

Exchequer of Pleas 1838

Case of THICKNESSE v LANCASTER CANAL COMPANY.

Overview

A company were empowered by an act of Parliament to make a canal within certain limits, without specifying any time within which it was to be completed. —Held, that no limitation as to time could be assigned to the powers conferred by an intendment that they were to be exercised within a reasonable lime, and consequently that the works might be resumed at any period.

Query, whether any and what acts would amount to an abandonment of the powers so conferred? f the capital, which the act empowers the Company to raise, be not raised to the full extent :

Query, whether that circumstance affects the rights of the Company to prosecute the work afterwards?

The act of Parliament gave certain commissioners power to purchase lands, etc. and directed them to make compensation to persons interested therein for all _ damage sustained : Held , that a party entitled to an easement over lands so purchased by them, could not maintain trespass for acts done upon those lands to the prejudice of his easement, but as soon as any damage was actually sustained, he ought to have claimed compensation under the act.

The Legal Case

This was an action on the case tried before Patteson, J., at the Liverpool Spring Assizes for the year 1837, when a verdict was found for the defendant for the damages in the declaration, subject to the following case.

The first count in the declaration stated, that the plaintiff was possessed of a coal mine under certain lands in the county of Lancaster, with liberty for him, his servants, etc., during the residue of a lease still in being, to enter on those lands with carts, horses, materials, implements etc., and to erect any buildings, machines, etc., and to make any drains, etc.; to make and use any wagon-ways, railways, and other ways, and to do any other acts on the said land necessary or convenient for working the said mines, or for selling or carrying away the same by such means as he might think fit; and to lay up the same for sale or other uses, on any part of the lands; and that by virtue and in exercise of the privileges, etc., the plaintiff had made and used certain railways and other ways on the said lands, for the purpose of working the mine, and selling and disposing of the same and its produce: yet that the defendant placed and threw large quantities of soil, earth, rubbish, etc., on those lands, and made embankments, and also canals and excavations in and across the same, and continued them hitherto, and thereby during that time obstructed the plaintiff in the working his mine and the enjoyment of the said privileges, and obstructed and destroyed the said railways and other ways, and prevented him from carrying away and selling and disposing of the said mine and its produce, and particularly from carrying it

towards or unto certain navigable canals, viz. the Lancaster Canal and the Leeds and Liverpool Canal.

The second count was similar, with respect to another coal mine held under similar privileges. The third count stated that certain lands were in the occupation of John Atherton, as tenant to the plaintiff, but that the defendants placed large quantities of soil, earth, rubbish, &c., thereon, and made embankments, and also canals and excavations, on and across the same, and continued them hitherto, by means whereof the plaintiffs reversion was injured, etc.

Plea, not guilty. By an act passed in the 32 d Geo. 3, (c. 101,) entitled An Act for making and maintaining a Navigable Canal from Kirby Kendal, in the county of Westmoreland, to West Houghton, in the county palatine of Lancaster, and certain branches, a company was incorporated for that purpose, by the name of "The Company of Proprietors of the Lancaster Canal Navigation," and were empowered to make the said canal and branches along a line specified, and all such reservoirs and feeders as should be necessary; and for the purposes aforesaid, (amongst others in the act mentioned,) the said Company, their deputies, agent, and workmen, were authorised to enter into and upon the lands and grounds of any person, etc.; and to survey, and to set out and ascertain such parts thereof as they should think necessary for making the said canal, etc., and all such other works, matters, and conveniences as they should think proper; and also to 'bore, dig, and trench, get, remove, take, and carry away and lay earth, clay, stone, soil, rubbish, trees, roots of trees, etc., and any other matters and things which might be dug or got in making the said canal, etc., (with other incidental powers,) they the said Company doing as little damage as possible, and making satisfaction in said manner by the said act mentioned, to the owners or proprietors of or persons interested in the lands, tenements, or hereditaments, etc., which should be taken and removed, diverted, or prejudiced, for all damages by them sustained; and it was further provided, that the said act should be sufficient to indemnify the Company for acts done by virtue thereof.

By section 30, it was enacted, that after any such parts of the said lands or grounds should be set out and ascertained for making the said canal and other works, it 'should be lawful for all persons whatsoever, who should be seized, possessed, or interested of or in any lands or grounds which should be so set out and ascertained, or any part thereof, to contract for, sell, and convey unto the Company, all or any part of such lands or grounds which should from time to time be so set out and ascertained.'

By section 32, after reciting that differences might arise between the Company and the several owners of and persons interested in any lands, grounds, tenements, hereditaments, etc., which should or might be affected or prejudiced by the execution of any of the powers of the said act, touching the purchase-money to be paid, or recompense to be made to them respectively, it was enacted that all persons qualified in the manner by the said act provided, should be commissioners for settling all questions and differences which should arise between the Company and the several proprietors of and persons interested in any lands, grounds, tenements, hereditaments, mills, fisheries, or waters, that should or would be affected or prejudiced by the execution of any of the powers thereby granted, and that they, or any five of them, by writing under their hands, with consent of parties, might determine what sums should be paid by the Company for the absolute purchase of the lands, grounds, or hereditaments, which should be set out and ascertained for making the said canal, etc., or others the purposes of the said act; and also adjust and determine what other distinct sum or sums should be paid by the Company as a recompense for any damages which might be sustained by persons being owners of or interested in any mills, etc., lands, grounds, tenements, or hereditaments, by reason of

severance; or in case such price could not be so settled, then the said commissioners were empowered to issue a warrant to the sheriff, commanding him to empanel a jury, to appear on a day not being less than nine, nor more than twenty one days after warrant served, who should 'inquire of and assess the sum to be paid for the purchase of such lands and grounds, or the recompense to be made for the damages that might or should/ be sustained ; and the jury were to take into consideration the damage or inconvenience which might arise by means of any bridges, roads or other communications, and assess separate damages for the same: and the commissioners should give judgment for such purchase-money or recompense.

By section 50, it was enacted that upon payment or legal tender of the money agreed upon, or determined upon by the said commissioners, or assessed by such juries as aforesaid, for the purchase of any such lands, grounds, or hereditaments as aforesaid, in the proprietors thereof, or other persons entitled to receive -such money, then it should be lawful for the Company immediately to enter upon such lands, etc., and to dig, etc., and remove earth, et.c., for making, etc., the said canal.

Section 53 enacted, that the commissioners might and should settle what shares and proportions of the purchase-moneys or recompense for damages which should be so agreed upon, determined, or assessed, should be allowed to any tenant or other person having a particular estate, term, or interest in the premises, for his or her respective interest therein.

Sections 55 & 56 reserved to proprietors of mines under the canal their right to work them, and provided a remedy in case of damage to the canal by working too near it. Section 128 provided, that in any action against the Company for acts done in pursuance of the act, the defendant or defendants might plead the general issue, and give the act and special matter in evidence ; and if it should appear to be so done, the jury should find for the defendant.

By statute 59 Geo. 3, c. 113, reciting that great progress had been made towards the completion of the canal, but that the money authorised to be raised had been found inadequate to the purposes of the act, the Company "were_ empowered to raise a further sum for the completion of certain new works thereby authorised, and certain other powers, limited in their duration to two years from the time of passing that act, were also conferred. The plaintiff has been for some time working an extensive colliery at Kirkless, at Aspull, in the county of Lancaster, lying under the lands delineated in a certain plan (which formed part of the case.) The coal under a portion of the lands, he holds under a lease from Mr. Wood, dated 3rd of May, 1824, for forty years: that under another portion, under a lease from Sir Robert Holt Leigh, dated the 1st February, 1834, for eleven years. He has also held other lands for twenty years as tenant from year to year to Sir Robert Holt Leigh, at a rent of £80, and has let the same to his coal agent, John Atherton, for many years, as tenant from year to year, at a rent of £60, who was in possession at the time of the supposed causes of action. The coals under another portion of the lands marked on the map, which, as well as the others, the plaintiff has worked for several years, he holds under a lease from Mr. Hodgson.

Narrative

The Lancaster Canal Company made their canal as far southward as a place called Bark Hill, about 1816. In that year an extension of it was made to a point in Kirkless, which is about four miles short of the place of West Houghton, to which they were originally authorised to extend it. The land taken by the Company for the purpose of that extension was contracted and agreed for between the Company and the owners of the lands through which that extended part passed, and was taken by the Company under such contracts.

In 1816 a junction was made at that point, between the Lancaster Canal and another public navigable canal called the Liverpool Canal. There was a formal opening on the occasion of that junction, on the 22nd October, 1816, a procession along the canals, several bands of music, and a great assemblage of people. Since that time the two canals have been open to the public; boats have traversed them, and tolls have been paid. From that time nothing was done by the Canal Company to the south of the point above mentioned, with the exception after mentioned, which produced the present action. The original line of the canal has been in progress for the last six or seven years. When the canal had been made to the above point, a wall was built across the end of the canal there. Lord Balcarres made a pier also upon the wall at the same point, for the purpose of loading coal on the canal there, and the plaintiff made another adjoining that of Lord Balcarres, and also a basin at the side of the canal at the same place, adjoining the pier, for the same purpose. This wall and the piers extended across the whole breadth of the canal. The plaintiff also, under the powers in his leases, made a railway connecting his pier with one of the basins of the Leeds and Liverpool Canal, for the purposes of his colliery. He also, under the powers in his leases, made a wharf or laying ground for the purpose of depositing his coals there. He also otherwise expended a large sum upon the colliery.

In April 1835, the workmen of the Company began to make the further cut in question, 'to the south of this point. This was done under certain agreements with Sir R. H. Leigh and the devisees of Hodgson, delineated in a certain plan and with their knowledge and consent. They pared away the turf along the whole line of their intended extension ; and the turf of that part of the land along the extended line which was included in the agreement hereinafter mentioned with Sir R. H. Leigh, was taken away by Sir R. H. Leigh. They excavated the ground on both sides of the plaintiff's railway, but left that standing until the 9th of February, 1836, when they removed it and the ground on which it stood, and let in the water from the canal. In making this extension they cut through the wall and piers. This extension is about 200 yards long, and terminates in a field occupied by Atherton under the plaintiff.

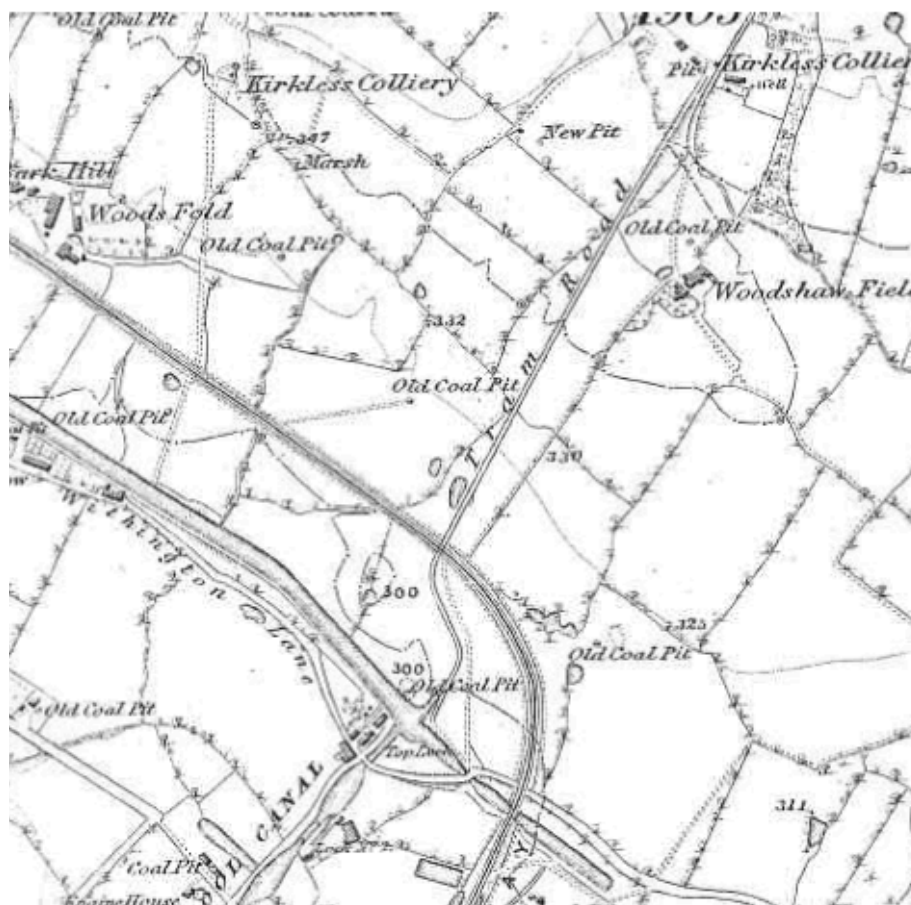
On the 29th of April, 1834, an agent of the Canal 'Company pointed out to Mr. Wood the land which was afterwards taken from him by the Canal Company, for the extension of their canal. On or about the 2nd of July, 1834, all the lands which were required by the Company for such extension, were set out. These lands were within the parliamentary line, and were necessary for the extension of the canal. On the 9th of September, 1834, the Canal Company received a notice from Mr. Wood not to trespass upon his lands, which intimated his dissent to the Company taking the same for the extension of their canal. On the 10th of September, Mr. Wood's land, which had been before set out, was staked out; and on the same day, a tender of a sum of money was made to him by the company, for the value of the said land and damages, which was refused by Mr. Wood, who admitted the value to be sufficient, but stated that he had promised his coal tenant, Mr. Thicknesse, to oppose the extension of the canal. Mr. Wood's tenant of this land was then applied to on the same day on the part of the Company, but she refused to treat with them for the sale of

her interest in the land. On the 19th of September, 1834, the Company received a notice from the solicitors of the plaintiff, stating that the plaintiff was the lessee of certain coal mines under certain lands, which were the same as those set out, through which the Lancaster Canal Company had manifested an intention of cutting a canal, and that he altogether disputed their right to cut such canal, and that, as the same would interfere prejudicially with his works and powers under his coal leases, he should resort to legal means for his protection. Besides the land belonging to Mr. Wood, and before mentioned, the land taken by the Company for the extension of their canal comprised certain land belonging to Sir R. H. Leigh, and certain other land belonging to Mr. Hodgson's devisees. These lands of Sir R. H. Leigh, and the devisees of Mr. Hodson, were taken by the Company under agreements with them respectively, and with their 'respective consents; and these agreements were pursuant to the provisions of the statute 32 Geo. 3, c. 101, and were duly enrolled; and were agreements for the value of the absolute interest in the lands.

The land purchased off Sir R. H. Leigh, under agreement before referred to with him, was part of the land demised by him to the plaintiff, - and by the plaintiff demised to John Atherton, as before mentioned.

On the 27th of September, 1834, five commissioners, duly qualified and appointed, gave due notice, in pursuance of a requisition to them on behalf of the said Company, of a general meeting of the said commissioners, at Lancaster, on the 13th day of October, for the purpose of determining and adjusting what sum or sums of money should be paid by the said Company to the said James Wood and his tenant Catherine Bretherton, for the absolute purchase of the lands before referred to, of which the said James Wood was owner, and Catherine Bretherton his tenant thereof, and also what other distinct sum should be paid to them or either of them in recompense for any damages which might be sustained by either by reason of severance of the lands; and that in case of their refusal to submit the said matters to the determination of the commissioners, they should issue their warrant to summon a jury, pursuant to the act, to assess the value of the said lands, and the amount of the said recompense. The commissioners met pursuant to such notice at the time and place specified in the notice, and proof being made to them of a refusal on the part of Mr. Wood and Mrs. Bretherton to submit the matter to their decision, they on the same day signed a warrant to the sheriff of Lancaster to empanel a jury to appear before them at Yarrow Bridge, at a certain place there within one mile of the canal, on the 24th of October; and notice of this intended meeting on the 24th was given to Mr. Wood, by a letter addressed and sent by the post to his attorney, on the 14th of October. On the said 24th 'day of October, the said commissioners and the jury which had been summoned and returned, met at the time and place named in the said warrant. Mr. Wood appeared by his attorney, under a written protest, which, amongst many others, recapitulated his previous objections to the want of power in the Company under their act to extend their canal, and insisted that the warrant ought to have made mention of Mr. Thicknesse, and have summoned the jury to-assess damages for his interest in the lands. The jury awarded by their verdict £80 to Wood for the value of the land, and £5 to the tenant for her interest in the same, and £20 to Wood for the damage occasioned by severance, and an inquisition was regularly drawn up and signed, and judgment given by the commissioners for the same. On the 4th of November, these sums were tendered to Wood and Bretherton respectively, and refused by them, and on the 9th of December, were paid into the Bank of England, in the name and with the privity of the Accountant-General, to the credit of Wood and Bretherton respectively. On the 19th of December, in the same year, the Company entered on the said lands belonging to Wood. The action was commenced on the 7th of July, 1836.

The plaintiff had no estate in the surface of the lands taken by the Company for the purpose of the said extension from Wood, or from the devisees of Hodgson. The question for the opinion of the Court was, whether the plaintiff was entitled to recover on all, or any, or which of the counts of the declaration, and in that case it was agreed that the amount of the damages should be referred. If the Court should be of opinion that the plaintiff was not entitled to recover, or that his action was commenced too late, then a nonsuit to be entered, or a verdict for the defendant.



Thicknesse's Kirkless Colliery, the Springs Branch railway and the bridge over the extension to the Lancaster Canal as shown on the 1849 O.S. Sheet 93.

Thickness Family

Ralph Thicknesse (1709-41), of Farthinghoe, Northamptonshire, who was educated at and became a fellow of King's College, Cambridge.) He qualified as a physician and, having disposed of Balterley, settled and practised in Wigan. His marriage to his kinswoman Anne Bostock was financially advantageous to him. In 1749 he published *A Treatise on Foreign Vegetables*. On his death, 12 Feb. 1790, he was variously described as 'a man of the nicest feeling, and of a compassionate disposition'; and as 'a victim ... to the blue demon of dismay', who 'as an acquaintance ... was capricious; as a master, a tyrant; and as a physician, trifling, unscientific, and generally unsuccessful'.²

By then his only son, imaginatively named Ralph, was established as a banker in Wigan. He was subsequently in partnership with Thomas Woodcock of Bank House, who presumably was his brother-in-law. He had a residence at Beech Hill, just to the north of the town centre, and became 'extensively engaged in the coal trade' at Birkett Bank and Ince; he was a co-proprietor of the lucrative Kirklees colliery.³ His politics were liberal, and on 10 Mar. 1831 he chaired a Wigan meeting called to express support for the Grey ministry's reform bill. He said that while the measure might have disappointed the advocates of the ballot and universal suffrage, it 'exceeded' the expectations of most reformers, whom he called on to back the king and his ministers against the boroughmongers. A few days later he announced his intention of standing for Wigan when the bill had become law.⁴ As it happened, he came forward as a reformer and the opponent of the Balcarres interest at the general election precipitated by the defeat of the measure. At the nomination he declared that 'a moderate reform, such as had been proposed by the enemies of the present bill, would never meet with the confidence of the nation'. He advocated free trade, and in particular abolition of the East India Company's monopoly:

The situation of the working classes of England was most deplorable; but he believed that if an opening was made in the Indian seas, our trade would be so much improved, that artisans of any description would get wages sufficient to keep them in happiness and comfort.

A serious outbreak of violence forced an adjournment of proceedings, but when order was restored the next day Thicknesse topped the poll.⁵ He never joined Brooks's, and in the House acted with the advanced wing of the government's supporters. He voted for the second reading of the reintroduced reform bill, 6 July, was a reliable voter for its details and divided for its third reading, 19, and passage, 21 Sept. 1831. He was in the minority of 27 against the grant for the Society for the Propagation of the Gospels in the colonies, 25 July. He voted with O'Connell to proceed with the Dublin election committee, 29 July, and was in the minority for disarming the Irish yeomanry, 11 Aug.; but he divided twice with ministers on the findings of the Dublin committee, 23 Aug. He was in minorities on the Liverpool writ, 5 Sept., and for inquiry into the Deacles' allegations against William Bingham Baring*, 27 Sept. He voted for the Scottish reform bill, 23 Sept., spoke at the Wigan reform meeting, 26 Sept.,⁶ and divided for the motion of confidence in ministers, 10 Oct. Thicknesse voted for the second reading of the revised reform bill, 17 Dec. 1831. He generally supported its details, but he was one of the minority of 32 who opposed the enfranchisement of £50 tenants, 1 Feb. 1832. He divided for the third reading, 22 Mar. He voted for the vestries bill, 23 Jan., and the abolition of Irish tithes, 16 Feb., but sided with ministers on the Russian-Dutch loan, 26 Jan., 16, 20 July, and relations with

Portugal, 9 Feb. He voted against Warburton's anatomy bill, 27 Feb., 11 May, when he was a teller for the minority of four. On 8 Mar. he presented and endorsed a petition against the factories regulation bill from the mill owners of Wigan who, he explained, were of opinion that reduced hours must entail lower wages. He divided with government on the navy civil departments bill, 6 Apr., but voted against the Irish registry of deeds bill, 9 Apr. He presented petitions for mitigation of the severity of the criminal code, 8 May, and voted for the Liverpool disfranchisement bill, 23 May, and against the government's temporizing amendment on the abolition of slavery, 24 May. He voted for the address calling on the king to appoint only ministers who would carry the reform bill unimpaired, 10 May, and presented a Wigan petition for supplies to be withheld until it had been passed, 18 May. He voted for the second reading of Irish reform bill, 25 May, and against a Conservative amendment to the Scottish measure, 1 June, but was in the minority for preservation of the voting rights of Irish freemen, 2 July. When ministers proposed an amendment to the boundaries bill to make Newton rather than Wigan the place of nomination for South Lancashire, 7 June, he argued strongly against it and, despite the county Member Lord Stanley's reasoned plea, insisted on dividing the House: he got five votes to 54. He was in the minorities on the boundaries of Whitehaven and Stamford, 22 June. He voted for a tax on Irish absentees and to suspend flogging in the army, 19 June, to make inquests public, 20 June, and to reduce the barracks grant, 2 July. He supported Alexander Baring's bill to exclude insolvent debtors from Parliament, 27 June, and presented a Wigan magistrates' petition against the vagrants removal bill, 16 July 1832.

Thicknesse topped the poll at Wigan at the general election of 1832, when he advocated repeal of the corn laws and the abolition of tithes and boasted of his 'non-attachment to any party'.⁷ By the time he stood down at the dissolution of 1834, he had withdrawn from the Wigan bank, which was now styled Woodcock and Son. He died, 'aged 74', at Beech Hill, 1 Nov. 1842.⁸ By his will, which was proved at Chester, 9 Jan., and in London, at £1,000, 16 Sept. 1843, he left all his property, including mines and collieries, to his only child, Ralph Anthony Thicknesse (1800-54), pro-ballot Liberal Member for Wigan from 1847 until his death.⁹ As Ralph Anthony's only son predeceased him, Beech Hill passed to his daughter Anne, whose husband, Francis Henry Coldwell, later bishop of Leicester, took the name of Thicknesse in 1859.