Act, or the Acts incorporated herewith, granted for executing the same … shall cease to be exercised, except as to so much of that railway as shall then have been completed, and also except those powers which are by the same Acts, or any of them, declared to be continued, or which may lawfully be exercised for a longer period."

I am inclined to think that "the railway" in this section must be read as meaning "the railway and works," because the interpretation clause of the Railways Clauses Consolidation Act, 1845 , which is incorporated with the special Act of 1865, enacts that the expression "the railway" shall mean the railway and works by the special Act authorized to be constructed. It is not, however, in my view of this case, necessary to decide this point.

It appears to me that the limit of five years mentioned for the completion of the railway in s. 36 of the Act of 1865 is subject to this, that if the company have powers which are declared to be continued, or which may lawfully be exercised for a longer period than five years, then they may execute such powers although the five years have elapsed.

Now, what is the true reading of s. 16 of the General Consolidation Act of 1845 It enacts that "subject to the ***434*** provisions and restrictions in … the special Act … it shall be lawful for the company for the purpose of constructing the railway … to execute any of the following works" (the letters are mine):—

(a) To make temporary or permanent inclined planes within the lands described in … the plans or books of reference.

(b) To alter the course of non-navigable rivers within the same lands and make bridges under or over

the same and to alter the course of streets.

(c) To make drains … into through or under lands adjoining the railway for the purpose of conveying water from or to the railway.

(d) To erect such houses warehouses offices or other buildings yards stations wharfs engines machinery apparatus and other works and conveniences as the company think proper.

And by clause (e) it is enacted that "the company may from time to time alter, repair, or discontinue the before-mentioned works or any of them, and substitute others in their stead."

And by (f) they "may do all other acts necessary for making, maintaining, altering, or repairing, and using the railway."

This last limb of this section (f) has been held to be in reality a proviso upon the whole section, for it has been held by the Court of Queen's Bench in *Reg. v. Wycombe Ry. Co.*[26] , approved of in this Court in *Pugh v. Golden Valley Ry. Co.* [27] , that the works authorized by this section must be works necessary for making, maintaining, altering, or repairing, or using the railway. The important question now raised is whether, if these works have been constructed within the time limited for making the railway (in this case five years from the passing of the special Act), the company may from time to time, either within or after the five years, alter, repair, or discontinue any of such works and substitute others in their stead.

Take the case in hand, namely, that of a station built within the five years, and apply paragraph (e) to it. Paragraph (e) enacts that the company may from time to time (without any limit as to time—the words are "from time to time") alter or discontinue a station and substitute another in its stead, and ***435** from time to time repair the same. This clearly applies to a part of as well as to the whole of a station.

Why is this alteration, or discontinuance and substitution, or repair to be limited to the period of five years wherein the railway is to be constructed? It is said it is unreasonable to construe the section without this limit, for, if so, the company might alter or discontinue and substitute in its stead an inclined plane, or the course of a non-navigable river, or a street, or the drains mentioned in (c) after the five years. Why not, if such works become necessary for the maintenance and user of the railway, and which, indeed, might be so necessary, either for maintaining the railway itself or for carrying the traffic thereon which the public require to have carried, that without them the whole undertaking would become unworkable?

I see nothing unreasonable in this, and I cannot think that the suggested limited construction is the true one, and certainly no such limit is to be found in the paragraph itself.

The whole tenor of railway legislation has been to give the railway companies power to execute and uphold works which are necessary to enable them to maintain and work their railway, and to afford proper accommodation for their traffic as against the rights of individuals, it being considered for the public benefit that this should be so, but always subject to this, that if, in the execution of such works, the company injuriously affect the property of individuals they must make compensation to them for so doing.

If we are to cut down paragraph (e) of s. 16 of the Railways Clauses Consolidation Act of 1845 , as we are invited by the plaintiffs to do, we shall be forcing a railway company either to buy off landowners at their own price when alterations, or repairs, or substitution of existing works which became necessary for the maintenance or user of the railway happen to injure the property of an individual, or else to force the company to incur the expense of going to Parliament and obtaining further powers.

In my judgment, paragraph (e) of s. 16 of the General Consolidation Act of 1845 was inserted and worded as it is—"from time to time"—expressly in order to obviate either of these results, ***436** and to enable a railway company to exercise the powers therein mentioned whilst they are working their railway without being liable to the Court of Chancery or any other Court stopping them by injunction, but with this limitation, that the company must pay compensation to persons injured by such exercise of their powers. This, in my opinion is why statutory powers are given to a railway company.

It was argued that if s. 16 of the General Consolidation Act authorizes a railway company to discontinue works and to substitute others, it must mean that the substituted works are to be erected on the same site as the discontinued works. I can find no indication of this in the section. The words

are not that the substituted works are to be in the *place* of the discontinued works, but in their stead. Whether new buildings can in any particular case be regarded as substituted for others on a different site must depend on the circumstances of the case. In this case the conclusion is obvious that the substitution is a real and honest substitution, and not merely a pretended one.

As to the works being necessary for the using of the railway, North J. found that they were so, and the evidence as to this is all one way, and uncontradicted, and it was not suggested that the defendants by what they were doing were causing unnecessary damage.

Representation

Solicitors: Pitman & Sons , for Emsley, Son & Smith, Leeds ; Williamson, Hill & Co. , for A. Kaye Butterworth, York .

(H. C. J.)

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1. Sect. 16 of the Railways Clauses Consolidation Act provided as follows:—"Subject to the provisions and restrictions in this and the special Act, and any Act incorporated therewith, it shall be lawful for the company, for the purpose of constructing the railway … to execute any of the following works, that is to say":— The works which the company might execute were enumerated in six clauses, of which the last three provided as follows:—"They may erect and construct such houses, warehouses, offices, and other buildings, yards, stations, wharfs, engines, machinery, apparatus, and other works and conveniences as they think proper; "They may from time to time alter, repair, or discontinue the before-mentioned works or any of them, and substitute others in their stead; and "They may do all other acts necessary for making, maintaining, altering, or repairing, and using the railway." The section concluded with a proviso as to damages.

2. Sect. 36 provided: "The railway by this Act authorized shall be completed within five years from the passing thereof, and on the expiration of that period the powers by this Act, or the Acts incorporated herewith, granted for executing the same or otherwise in relation thereto, shall cease to be exercised, except as to so much of that railway as shall then have been completed, and also except those powers which are by the same Acts, or any of them, declared to be continued, or which may lawfully be exercised for a longer period."

3. *L. R. 5 Eq. 352; 3 Ch. 679* .

4. *22 Ch. D. 25; 9 App. Cas. 480* .

5. *15 Ch. D. 330* .

6. *L. R. 20 Eq. 353* .

7. *[1894] 1 Q. B. 384* .

8. *11 App. Cas. 45* .

9. *9 App. Cas. 480* , 517.

10. *3 Macq. 833* .

11. *L. R. 3 Ch. 679* .

12. 7 Rail. Cas. 356.

13. *[1894] 1 Q. B. 384* .

14. 5 Rail. Cas. 187.

15. *L. R. 2 Q. B. 310* .

16. *L. R. 20 Eq. 544* .

17. *15 Ch. D. 330* .

18. *4 D. J. & S. 679* .

19. *[1892] 2 Ch. 47* .

20. *6 Ex. 143* .

21. *11 App. Cas. 45* .

22. *7 Hare* , 259.

23. *5 H. & N. 679* .

24. *L. R. 4 H. L. 171* .

25. *L. R. 2 Q. B. 310* .

26. *L. R. 2 Q. B. 310* .

27. *15 Ch. D. 330* .