CANADIAN NATIONAL RAILWAY COMPANY ..... } PLAINTIFF;

1930
Mar. 21.
April 10.

VS.

ALEX. M. LEWIS ET AL..... DEFENDANTS.

Expropriation by Canadian National Railway—Jurisdiction—Comity of Court—Effect of Repeal—9-10 Geo. V, c. 13—19-20 Geo. V, c. 10.

On the 13th July, 1927, the plaintiff expropriated certain lands for the purpose of erecting a station in Hamilton, under Section 13 of 9-10 Geo. V, c. 13. Notice was then given defendants by plaintiff, under said Act, that it would apply to Carpenter J., to determine the compensation, and defendants, Lewis et al, gave notice to the plaintiff that they would apply to Evans J. for the same purpose, which cases are still pending before the Provincial Courts. On June 14, 1929, by 19-20 Geo. V, ch. 10, the Exchequer Court of Canada was given jurisdiction to hear and determine actions by the C.N.R. to fix the compensation to be paid by it for lands expropriated, excepting in cases below $2,500 which were still to be determined by the Provincial Courts.

1930

CAN. NAT. RY. CO. v. LEWIS ET AL.

Held, that the Exchequer Court of Canada has no jurisdiction to hear and determine an action by the Canadian National Railway, for fixing the compensation to be paid for lands expropriated by it before the 14th June, 1929, date when the C.N.R. Act (19-20 Geo. V, c. 10) came into force, conferring jurisdiction on this court.

2. Held further that the legal proceedings already instituted before the Provincial Courts, under the Railway Act, should be there continued and even enforced, the defendants having a vested right to do so under the law existing at the date of expropriation.

3. That when the effect of a repeal is to take away a right, *prima facie,* it is not retroactive; but when it deals exclusively with procedure it is retroactive.

4. That a court must not usurp a jurisdiction with which it is not clearly legally vested, but must keep within the limits of its statutory authority and should not exercise powers beyond the scope of the Act giving it jurisdiction and it cannot assume jurisdiction, unless clearly conferred, in respect of matters of prior origin to the Act.

Quaere—Does not Comity of Courts also arise in the present case?

Argument on questions of law raised by the leadings, in an action by the Canadian National Railway to have certain lands expropriated by it in 1927 valued, and the compensation to be paid therefore fixed by the court.

The questions of law were argued before the Honourable Mr. Justice Audette at Ottawa.

C. W. Bell, K.C., and *R. E. Laidlaw,* for plaintiff.

F. H. Chrysler, K.C., and *P. H. Chrysler* for defendants Levy.

A. M. Lewis, K.C., appearing personally.

The facts are stated in the reasons for judgment.

AUDETTE J., now (April 10, 1930), delivered judgment.

This matter comes before the court, under the provisions of Rule 126, pursuant to an order directing that the question of law, raised by the pleadings, respecting the jurisdiction of this court, be disposed of before the trial and that upon such hearing the parties may adduce evidence as may be deemed necessary for the proper determination of the said question of law.

No evidence was adduced on the hearing, but a voluminous *statement of facts,* duly agreed upon, was filed of record. The only defendants appearing on this hearing were Alex. M. Lewis, Morris Levy and Gabriel H. Levy, no one appearing on behalf of all the other defendants, although duly notified.

1930

CAN. NAT. RY. CO. v. LEWIS ET AL.

Audette J.

The plaintiff expropriated a certain parcel or tract of land in the city of Hamilton, for the purpose of erecting a new station thereon. This expropriation was effected by depositing, on the 13th July, 1927, a plan and description of the land, under the provisions of the Expropriation Act applicable to such mode of expropriation, under section 13 of "An Act to Incorporate Canadian National Railway Company and Respecting Canadian National Railways" 9-10 Geo. V, ch. 13 (now sec. 17, ch. 172, R.S.C., 1927, which came into force on the 1st February, 1928).

Under the provisions of this section 13 (which, as said in the case of *Boland* v. *C.N. Ry.* (1), employs a very involved method of expression) the land taken became vested in the railway by the mere depositing of the plan, as provided by the Expropriation Act, but the compensation to be paid for such land is to be ascertained under the provisions of the Railway Act.

Acting in compliance thereto, notice was given by the plaintiff to the defendants, dated 26th February, 1929, that an application would be made, on the 13th March, 1929, to His Honour Judge Carpenter, to determine the compensation.

The defendants Lewis, M. Levy and G. H. Levy, on the 25th February, 1929, served on the plaintiff a notice that on the 7th March, 1929, an application would be made to His Honour Judge Evans, to determine the compensation.

An application by the plaintiff to set aside proceedings before His Honour Judge Evans was refused and the appointment before him was, from time to time, postponed. The plaintiff appeared nevertheless before His Honour Judge Carpenter on the day appointed.

The matter stood in that stage when, on the 14th of June, 1929, An Act to amend the Canadian National Railways Act, 19-20 Geo. V, ch. 10, came into force, wherein by section 2 thereof section 17 of the Canadian National Railways Act was amended whereby under subsection (*d*) thereof it is provided that the compensation payable for the land expropriated is to be ascertained by the Exchequer Court, excepting, however, in cases of and below $2,500, where the latter amount is still to be ascertained under the Railway Act.

(1) 1927, A.C. 205.

1930

CAN. NAT. RY. CO. v. LEWIS ET AL.

Audette J.

Hence the present controversy which consists in determining which court as between the Exchequer court, which is given jurisdiction on the 14th June, 1929, and the Provincial Court, which had jurisdiction prior to that date, has jurisdiction, in the present case, to ascertain the compensation for land expropriated as far back as the *13th July, 1927*.

It is perhaps well to pause here and bear in mind that the mode of taking, expropriating the land, by the deposit of plan, under the Expropriation Act, is the same before and after the passing of the Act of 1929, so far as this case is concerned. Moreover that the Act of 1929, while giving this new jurisdiction to the Exchequer Court, does not oust the jurisdiction of the Provincial Court, under the Railway Act, to ascertain such compensation. It does not say that in future, from that date, the Provincial Court shall have no further jurisdiction under the Railway Act, it does not formally take away such jurisdiction nor does it say that the Exchequer Court shall have jurisdiction even in respect of cases where the plan has been deposited before 1929. It is silent in that respect. Quite the contrary, such jurisdiction is specifically maintained and is still extant and more especially so, in cases where the taker does not offer an amount exceeding $2,500. That court, possessing such jurisdiction, is therefore not abolished. The Railway Act is still in force and has not been amended under the Act of 1929.

The three defendants above mentioned refused the offer of $36,135 made by the plaintiff as compensation.

On the 8th November, 1929, the plaintiff instituted proceedings in this court, under the Act of 1929, by filing a statement of claim and the defendants, Lewis, M. Levy and H. Levy, filed a statement of defence thereto, stating, among other things, that as the expropriation had taken place on the 13th July, 1927, the Exchequer Court had no jurisdiction to hear the question of ascertaining the compensation; but that such jurisdiction was vested in the Provincial Courts, under the Railway Act, as provided by the statute in force at the date of expropriation.

While the case has been instituted in this Court, both the plaintiff and defendants have already instituted pro-

1930

CAN. NAT. RY. CO. v. LEWIS ET AL.

Audette J.

ceedings under the Railway Act before the Provincial Court which is still seized of the matter. The case has not been withdrawn or discontinued before that court. Therefore, there are two cases in respect of the same matter now pending before two different courts. There was *lis pendens* in the Provincial Court, when the case was instituted in this court and the Exchequer Court cannot interfere when litigation is in an appropriate court. Does not comity of court also arise in a matter of this kind? And as said in the case of *Gaylord* v. *Fort Wayne, Etc. Ry. Co.* (1), the sane rule to adopt, in our mixed systems of state and federal jurisprudence, is that the court which first obtained jurisdiction of the controversy, therefore of the *res,* is entitled to retain it until the litigation is settled.

The lands in question became vested in the plaintiff company, on the 13th July, 1927, under the provisions of section 13 of the Act of 1919 and clearly not under the provisions of the Act of 1929, and it would seem that the right course to follow now would be to have the compensation ascertained under the Act of 1919.

The language of subsection (*d*) of section 17, amended in 1929, is clearly not retroactive in terms, but rather prospective.

And in support of that contention the defendants cite the first part of section 19 of the Interpretation Act which enacts that when any Act or enactment is repealed . . . then, unless the contrary intention appears, such repeal . . . shall not, *save as in this section otherwise provided,*

(*b*) *affect the previous operations* of any . . . enactment so repealed or anything done or suffered thereunder,

(*c*) affect any *right, privilege* . . . accrued, accruing or incurred under the Act so repealed,

(*e*) affect any investigation, *legal proceedings* or remedy in respect of such privileges . . . and any such investigation, *legal proceedings* . . . may be *continued* or *enforced* . . . as if the Act had not been repealed.

All of this would clearly go to establish that the legal proceedings already instituted before the Provincial Court, under the Railway Act, should be there continued and even

(1) (1875) 6 Biss. Rep. (U.S. Cir. Ct.) 286-291.

1930

CAN. NAT. RY. CO. v. LEWIS ET AL.

Audette J.

enforced, the defendants having a vested right to do so under the law existing at the date of expropriation.

It is well established, by the canon of a number of decisions, that when the effect of a repeal is to take away a right, prima facie, it is not retroactive; but when it deals exclusively with procedure it is retroactive. And it is with that in mind that one must approach the interpretation of section 19 of The Interpretation Act, because while the defendants seek help by the first subsection thereof, the plaintiff likewise seeks relief by invoking the second section. However, it must be found that the first part of the section deals with rights, privileges, and the second part deals with procedure. That is the only way to reconcile these two parts of section 19, otherwise they contradict and nullify one another and become meaningless. The defendants contend that if the case is tried in this court their substantive *rights* and privileges, attaching to the Provincial Court, which is already seized of the matter, of having a jury and more appellate courts will be denied them, and that in such a case the statute cannot be held retroactive. Section 19 says that the "*legal proceedings*" may be continued and enforced as if the Act has not been repealed. The taking of a second action for the same subject matter in this court, while a similar action is still pending in another court, is hardly consistent with the enactment of section 19. Moreover, public interest is not involved in the present case, the parties hereto are alone interested. Craies 237.

There is more, whether it has any importance or not, and that is that on the 13th July, 1927, when the expropriation took place by the deposit of plans, section 15 of the Act contained the provision that "nothing in this Act shall affect pending litigation." This enactment is not to be found in section 17, ch. 172 of the Revised Statutes of 1927, which came into force on the 1st February, 1928.

Statutory provisions giving jurisdiction must be strictly construed and that is especially true when the statute confers jurisdiction upon a tribunal, like the Exchequer Court, of limited authority and statutory origin, and in such a case a jurisdiction cannot be said to be *implied*. A court must not usurp a jurisdiction with which it is not clearly

legally vested; but must keep within the limits of its statutory authority and should not exercise powers beyond the *scope of the Act* giving it jurisdiction and it cannot assume jurisdiction, unless clearly conferred, in respect of matters of prior origin to the Act.

Jurisdiction and procedure are quite different. When jurisdiction is given to a court, that court can provide for rules and machinery for exercising that jurisdiction. Jurisdiction goes to the root of the subject matter and procedure goes to the form.

It is quite clear that the expropriation or the taking of land is made in a similar manner both before and after the Act of 1929. The only question left to be determined by this court is one of jurisdiction under the circumstances above recited and I have come to the conclusion that the boundaries between the jurisdiction and authority of the Exchequer Court of Canada and the Provincial Courts are to be determined by the time when the plan was deposited in the Registry Office, as provided by the statute on that behalf.

May I now cite decisions in support of that view.

Craies on Statute Law, 3rd Edition, p. 330, says:

> It is a well recognized rule that Statutes should be interpreted, so as to respect vested rights (*Hough* v. *Windus*) (1), and such a construction should never be adopted if the words are open to another construction (*Cowan* v. *Lockyear*) (2). This rule is especially important with respect to statutes for acquiring lands for public purposes (*Cholmondley* v. *Clinton*) (3); (*Clissold* v. *Perry*) (4). For it is not to be presumed that interference with existing rights is intended by the Legislature, and if a statute be ambiguous the Court shall lean to the interpretation which would support existing rights (*Macdonald (Lord)* v. *Finlayson*) (5).

Then at page 105:

> Express and unambiguous language appears to be absolutely indispensable in statutes passed . . . . for altering the jurisdiction of a Court of Law.

See also at pages 109, 113, 163, 330 and 331. At page 329, the author further recognized the axiom of construction that statutes are not to be taken as having a retroactive operation unless express words are used for the pur-

(1) (1884) 12 Q.B.D., 224 at 237.
(2) (1904) 1 Australia C.L.R. 460-466.
(3) (1821) 4 Bligh (H.L.) 1.
(4) (1904) 1 Australia C.L.R. 363, 373.
(5) (1885) 12 Rettie (Sc.) 228, at p. 231. (Sess. Cases, 4th Ser.)

1930

CAN. NAT. RY. CO. v. LEWIS ET AL.

Audette J.

pose or unless there is an implication of retroactivity necessarily arising from the language used and the statute here is silent in that respect.

In Mr. C. K. Allen's work, "Laws in the making," we find at page 263 this expression of opinion:—

> No rule of construction is more firmly established than this: that a retrospective operation is not to be given to a statute so as to impair an existing right or obligation, unless that effect cannot be avoided without doing violence to the language of the enactment. If the enactment is expressed in language which is fairly capable of either interpretation, it ought to be construed as prospective only.

In re *Athlumney* (1); *West* v. *Gwynne* (2).

In *Doran* v. *Jewell* (3), the Supreme Court of Canada held that

> an Act of Parliament enlarging the right of appeal to the Supreme Court of Canada does not apply to a case in which the action was instituted before the Act came into force.

In *Williams* v. *Irvine* (4), the same court held that

> the right of appeal given by 54-55 Vic., ch. 25, does not extend to cases standing for judgment in the Superior Court prior *to the passing of the said Act.* . . . That a statute is not applicable to cases already instituted or pending before the courts, no special words to that effect being used.

See also *British Columbia Electric Ry.* v. *Crompton* (5).

And again in *Hyde* v. *Lindsay* (6), it was held that

> The Act 60-61 Vic., ch. 34, which restricts the right of appeal to the Supreme Court in cases from Ontario, as therein specified, does not apply to a case in which the action was pending when the act came into force although the judgment directly appealed from may not have been pronounced until afterwards.

In *The Colonial Sugar Refining Company, Ltd.* v. *Irving* (7), it was

> held that although the right of appeal from the Supreme Court of Queensland to His Majesty in Council given by the O.C. of June 30, 1860, has been taken away by the Australian Commonwealth Judiciary Act, 1903, s. 39, subsec. 2, and the only appeal therefrom now lies to the High Court of Australia, yet the Act is *not retrospective*, and a right of appeal to the King in Council in a suit pending when the Act was passed and decided by the Supreme Court *afterward* was not *taken* away.

See also against retrospective view, *Gardner* v. *Lucas* (8), *Macdonald* v. *Finlayson*, ubi supra. *In re Ex parte Raison* (9).

(1) (1898) 2 Q.B.D. 547, 551.
(2) (1911) 2 Ch. 1, 15.
(3) (1914) 49 S.C.R. 88.
(4) (1893) 22 S.C.R. 108.
(5) (1910) 43 S.C.R. 1.
(6) (1898) 29 S.C.R. 99.
(7) (1905) A.C. 369.
(8) (1878) 3 A.C. (H.L.) 582.
(9) (1890-1) 7 T.L.R. 185.

1930

CAN. NAT. RY. CO. v. LEWIS ET AL.

Audette J.

See also *Fowler* v. *Vail* (1).

In *Corporation of Morris* v. *Corporation of Huron* (2), it was also held that *rights of action accrued at the passing of an Act are not affected thereby.* See to the same effect *Hudson and Hardy* v. *Township of Biddulph* (3), and the case *Minister of Railways for Canada* v. *Hereford Railway Company* (4), confirmed on appeal to Supreme Court of Canada.

For the considerations to which I have above adverted I find that this Court has no jurisdiction to entertain the present action and there will be judgment dismissing the same with costs.

Judgment accordingly.