

E. D. Armour, K.C., and R. B. Henderson, for the railway company.

M. K. Cowan, K.C., and A. W. Ballantyne, for Robert Davies.

The judgment of the Court was delivered by HODGINS, J.A.:—By sec. 170 of the Railway Act, R.S.C. 1906 ch. 37, minerals must be expressly purchased, i.e., bought or expropriated, and the railway company have not expressly purchased them in this case. The arbitrators have, nevertheless, allowed the respondent \$123,046 for these minerals under and in the slopes supporting the right of way, made up . . . as follows:—

2. Damage by taking 196,500 yards of shale in right of way from C.P.R. to test-pit 7, less 33 yards, at 75 cents	\$73,886
3. Damage by taking 20,666 yards of shale in slope supporting right of way to test-pit 7, at 75 cents.....	7,905
6. Damage by taking 128,744 yards of shale in right of way 1.33 acres from line belt, lots 14 and 15 opposite North Hill to a point 550 feet south, at 55 cents.....	36,113
7. Damage for taking shale contained in slope along 550 feet on right of way opposite North Hill, 18,333 yards, at 55 cents.....	5,142
	\$123,046

With regard to items 2 and 6, the effect seems to be to give the respondent the value of the minerals under the railway line, although they are not taken. And it is urged that deprivation . . . is equivalent to actual taking, because the Railway Act provides for giving compensation once only, and that, unless the land-owner can recover compensation now for this deprivation, he can never get it at all. The provisions of the English Railway Clauses Consolidation Act, 1845, 8 & 9 Vict. ch. 20, secs. 77 to 85, are contrasted with those in our Railway Act, R.S.C. 1906 ch. 37, secs. 170 and 171, and the above conclusion is drawn from what the comparison shews. . . .

[Reference to *Howley Park Coal Co. v. London and North Western R.W. Co.*, [1911] 2 Ch. 97, affirmed in the House of Lords, *London and North Western R.W. Co. v. Howley Park Coal Co.*, [1913] A.C. 11, 107 L.T.R. 625; *Fletcher v. Great Western R.W. Co.*, 4 H. & N. 242, 5 H. & N. 689; *Great Western R.W. Co. v. Bennett*, L.R. 2 H.L. 27; *Errington v. Metropolitan R.W. Co.*, 19 Ch.D. 559; *Ruabon Brick Co. v. Great Western R.W. Co.*, [1893] 1 Ch. 448; *In re Lord Gerard and London and*