Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of The Caledonian Coal Company, Limited, v. The Seaham Colliery Company, Limited, from the Supreme Court of New South Wales; delivered 13th June 1901.

Present at the Hearing:

LORD MACNAGHTEN.
LORD JAMES OF HEREFORD.
LORD LINDLEY.
SIR RICHARD COUCH.
SIR FORD NORTH.

[*Delivered by Lord James of Hereford.*]

This is an Appeal from a decree of the Chief Judge in Equity of the Colony of New South Wales. The question at issue arises out of the following facts.

The Appellants and Respondents are Colliery Companies, both possessing collieries in New South Wales. In the year 1886 the Wallsend Coal Company and the Monk Wearmouth Colliery Company were in possession of certain adjacent coal mines and land containing coal. These two Companies desired to construct a railway to facilitate communication between their respective collieries and the Government railway and they accordingly in the year 1886 entered into an agreement for the purpose of carrying out this object. It being necessary for the purpose of constructing the railway to acquire compulsory powers, an Act of the Parliament of New South Wales was obtained under which power was given to construct the railway in accordance with the terms contained in the agreement which

16912. 100.—6/1901. [30] A

is set out in the schedule to the Act and is as follows:—

"An Agreement made this day of A.D. one "thousand eight hundred and eighty-six between the West "Wallsend Coal Company Limited of the one part and the "Monk Wearmouth Colliery Estate Company of Australia "Limited of the other part.

"Witnesseth that in consideration of the terms hereinafter "expressed the said Companies have agreed to join in "constructing a railway line from a point near the West "Wallsend Coal Company's pit to the Sydney and Waratah "Railway Line the cost of construction and purchase of land "for the said line to run over and all the necessary expenses "of laying the said Railway Line to be borne by the respective "Companies in equal shares half cost of value of land belong-"ing to West Wallsend over which railway passes to be paid "by Monk Wearmouth. The cost of renewals and main-"tenances to the said Railway Line to be paid by each "Company or their transferees in proportion to the traffic "done by each Company or their transferees and it is also "agreed that should the Monk Wearmouth Colliery Estate "Company of Australia Limited or their transferees so desire "they shall be at liberty to construct an extension of the said "Railway Line from the said West Wallsend Coal Company "pit to their collieries situated at Monk Wearmouth at the "cost of the said Monk Wearmouth Colliery Estate Company. "Provided always that the West Wallsend Coal Company "Limited or their transferees shall be at liberty to use the "said extension by paying a proportionate part of the cost "of renewals and maintenance to the extension according to "the traffic done by the said West Wallsend Coal Company "Limited or their transferees. And it is further agreed be-"tween the parties hereto that in case of any dispute arising as "to the management and construction of the said line the same "shall be referred to arbitration as provided for in the 'West "'Wallsend and Monk Wearmouth Railway Act of 1886.'"

The Act contained two sections which bore materially upon the question under consideration. The third section enacted that the railway should be open to the public use upon payment of a toll to the two Companies of a sum not exceeding 2*d.* per ton per mile in respect of every ton of goods carried for the public. The fourth section gave power to the owners and occupiers of lands traversed by the railway to lay down upon their own lands collateral branches of railway to communicate with the said railway and enacted that the Companies should if required at the expense of

such owners or occupiers make openings in the rails and such additional lines of railway as might be necessary for effecting such communication.

In pursuance of the agreement they had entered into the Companies constructed the railway and worked it for some years. In 1894 the Appellants acquired the interests of the Wallsend Company and in 1897 the Respondents became possessed of the interests of the Monk Wearmouth Company and since that year the two Companies have jointly used and managed the railway.

In the year 1896 the Appellants acquired the Killingworth Colliery, a coal bearing field adjoining the Wallsend Colliery and commenced to work it and so raised an additional quantity of coal. At the time of the purchase the Killingworth Company had partly constructed a branch line for the purpose of conveying coal on to the railway belonging to the two Companies, and the Appellants proceeded to complete the branch line and to carry it on so as to communicate with the Companies' line. This communication was effected a few months before the commencement of this action.

The Respondents forthwith made a claim under the third section of the Act alleging that for the purposes of the traffic brought over the branch line the Appellants must be regarded as being members of the public and were therefore liable to pay a toll of 2*d*. per ton per mile for the coal coming from the Killingworth colliery carried on the joint line.

In the Court below judgment was given in favour of this claim and the Appeal from such judgment now comes before their Lordships.

Both in the Court below and on the hearing of the Appeal it was contended on the part of the Plaintiffs in the action (the present Respondents) that in constructing the branch railway and

when carrying the coals brought by such branch railway on the jointly constructed line the Appellants must be regarded as one of the public and must pay the toll mentioned in Clause 3 of the Act.

But their Lordships are of opinion that the contention is erroneous and cannot be maintained.

The Appellants and Respondents are joint owners and occupiers of the railway line constructed under the agreement. That line was intended to be used for the purpose of carrying the coal of those who are now represented by the Appellants and Respondents. No limitation as to the quantity of coal to be carried or the collieries from which it is to be derived can be found in the statute or in the scheduled agreement. The recital in the preamble to the Act does not appear to constitute any such limitation. It is true that the opening of branch lines at the will of one of the parties to the agreement would probably cause such Company to be obtaining a greater advantage from the joint line than that enjoyed by the other Company. But the parties to the agreement seemed to contemplate that this inequality of user might exist.

There is no reference to an equal use of the line either in the Act or agreement, and the latter document recognises an unequal use by the insertion of the term "that the cost of renewals "and maintenances to the said railway line to be "paid by each Company or their transferees in "proportion to the traffic done by each Com-"pany." Greater proportionate traffic would thus throw greater expenditure upon either Company and so to a very considerable extent regulate the adjustment between benefit and cost.

It is worthy of notice that the Appellant Company appears to have constructed the branch

line in question and brought it into communication with the original line independently and without applying to the joint Companies to make openings in the latter line and paying the expense incurred thereby. Under Clause 4 of the Act such application and payment would have to be made if the branch line had been made by one of the public.

It seems to their Lordships that the bringing the branch line into communication with the main line and the carrying of the Appellants' coal upon the latter were acts lawfully done—and being in accordance with the intention and purpose of both of the parties to the agreement there is nothing approaching an ouster of one of the joint occupiers of the line by the other.

For these reasons their Lordships are of opinion that the decree made in the suit cannot be maintained and should be reversed and the suit dismissed with costs, and their Lordships will humbly advise His Majesty accordingly. The Respondents will pay the costs of this Appeal.