THE VANCOUVER, VICTORIA & EASTERN RAILWAY & NAVIGATION COMPANY (DEFENDANTS) ..... APPELLANTS;

AND

PHILIP McDONALD (PLAINTIFF) .... RESPONDENT.

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*Oct. 13.
*Dec. 9.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA.

Railways — Construction and operation — Location plans — Delaying notice to treat—Action to compel expropriation—Compensation in respect of lands not acquired—Mandamus—Use of highway—Crossing public lane—Nuisance.

The approval and registration of plans, etc., of the located area of the right-of-way, under the provisions of the "Railway Act," and the subsequent construction and operation of a railway along such area, do not render the railway company liable to mandamus ordering the expropriation of a portion of the lands shewn upon the plans which has not been physically occupied by the permanent way so constructed and operated.

Judgment appealed from reversed, the Chief Justice and Davies J. dissenting.

APPEAL from the judgment of the Court of Appeal for British Columbia affirming the order for mandamus made by Irving J. at the trial.

The plaintiff is lessee of land on the projected line of the railway. The company, pursuant to sections 158, 159 and 160 of the "Railway Act," obtained from the Board of Railway Commissioners the approval of

*PRESENT:—Sir Charles Fitzpatrick C.J. and Davies, Idington, Duff and Anglin JJ.

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a plan, profile and book of reference, shewing the right-of-way as including part of the plaintiff's property, but at no point was the whole of the right-of-way upon this property; the greater part of it was on adjoining lands. The company caused the plan, etc., to be duly registered and, without resorting to arbitration, acquired the interest of plaintiff's landlord, and constructed their permanent way clear of that portion of the right-of-way which extended over the land in which the plaintiff was interested, keeping it upon the adjoining lands in which the plaintiff had no interest. The company consequently proposed to wait until the expiration of the plaintiff's lease before taking possession of the portion of the right-of-way in question and contended that they could not be compelled to make compensation for the portion of its right-of-way of which they had not actually taken possession, and that they were operating their railway without interfering with the plaintiff's enjoyment of his property. They gave no notice to treat and took no steps towards expropriating the plaintiff's rights. The property in question is situated in the townsite of Huntingdon, B.C., and, in virtue of permission to cross the highways granted by the Board of Railway Commissioners, the company constructed the railway across a public lane in rear of the plaintiff's property. The evidence shewed that, on one occasion, a projection from one of the company's trains damaged the fence and an outbuilding upon the plaintiff's property, the injury so caused being to the amount of $10.

By the judgment appealed from the plaintiff recovered judgment for $10 for the damages mentioned, and the company was directed forthwith to acquire the portion of the right-of-way shewn over the plaintiff's

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property and make compensation therefor under the provisions of the "Railway Act."

Ewart K.C. for the appellants. The company is not bound immediately upon the filing, approval or registration of the plans, etc., to acquire, by purchase or expropriation, all the lands and interests in lands shewn to lie within the limits of the right-of-way. Unless they enter upon or injure the property they are not bound to take proceedings to acquire it or settle compensation under the "Railway Act." They have constructed and are operating the railway without such entry or injury, they have done no wrong to the owner or occupant, and he cannot compel them to do him an injury in order that he may obtain compensation therefor. There is nothing to prevent the company permitting an owner or tenant remaining in possession of a portion of their right-of-way.

The "Railway Act" does not contemplate that a railway company should acquire a right-of-way of uniform width. See section 158. If it was contemplated that all the lands shewn on the plans should be acquired the provisions of section 164 requiring the filing of another plan when the railway is completed would be superfluous. See also 3 Edw. VII. ch. 58, sec. 128. The amendments, in 1909 (sec. 3), to subsection 2 of section 192 give the owner the remedy of forcing the company to take the lands and pay compensation whenever the plans have been filed.

The judgment appealed from is inconsistent with section 194 requiring an engineer's certificate that the land is necessary for the purposes of the railway, at the date of the certificate. There is nothing to shew that the lands in question in this case are so required;

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on the contrary, the fact that the railway is in operation without taking or interfering with these lands indicates that they are not required. If, under section 207, the company may decide not to take the lands mentioned in the notice, why may they not come to the same decision before any notice is given? We also refer to sections 151 and 155 as to alteration and discontinuance of works and the making of compensation. By refraining from entering or interfering with the plaintiff's lands and allowing him to remain in possession for the unexpired term of his lease the company is carrying out the spirit of the Act.

There is no precedent for an action such as the present. The powers given to railway companies are permissive only and not compulsory. So long as the respondent remains in occupation, by lease or license, without injury to himself or to the public there can be no ground of complaint.

We rely upon the decisions in *York and North Midland Railway Co.* v. *The Queen*(1); *Scottish North Eastern Railway Co.* v. *Stewart*(2); *The Queen* v. *Great Western Railway Co.*(3).

George F. Martin for the respondent. We rely upon section 2, sub-sections 11 and 15, section 155 and section 237, sub-section 3, of the "Railway Act." The cases of *Corporation of Parkdale* v. *West*(4), and *Hendrie* v. *Toronto, Hamilton and Buffalo Railway Co.*(5), apply; and it is admitted that the lessee is in the same position as an owner of land.

The company have taken the lane in rear of the

(1) 1 E. & B. 178, 858.
(2) 3 Macq. 382.
(3) 62 L.J.Q.B. 572.
(4) 12 App. Cas. 602.
(5) 26 O.R. 667; 27 O.R. 46.

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property and trespassed upon the property itself. The respondent is, therefore, entitled to compensation to be settled under the "Railway Act." Section 158 of the Act does not contemplate the operation of a railway for years without acquiring the right-of-way. The company has acquired the fee from the owner, but insist that the tenant must await their pleasure. If the lease had 99 years to run, could they delay until it had expired ?

On filing the plan mentioned in section 164 the company have the right to obtain forcible possession under sections 217 and 218. This clouds the title to the lands and prohibits improvements of a permanent nature or advantageous sale of the plaintiff's rights. When the company commenced the operation of the railway the right-of-way shewn on the plan must have been acquired; sections 192 and 193. The provisions of section 254, sub-section (*a*), are directory and must mean the whole right-of-way, not a zig-zag course. The railway fencing could not be done without interfering with the plaintiff's property. The amendment by 8 & 9 Edw. VII. ch. 32, sec. 3, was passed after the writ in this action was issued. Mandamus or direction to proceed to acquire the right-of-way is the proper remedy under the provisions of the "Railway Act." *Corporation of Parkdale* v. *West*(1) ; *Bowen* v. *Canada Southern Railway Co.*(2).

THE CHIEF JUSTICE (dissenting).—I would dismiss this appeal for the reasons given by Sir Louis Davies.

(1) 12 App. Cas. 602.

(2) 14 Ont. App. R. 1.

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DAVIES J. (dissenting).—A very nice and difficult question has been raised by the appellants in this case, namely, whether a railway company can at any time be compelled by law to have compensation assessed and paid to the owners of parcels of lands embraced within the "located area" of the approved plans deposited by them with the Railway Board and in the county registry offices and over or along which they have constructed their roadbed, when such construction does not physically cross or touch these parcels of lands.

The appellate court of British Columbia held in this case that under the circumstances existing at the time respondent made his application for a mandamus such a right existed in him with respect to his lands, they being embraced and included in the located area of the approved plans deposited with the Board and with the registrar of deeds for the county or district through which the line of railway passed, and the roadbed having been constructed and the road operated on the adjoining parcels of lands past plaintiff's lot within the railway "located area."

The appellants contend that while they have *the right* to take the necessary proceedings to value any parcel of land embraced within the plans at any time after the latter's approval and registration has taken place, and the further right to take possession of any such lands upon payment or legal tender of the amount awarded, the right is purely optional, and that, with respect to lands within the located area not physically taken for the roadbed or touched by it, they cannot be forced or compelled to take the necessary proceedings to have compensation awarded whether their roadbed is completed past such lands or not. In

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other words, they contend that they can lay and run their railway along the lands embraced within their plans and can leave any one or more plots or parcels of land on either side of their rails and embankment, although within the area of the approved and filed plans, without taking the statutory steps to compensate the owner. They, of course, concede that they could not legally take physical possession of any part of any plot of land without first compensating the owner, but they contend that, if they can succeed in constructing their roadbed and laying their rails and running their road without touching any particular parcel of land within the located area, the owner of that parcel is powerless to compel them to take the compensation proceedings.

These propositions are, to say the least, a little startling. If the "Railway Act" permits a company to construct and run its road within and along a "located area" as to which their plans have been approved and registered, and compels them only to pay compensation to the owners of such plots of land within such located area as their roadbed has physically crossed, while permitting them to refuse compensation to the owners of such plots within such area as they have constructed their roadbed past, but have not physically touched, then a legislative wrong has been unintentionally committed. A cloud will have been placed on the owner's title; he will practically be unable to sell or utilize his lands as he might otherwise desire to do, and be helpless to have the wrong remedied. I cannot adopt such a construction of the statute.

The general scheme of the Act provides in section 157 for the fixing, subject to the approval of the Minis-

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ter, of the *general location* of the proposed line of railway, shewing among other things the termini and the principal towns and places through which the railway is to pass.

Then section 158 provides for the special and *defined location* and enacts that, when the provisions of section 157 are complied with, the

> company shall make a plan, profile and book of reference of the railway

shewing a great many particulars, amongst them being

> (*d*) the property lines and owners' names; (*e*) the areas and length and width of land proposed to be taken, in figures, stating every change of width.

Sub-section 4 provides that

> the book of reference shall describe the portion of land proposed to be taken in each lot to be *traversed* giving numbers of the lots and the area, length and width of the portion of each lot proposed to be taken, and the names of owners and occupiers so far as they can be ascertained.

I take it as beyond doubt that the words "traversed" and "taken" apply in this sub-section to all the parcels of land within the located area, whether physically crossed by the company's roadbed or not.

Sub-section 6 provides that

> the plan, profile and book of reference may be of a section or sections of the railway.

The 159th and following sections provide for the sanction of the Board being given to such plan, profile and book of reference and for their deposit, when sanctioned, with the Board, and the deposit of copies in the offices of the registrars of deeds for the districts or counties through which the road passes; and the 168th section prohibits the commencement of construction until the plan, profile and book of reference have been

so sanctioned by the Board and copies deposited with the registrars of deeds.

The practical effect of these sections is to delimit definitely the right-of-way of the company and to accurately fix and determine the areas, length and width of the lands proposed to be taken "and the proportion of land proposed to be taken in each lot" to be traversed and to give the company "power to proceed at once with the construction of the railway."

The 191st section provides for a notice of the deposit of such plans being given and published after which the company may enter into voluntary agreements with any of the owners of the lands taken "touching the same or the compensation to be paid therefore"; and section 192 declares that the deposit of the plans, etc., and the notice of such deposit shall be deemed a *general notice to all parties of the lands which will be required for the railway and works,* and that the date of such deposit shall be the date with reference to which such compensation or damages shall be ascertained.

An amendment was made in 1909 to the latter part of section 192 providing that, if the company did not actually acquire title to the lands within one year from the date of such deposit, then the date of such acquisition should be the date with reference to which such compensation or damages should be ascertained.

This amendment does not, however, in my opinion, affect the question of the owner's right to compel the company in case the compensation cannot be voluntarily agreed upon to take the statutory steps to have it fixed by arbitration.

Then follow sections 193 to 214 setting out the method or procedure with respect to the fixing of the

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compensation for the lands taken if not mutually agreed upon. The initiation of these proceedings lies with the company and, as I understand the argument submitted to us, it comes to this, that as the Act does not in the cases of disagreement as to the amount of compensation to be paid specifically confer on the owners of the lands taken power to initiate or bring about an arbitration to fix the damages, the company cannot be compelled to exercise its statutory powers of having an arbitration held for the purpose, and the owner, although his title had been clouded by the plan, profile and book of reference filed, and he himself practically denied the power of utilizing his lands for the purposes an owner may legitimately desire to do, must submit for just so long a time as the company determines. The argument is pressed in the case before us to the length of saying that even if the company by agreement or otherwise with some of the owners of these located lands is able to lay its rails along and across their lots past the lots of other owners, all being within the "located area," and operate its railway on these rails, without encroaching upon the actual area of these latter parcels, the owners of these latter parcels within the "located area" must submit to go without compensation at the whim or caprice of the company, and are powerless to invoke the aid of the courts to compel the company to exercise its statutory powers of having the damages assessed. In short, the argument is that the lands within the "located area" are not necessarily to be compensated for, but only such lots or parcels as the roadbed physically touches.

The 215th section declares that on payment or legal tender of the compensation or annual rent as awarded and agreed upon to the person entitled to receive it,

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the award or agreement shall vest in the company the power forthwith to take possession of the lands. I cannot, however, conceive it to be the true construction of the "Railway Act" to vest in the company the arbitrary powers of selecting which of the parcels of lands they have described in the located area for their railway right-of-way they shall have the compensation assessed for and which they can refuse unless they can get the lands on their own terms.

The depositing by the railway company of the approved plans with the Board and the registrars of the several counties through which the road is to pass, and the public notice given of such deposit vests a power in the company to take all the lands within the bounds of the located area of the right-of-way for the purposes of their road. It seems to me that if the company in the exercise of that power, either by agreement or arbitration, acquires the right to possession of some of the areas within their located right-of-way and then actually constructs their railway along and across those areas so acquired, their right to have compensation assessed as against the owners of other areas within the located area, which their railway has passed by but has escaped touching, at once ripens into a *duty,* which the injured owner can invoke the aid of the courts to have enforced.

If this is not so then it must be held that the company's caprice with regard to the parcels of land in the located area not physically crossed by their roadbed for which they must pay damages shall be the test of their liability to pay compensation, and that, although they have done everything required by the statute to delimit and fix the located area for their right-of-way, they can construct their roadbed in such

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way and manner that many parcels of land which they cannot obtain at their own price may be tied up in their owners' hands, the title clouded by the statutory action taken by the railway in placing the lands within the located area, and the owners left without any remedy to compel a valuation and payment. Such a construction is, to say the least, very startling and would result in many cases in creating most grievous hardship. I have reached the conclusion that there is a stage in the progress of these statutory proceedings when the powers of the railway ripen into a duty and that the facts of the case now before us shew that stage had been reached when the plaintiff began this action and entitled him to invoke the powers of the courts to compel the performance of that duty.

In the case now before us the determining factors are the approval in the first instance by the Minister of Railways of the *general location* of the defendant company's proposed line of railway. Secondly, the submitting by the company to the Board of Railway Commissioners of the plan, profile and book of reference of the located area, which included plaintiff's lands, and obtaining the Board's sanction to the same. Thirdly, the deposit with the Board of such approved plan, profile and book of reference, and of copies of the same in the offices of the registrars of deeds of the districts or counties through which the railway was to pass. Fourthly, the actual construction of such railway along the company's located right-of-way past and beyond but not touching physically plaintiff's lands.

The company's answer to the plaintiff's demand for compensation is that as it was able to construct its railway along its located right-of-way past the

plaintiff's lot of land without physically touching his plot they cannot be compelled to initiate the compensation proceedings with respect to it.

These several acts by the defendant company, all of them done under the authority of the "Railway Act," combine, in my judgment, to create a condition under which the defendant's statutory power to expropriate plaintiff's interest in the lands in question and have the compensation for such interest fixed by the arbitrators developed into a statutory duty of which the courts were competent to enjoin the performance. The language of the statute in conferring these powers, it is true, is not imperative, but the defendant's action may, in my opinion, at a certain stage make them so.

We have to choose between two interpretations of the statute, one leaving in the railway company an arbitrary discretion as to what lands within their located right-of-way they will pay compensation for, limited and controlled only by their ability so to construct their roadbed as to avoid trespassing physically upon areas or plots they do not desire to pay compensation for, or the interpretation I have adopted which is that, after the deposit of the approved plans with the Board and the registrars of the counties along the "located right-of-way," and after the giving of the prescribed public notice of this having been done, and after the construction of the roadbed along and across such located area has actually taken place, the company can be compelled to take the statutory proceedings to have the damages assessed with respect to all lands within such located and approved right-of-way along and past which they have so constructed their roadbed, whether the roadbed physically touches any part of such lands or not.

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The statute is careful to guard against the railway being compelled to pay for the lands within the right-of-way before they are required, because it provides that the plans submitted to the Board for its approval may be of a section or sections of the railway only, and the construction of the Act I contend for as the correct one does not impose upon the company the duty of initiating the proceedings for compensation except with respect to lands within the located area of their right-of-way as far as they have constructed their roadbed.

The conclusion, therefore, I reach is that where construction has commenced and been carried on along the located line and to the extent to which such construction has been carried, there has been a statutory taking of all the lands within such located lines, and that all of the owners of such lands have by reason of such statutory taking become entitled to require proceedings to be taken for the assessment of their compensation or damages; that the option of paying one such owner and refusing to pay another is not vested in the company, and that the test is not whether an owner's lot within the located area has been physically touched by the constructed roadbed, but whether such roadbed has been constructed on the located area past an owner's lot within such area.

I would, therefore, dismiss the appeal.

IDINGTON J.—The appellant obtained an order from the Railway Commission approving under section 237 of the "Railway Act" of the plans filed by said company, and permitting construction in accordance therewith.

It registered said plan and constructed said railway according thereto before this suit.

The right-of-way claimed by said plan and approved by said order covered part of the lands of which respondent was and is a lessee.

The appellant took no steps to acquire the title to said lands so leased, by giving notice to treat or obtaining an order for possession.

The railway track does not touch said lands, but passes so closely that a piece of timber on a passing car struck and damaged a fence or shed thereon.

The respondent sued for such damages and also to have a mandatory order issued directing the appellant to acquire said lands and compensate respondent therefor, so far as lying within the limits of said proposed right-of-way.

The case coming on for trial was disposed of, on statements of counsel as to the facts, by a judgment for ten dollars, to cover said damages, and ordering the appellant to proceed forthwith to acquire the right-of-way for their railway through and over lots 19 and 20, block 10, which includes the lands held by respondent as lessee, and pay him compensation he is entitled to by virtue of the "Railway Act."

On appeal the Court of Appeal for British Columbia maintained the judgment and dismissed the appeal.

I regret I cannot see my way to upholding the mandatory part of the said judgment.

It seems to me no legal relationship has arisen between the parties respecting said lands entitling any court to so direct as this judgment does, relative to the acquisition of said lands or compensation therefor.

In the absence of a notice to treat or any other

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basis in way of contract, there is no such contractual relation created as to warrant such interference.

Nor can I see any other obligation in law springing from what has transpired to form a basis of action for such adjudication.

The statute neither expressly nor impliedly asserts any such thing by way of creating a right in respondent.

The conduct of appellant, in refraining from living up to the spirit of what the Commission, in making the order permitting the construction, probably anticipated would be done, may be improper.

It may render the appellant liable to such proceedings as the Board of Railway Commissioners in discharge of their duties relative to public safety may see fit to take.

It does not, however, give to the respondent any special and personal right peculiar to him apart from the rest of the public.

It is, in a loose sort of way alleged, that the railway has been constructed along or across a lane in such a way as to injuriously affect the respondent's property.

I am not able on the meagre facts presented relative to this branch of the case made by the pleadings to see how we can give any relief on that score.

I am not sure that any relief in law is possible.

So far as it appears it may be that the appellant has acted entirely within its rights in law and injured no more than necessarily incidental to the exercise of its powers.

It may, on the other hand, have brought itself within the range of what is contemplated by section

155 of the "Railway Act," which has not been passed upon by this court in any case I can find.

So far as judicial authority goes the railway company may in constructing and running its road, or at all events the latter, do much detrimental to others for which no compensation can be claimed.

I am not prepared, however, to say, that no case can be made for claim to damages arising from obstructing and impeding the entrance to any part of an owner or lessee's property.

Probably this part of the case of the lessee has merely been alleged in the pleading on the supposition that the claim for mandamus, if tenable, would cover the whole, and substantially give full relief.

Without expressing any opinion on the legal merits of such a claim or that our present judgment may be pleaded by way of *res judicata* thereto, I think, as the respondent may be justified in overlooking it under the circumstances, he ought to be given, if he desires it, the opportunity to strike it out of his pleading if he thinks our refusal to maintain the mandatory order can be treated as relative thereto *res judicata.*

I would, therefore, allow the appeal and direct that the judgment be set aside and the claim for mandamus covered thereby be dismissed.

DUFF J.—I think the appeal should be allowed and for the reasons given by my brother Idington.

ANGLIN J.—Notwithstanding that the defendants appear to have used their statutory powers in a manner which I find it impossible to conceive that Parliament contemplated, I fear that the present action must fail.

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Apart from the injury to his fence, which is admitted and in respect of which he has been allowed $10 as damages, the plaintiff has not shewn that his lands have been "injuriously affected" by the construction of the defendants' railway. He has not established a case of interference with access to and from his property by the lane in question. He has not shewn that this lane has actually been taken by the company as part of its right-of way. Without a specific order for the closing or diversion of a highway the mere approval of a location plan, which shews it to be included in the projected right-of-way, does not warrant its being closed to traffic by a railway company. If it were duly closed and were actually taken as part of the right-of-way it may well be that the company would be obliged to fence it off from the adjoining property under section 254(*a*). There is no evidence that it has been so closed or taken. The only order of the Railway Board produced gives to the company merely a right to cross the lane—not a right to close it or divert it. An order merely authorizing the crossing of a highway does not confer the right to close it or the right to fence it off or otherwise to interfere with the access to it of the public or of adjoining property owners. It has been held in many cases that the mere laying of a railway upon a public highway does not give a right to compensation to the property owners whose property adjoins such highway. *Powell* v. *Toronto, Hamilton and Buffalo Railway Co.*(1).

Assuming that the construction of the defendants' railway and its operation where it passes the plaintiff's property with a narrower right-of-way than that shewn upon the location plan and sanctioned by the

(1) 25 Ont. App. R. 209.

Railway Board involved "a change, alteration or deviation" prohibited by section 168 of the Act, because the steps prescribed by section 167 had not been taken, and that such construction and operation were, therefore, illegal, the plaintiff has entirely failed to give evidence of any special damage such as he would have to prove to entitle him to an injunction restraining the operations of the defendants if he had in other respects made out a case for such relief. At the trial he tacitly disclaimed any special damage except as to the injury to his fence valued at $10 already referred to. Moreover, in his statement of claim he has not asked that the operation of the defendants' railway be enjoined as a nuisance, and at the opening of the trial his counsel defined his claim in these words:

> This is an action to compel the railway company to take lots 19 and 20 in the town-site of Huntingdon.

The proceedings which followed, consisting merely of statements by the opposing counsel to the presiding judge, make it clear that the only relief sought by the plaintiff was a mandatory order requiring the defendants to take statutory steps for the expropriation of his interest in the portions of the above lots included in their right-of-way as shewn on their location plan and to make him compensation for the interest so to be taken. In order to grant the plaintiff any other relief his action must be entirely re-cast and inferences of the existence of certain conditions and of special damage must be drawn without evidence to support them. I think it impossible that this should be done at the present stage of the litigation.

For the reasons given by Mr. Justice Idington I am of the opinion that the mandatory order granted

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to the plaintiff in the provincial courts cannot be maintained. However far the appellants may have departed from the spirit, and indeed from the letter, of the provisions of the "Railway Act"—however grossly they may have abused their statutory powers, I find no basis on which to rest an adjudication that they have established between themselves and the plaintiff a relationship such that from it flows a duty on their part to acquire his interest in the property in question which the courts may enforce by mandamus. I reach this conclusion with regret, because the conduct of the defendants seems to me to have been high-handed and most objectionable.

Although, in a proper case and upon proper evidence, it may be that the plaintiff would not be entirely without relief, the circumstances of this case appear to me to make it reasonably clear that legislation is desirable expressly empowering the Board of Railway Commissioners, when approving a location plan, to fix either a period within which the railway company must acquire or abandon the lands included in its right-of-way as shewn thereon, or after which the notices mentioned in section 193 shall be conclusively deemed to have been given, and, whether the Board has or has not fixed such a period when sanctioning the location plan, on the application of the owner of any such land at any time thereafter to fix such a period in respect of his property. The amendment of 1909 enabling the property owner, where notice to treat (section 193) has been given to him but has not been followed up by the company, himself to apply for the appointment of arbitrators, etc., does not provide for what is a case of real hardship, viz., the inclusion by a railway company in its

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projected right-of-way, as shewn upon a location plan, of lands in respect of which it unreasonably postpones the giving of notice to treat, although by the registration of the sanctioned location plan the owners of all lands within the located right-of-way are practically prevented from selling them or using them to any advantage. Where the company has not only filed the location plan, but proceeds to construct and operate its lines without acquiring some of the land included in its right-of-way as shewn on the location plan the hardship to which the owner of such land is subjected is still greater. It may be that in the latter case the land-owner can obtain some indirect and not very satisfactory relief by way of injunction or otherwise; but in the former, under the present legislation, he appears to be entirely without relief.

I am, with respect, of the opinion that this appeal must be allowed.

Appeal allowed with costs.

Solicitors for the appellants: *MacNeill, Bird, Macdonald & Bayfield.*

Solicitor for the respondent: *George E. Martin.*