THE KING, ON THE INFORMATION OF THE ATTORNEY-GENERAL OF CANADA.......... } PLAINTIFF;

1910
Nov. 2.

AND

JANE MARY JONES.......................DEFENDANT.

National Transcontinental Railway—Lands taken by Commissioners—Compensation—Arbitration—Jurisdiction of Exchequer Court—Construction of statutes.

Section 13 of 3 Edw. VII, c. 71, reads as follows :—

"The Commissioners may enter upon and take possession of any lands required for the purposes of the Eastern Division, and they shall lay off such lands by metes and bounds, and deposit of record a description and plan thereof in the office for the registry of deeds or the land titles office for the county or registration district in which such lands respectively are situate; and such deposit shall act as a dedication to the public of such lands, which shall thereupon be vested in the Crown saving always the lawful claim to compensation of any person interested therein."

Held, that, under the terms of section 15 of the above Act (read in connection with the provisions of *The Railway Act*, R. S. 1906, c. 37), when lands have been taken and become vested in the Crown as provided by section 13, and the Commissioners cannot agree with the owner thereof as to compensation for the same, such compensation must be ascertained by a reference to arbitration, and not by proceedings taken in the Exchequer Court for such purpose.

National Transcontinental Ry.; Ex p. Bouchard, 38 N. B. R. 346, not followed.

THIS was a case arising upon an information for the expropriation of certain lands required for the purposes of the Eastern Division of the National Transcontinental Railway.

October 11th, 1910.

J. Friel, for the plaintiff;

W. B. Chandler, K.C., for the defendants.

The case having been called for trial at a sittings of the court in St. John, N.B., the learned judge intimated

1910
THE KING v. JONES.
Argument of Counsel.

to counsel that before proceeding with the evidence he desired to have the question of the court's jurisdiction to entertain the case argued. On motion of counsel for the plaintiff, counsel for the defendant consenting, the case was withdrawn from the docket, until the question of jurisdiction was argued and decided.

October 28th, 1910.

E. L. Newcombe, K.C., for the plaintiff, now argued the question of jurisdiction. The defendants were not represented on the argument.

Mr. Newcombe: The court, under the provisions of sec. 20 of *The Exchequer Court Act*, has undoubted jurisdiction to hear the case unless such jurisdiction is affected by the provisions of the *National Transcontinental Railway Act*, 3 Edw. VII, chap. 71. If by that statute the legislature has shewn a clear intention to create a special tribunal for the trial of these railway claims, then it must be in such tribunal and not here that compensation must be sought. But, I submit, no such intention is shewn by the statute.

[CASSELS, J: *The Expropriation Act* does not apply to this railway, and if I entertained the information upon what basis could I assess compensation?]

The court will administer its ordinary and proper procedure in a case where it is seized of jurisdiction. This is property taken for a public purpose, and the Crown must make compensation therefor in its court. (*Feather* v. *The Queen.*) (1)

[CASSELS, J: The statute says it must be a "lawful claim" to compensation. It can only become a "lawful claim" by first being ascertained by the method laid down in the general *Railway Act* of 1906.]

The court in any event may make a declaratory order. (Cites, Rules 2 and 3; *Chapelle* v. *The King.*) (2). The

(1) 6 B. & S., 294. (2) 7 Ex. C. R. 414.

information in this case alleges that the Commissioners have entered upon and taken the lands in question, and that they are vested in His Majesty; therefore, the provisions of sec. 13 of the *National Transcontinental Railway Act* apply, and compensation ought to be declared. The court ought not to refuse to make such declaration when the Attorney-General asks that it be made.

[CASSELS, J: Suppose I entertain the case, what rule am I to apply as to offsetting the enhancement of value by reason of the work constructed, is it to be the rule in the *Expropriation Act* or that in the general *Railway Act ?*]

I submit that you have to regard the case as an ordinary expropriation where the lands are vested in the Crown, as the *Transcontinental Ry. Act* expressly provides. If that Act clearly provided a special tribunal, there would be an end of the matter, but that Act only invokes the provisions of the *Railway Act* "so far as they are applicable" (Sec. 15). The last part of section 15 is only an amplification of the language of the first part clothing the Commissioners with the powers of a railway company. The provisions of the general *Railway Act* are not applicable to a case of compensation where the lands are vested in the Crown. It is the Crown's prerogative to choose its courts, and the prerogative is not to be presumed to be affected by any general provisions in section 15 of the Act. The methods by which an ordinary railway corporation acquires title by expropriation differs from the case where the Crown expropriates. In the former case there is a circuitous procedure to be followed, as laid down in the general *Railway Act.* In the case of the Crown the property vests *per saltum*, so to speak, upon the filing of the plan and description.

As to the fact that the Commissioners are made a corporation by the Act, that is only a matter of convenience. The Warden of a penitentiary is a corporation sole, but

1910
THE KING
v.
JONES.
Reasons for Judgment.

we have never raised any question that the Crown was liable in respect of his lawful acts and contracts. (Cites Robertson's *Civil Procedure for and against the Crown* (1)

I submit that upon a reasonable construction of the whole legislation governing the procedure in respect of compensation for property taken by the Crown, the conclusion must be reached that the Exchequer Court is the proper forum for the determination of the compensation accruing to the defendant in this proceeding.

CASSELS, J. now (November 2nd, 1910) delivered judgment.

The first paragraph of the information reads as follows :—

"1. The Commissioners of the Transcontinental Railway charged under and by virtue of the Act of the Parliament of Canada, 3 Edward VII, chapter 71, with the construction of the eastern division of the National Transcontinental Railway extending from the city of Moncton, in the province of New Brunswick, to the city of Winnipeg, in the province of Manitoba, have by themselves their engineers., agents, workmen and servants, entered upon and taken possession of certain lands and real property hereinafter described, the same being in the judgment of the said commissioners necessary for the use, construction and maintenance of the said railway, and for obtaining access thereto, and the said lands and real property have been taken for the use of His Majesty the King and have been measured off by metes and bounds, and a plan and description of the same, signed by the chairman of the said commissioners, and by their chief engineer, were deposited of record in the office of the registrar of deeds in and for the county of Westmorland, in the province of New Brunswick, in which county the said lands and real property are situate, on the

(1) P. 82.

fifteenth day of May A.D. 1908; and the said lands and real property thereby became and are vested in His Majesty the King."

The second paragraph of the prayer of the information is as follows:—

"2. That it may be declared that the said sum is sufficient and just compensation to the defendant for and in respect of the above described lands and real property so taken as aforesaid, and the aforesaid claim for alleged loss and damage mentioned in the third paragraph of this information."

Special circumstances were shown as a reason why this and another case should be tried at Moncton, N. B., where all the witnesses reside, and prior to the sitting at St. John, I was asked to hear the evidence at Moncton.

I acceeded to the request, but directed the cases to be entered at St. John and the legal question argued there as to whether or not the proper method of procedure to to ascertain the compensation for the lands is, or is not, by arbitration under the provisions of the general *Railway Act*, or under the provisions ot the *Exchequer Court Act*.

On the opening of the case at St. John, counsel for the suppliant and counsel for the respondent asked that this question should be argued in Ottawa, it being a question of considerable importance and affecting numerous cases.

Mr. Newcombe, K.C., argued the case at considerable length, and the view in favour of the Exchequer Court entertaining the action so far as ascertaining the compensation is concerned was presented very clearly.

I have carefully considered the question and will express my view on the subject.

It is not a technical question, but may be one of very considerable importance to the owners whose lands are expropriated.

Section 50 of the *Exchequer Court Act* reads as follows:—

1910
THE KING
v.
JONES.
Reasons for Judgment.

"50. The court shall, in determining the compensation to be made to any person for land taken for or injuriously affected by the construction of any public work, take into account and consideration, by way of set-off, any advantage or benefit, special or general, accrued or likely to accrue, by the construction and operation of such public work, to such person in respect of any lands held by him with the lands so taken or injuriously affected."

Section 198 of the general *Railway Act* (Cap. 37, R.S.C.) reads as follows:—

"198. The arbitrators or the sole arbitrator, in deciding on such value or compensation, shall take into consideration the increased value beyond the increased value common to all lands in the locality, that will be given to any lands of the opposite party, through or over which the railway will pass, by reason of the passage of the railway through or over the same, or by reason of the construction of the railway, and shall set off such increased value that will attach to the said lands against the inconvenience, loss or damage that might be suffered or sustained by reason of the company taking possession of or using the said lands."

By the *Exchequer Court Act* what has to be taken into account by way of set-off is any advantage, special or general, accrued or likely to accrue, &c.

Section 198 of the general *Railway Act* limits the set off to the increased value *beyond the increased value common to all lands in the locality*, &c.

Dealing with a case relating to taxation *Nicholls* v. *Cumming* (1) the late Chief Justice Ritchie (then Ritchie, J.), used the following language:—

"The principle of the Common Law is, that no man shall be condemned in his person or property without an opportunity of being heard. When a statute derogates from a common law right and divests a part of his pro-

(1) 1 S. C. R. 422.

perty, or imposes a burthen on him, every provision of the statute beneficial to the party must be observed. Therefore it has been often held, that acts which impose a charge or a duty upon the subject must be construed strictly, and I think it is equally clear that no provisions for the benefit of protection of the subject can be ignored or rejected."

And Strong, J., at page 427:—

"Taxation is said to be an exercise by the Sovereign power of the right of eminent domain (Bowyer's Public Law, p. 227) and, as such it is to be exercised on the same principles as expropriation for purposes of public utility, which is referable to the same paramount right. Then, it needs no reference to specific authorities to authorize the proposition, that in all cases of interference with private rights of property in order to subserve public interests, the authority conferred by the Sovereign—here the Legislature—must be pursued with the utmost exactitude, as regards the compliance with all prerequisites introduced for the benefit of parties whose rights are to be affected, in order that they may have an opportunity of defending themselves (Cooley on Taxation, p. 265; Maxwell on Statutes. pp. 333, 334, 337, 340; *Noseworthy* v. *Buckland in the Moor.* L. R. 9 C. P. 233.)"

The question in that case was of course different from the one before me, but the language used is apposite.

I will have occasion later to discuss authorities dealing with the question of the jurisdiction of the courts to assess compensation where a special statutory mode of ascertaining the compensation has been provided.

In the cases of *Johnston* v. *The King* and *Couse* v. *The King*, (1) I had occasion lately to consider the statutes relating to the National Transcontinental Railway. These were cases relating to contracts entered into by the commissioners under the provisions of the statute. They

(1) Reported *ante*, p. 155.

1910
THE KING
v.
JONES.
Reasons for Judgment.

were not cases relating to land damages for land expropriated for the use of the railway.

I do not propose to repeat what I wrote in giving my reasons in deciding those cases.

The Statute 3 Edward VII, Cap. 71 is "An Act respecting the construction of a National Transcontinental Rail-"way." The preamble recites:— "Whereas, &c., the "necessity has arisen for the construction of a National "Transcontinental Railway, to be operated as a com-"mon railway highway across the Dominion of Canada "from ocean to ocean and wholly within Canadian Terri-"tory, &c."

It recites the agreement of the 29th July, 1903, between His Majesty the King, of the first part, and Sir Charles Rivers Wilson, G.C.M.G., C.B., and others representing the Grand Trunk Pacific Railway Co., "making provision for the construction and operation of such a railway." ...."And whereas it is expedient that "Parliament should ratify and confirm the said agree-"ment and should grant authority for the construction in "manner hereinafter provided of the Eastern Division of "the said Railway," &c.

The statute by section 2 confirms the agreement and provides that "His Majesty and the company are here-"by authorized and empowered to do whatever is neces-"sary in order to give full effect to the agreement and "to the provisions of this Act."

The 8th section provides:—

"The Eastern Division of the said Transcontinental "Railway extending from the City of Moncton to the "City of Winnipeg shall be constructed by or for the "Government in the manner hereinafter provided, and "subject to the terms and provisions of the agreement."

The 9th section of the statute reads as follows:—

"9. The construction of the Eastern Division and the operation thereof until completed and leased to the com-

pany pursuant to the provisions of the agreement shall be under the charge and control of three commissioners, to be appointed by the Governor-in-Council, who shall hold office during pleasure, and who, and whose successors in office, shall be a body corporate under the name of 'The Commissioners of the Transcontinental Railway' and are hereinafter called 'the Commissioners.'"

It will be noticed that no mention is made as to the acquisition of land upon which to construct the railway.

The agreement, however, paragraph 15, defines the expression "cost of construction."

It includes all expenditure for right of way and other lands required for the purposes of the railway, &c.

The 10th section of the Act provides for the appointment of a chief engineer.

The 11th section reads as follows:—

"11. The commissioners may appoint and employ such engineers (under the chief engineer), and such surveyors and other officers, and also such servants, agents and workmen, as in their discretion they deem necessary and proper for the execution of the powers and duties vested in them under this Act."

The 13th section reads as follows:—

"13. The commissioners may enter upon and take possession of any lands required for the purposes of the Eastern Division, and they shall lay off such lands by metes and bounds, and deposit of record a description and plan thereof in the office for the registry of deeds, or the land titles office for the county or registration district in which such lands respectively are situate; and such deposit shall act as a dedication to the public of such lands, which shall thereupon be vested in the Crown, saving always the lawful claim to compensation of any person interested therein."

The 15th section is important; it reads as follows:—

1910
THE KING
v.
JONES.
Reasons for Judgment.

"15. The commissioners shall have in respect to the Eastern Division, in addition to all the rights and powers conferred by this Act, all the rights, powers, remedies and immunities conferred upon a railway company under the *Railway Act* and amendments thereto, or under any general *Railway Act* for the time being in force, and the said Act and amendments thereto, or such general *Railway Act*, in so far as they are applicable to the said rail way, and in so far as they are not inconsistent with or contrary to the provisions of this Act, shall be taken and held to be incorporated in this Act."

It may be well at this point to refer to the general *Railway Act* now found in the Revised Statutes of Canada, 1906, cap. 37. The statute was enacted in the same year as the National Transcontinental Railway Act 3 Edward VIII. cap. 71.

It provides :—

Section 2 : "In this Act, and in any *Special Act* as hereinafter defined, in so far as this Act applies, unless the context otherwise requires."

"(4) 'Company'

"(a) means a railway company, and includes every such company and any person having authority to construct or operate a railway."

Clause 28 of this section defines the words 'Special Act':—

"28 '*Special Act*' means any Act under which the company has authority to construct or operate a railway, and which is enacted with special reference to such railway, and includes

(a) All such Acts.

(b) With respect to the Grand Trunk Pacific Railway Company, the *National Transcontinental Railway Act*, and the Act in amendment thereof passed in the fourth year of His Majesty's reign, chapter twenty-four, intituled "An

Act to amend the *National Transcontinental Railway Act*, and the scheduled agreements therein referred to."

I have no doubt that part of the duties of the commissioners was the acquisition of the lands required for the construction of the railway. They could make agreements with the land-owners, and failing an agreement can arrive at the amount payable under the provisions of the general *Railway Act*.

Under the 13th Section the lands are vested in the Crown, differing from the general *Railway Act*, and the words "saving always the lawful claim to compensation of any person interested therein" are to prevent any construction that the landowner is to be deprived of his lands without compensation.

See *Williams* v. *Corp. of Raleigh.* (1)

Hereafter it may be necessary to consider, if the case ever arises (which is not likely), whether the words have the effect of creating a vendor's lien after the compensation is ascertained by agreement or award. See *Norvall* v. *Canada Southern Ry. Co.* (2), where specific performance was decreed.

Turning to the Agreement of the 29th July, 1903, it recites that a line of railway should be "constructed and operated as a common railway highway." It proceeds to provide for the construction of the railway, leasing, &c.

Now, it seems to me quite clear that the provisions of the general *Railway Act* as to arbitration are applicable. There is nothing inconsistent between them and any provision of the *Special Act*. The fact that the lands are vested in the Crown does not affect the question. Failing to agree on a price the amount payable must be ascertained in some manner. The whole purview of the statute seems to treat the Transcontinental Railway as something different from an ordinary government rail-

(1) 21 S. C. R. 121. (2) 5 Ont. A. R. 13.

1910
THE KING
v.
JONES.
Reasons for Judgment.

way. I have set out in my former opinion in the *Johnston* and *Couse* cases why I think the Commissioners are not to be treated merely as ordinary agents of the Crown, and I referred there at some length to the English authorities. (1)

It is conceded that the *Government Railway Act* (2) does not apply to this railway.

Section 2, sub-sec. (c) interprets "Railway":—

"'Railway' means any railway, and all property and works connected therewith, under the management and direction of the Department."

Sub-sec. (d): 'Department' means the Department of Railways and Canals."

Section 4:—

"This Act applies to all railways which are vested in His Majesty, and which are under the control and management of the Minister".

Looking at the *Expropriation Act*, (3) we find that by section 2, sub-sec. (a):—

"'Minister' means the head of the Department charged with the construction and maintenance of the Public Work."

By sub-sec. (d): "'Public work or works' means and includes 'Government Railways'."

I have pointed out that in my opinion the Transcontinental Railway is not a Government Railway within the meaning of the *Government Railways Act*, nor do I think the provisions of *The Expropriation Act* apply.

Cap. 39 of R.S.C., 1906, relating to Public Works has no application.

The case of *National Transcontinental Ry.*; *Ex parte Bouchard* (4) is not binding on me. The court there dealt with the matter as if section 5 of the *Government Railway Act* concluded the question.

(1) See *ante* p. 166 *et seq.*
(2) R. S. C. 1906, Cap. 36.
(3) R. S. C. 1906, Cap. 143.
(4) 38 N. B. R. 346.

In arriving at a decision in this case, the point must not be lost sight of that the *Grand Trunk Pacific Railway Company* are interested in the amount of compensation paid, as it forms an element in arriving at the rental and the manner in which such compensation is ascertained. They had stipulated in the agreement that so far as the location, construction and operation of the Western Division is concerned the *Railway Act* should apply (1).

If Parliament has provided a particular tribunal for the ascertainment of compensation the course prescribed for arriving at the amount payable must be adopted.

The section of *The Exchequer Court Act* (20) which provides that the Exchequer Court shall have exclusive original jurisdiction to hear and determine the following:—

"(a) Every claim against the Crown for property taken for any public purpose,"

and the subsequent clauses do not in my judgment affect the question. The statutes referred to were enacted long subsequent to the *Exchequer Court Act*, and, as I view it, the tribunal to ascertain the amount payable, failing an agreement, is the arbitration board provided by the statute.

It may well be that once the "lawful claim" is ascertained in the manner provided then the enforcement of it could be had in the Exchequer Court. *Yule* v. *The Queen* (2) is an entirely different case. In that case the statute conferring right to enforce:

"(d) every claim against the Crown arising under any law of Canada."

was enacted subsequently, and besides the facts in that case were peculiar.

The present case is more like *Scott* v. *Avery*, (3) and numerous other authorities of a similar character. *Williams* v. *Corp. of Raleigh* is reported in 14 *Ont. Pr. R.* 50;

(1) See clause 38 of Agreement. (2) Ex. C. R. 103; 30 S. C. R. 24.
(3) 5 H. L. C. 811.

21 *S. C. R.* 104; *L. R. App. Cas.* 1893, *p.* 540. It is also reported in full in *Clarke & Scully's Drainage* cases p. 1. The facts in that case were rather complicated. The action included claims of different character and there was considerable divergence of opinion among the judges. The final result of that case was that so far as what is termed the claim in respect of the Bell drain the action was dismissed, the remedy being under the provisions of the *Drainage Acts* to ascertain the amount of compensation payable. This case was a strong one because a reference had been agreed to. Lord Macnaghten, in his reasons for judgment, states as follows (p. 53) :—

"Their Lordships regret that they are unable to affirm the judgment of the Supreme Court in all respects, because they cannot help seeing that the plaintiffs have been seriously injured by the construction of the Bell drain, as well as by the breach of the statutory duty imposed upon the municipality. As far as the evidence goes there is no reason to suppose that the municipality would have been able to cut down the damages if the respondents had proceeded by arbitration," etc.

The result was that the action, as regards the Bell drain, was dismissed without prejudice to any claim on the part of the respondents to have the amount of the damages to "their property occasioned by the construction of the Bell drain and consequent thereon determined by arbitration."

In *Water Commissioners of City of London* vs. *Saunby*, (1) the same result was arrived at. It is true that this case was reversed in the Privy Council (2), but the principle laid down by the Supreme Court was not questioned. The judgment was reversed because their Lordships were of opinion (see p. 115) that the provisions as to arbitration never came into force, the commissioners not having proceeded in accordance with the Act.

(1) 34 S. C. R. 650. (2) (1906) A. C. 115.

1910
THE KING
v.
JONES.
Reasons for Judgment.

Such cases as *Parkdale* v. *West*, (1) were invoked as authorities.

Numerous other authorities in the Ontario courts on the same lines could be cited.

It was contended that the Crown is not bound by the provisions of the general *Railway Act*.

I have cited authority in the *Johnston* and *Couse* cases to show if the commissioners are subject to the general *Railway Act*, the Crown through them is subject to its provisions.

In this case it is not necessary to rely on this authority, as the statute expressly makes the provisions of the *Railway Act* applicable.

I have dealt with the question at considerable length as it is one of importance.

Even if I did not entertain the opinion I have formed as to my jurisdiction, the question is so debatable that I would be loath to entertain jurisdiction until a decisive opinion was passed upon the question by the Supreme Court, or legislation putting the matter beyond doubt.

Judgment accordingly.

Solicitor for plaintiff: *J. Friel.*

Solicitor for defendant: *W. B. Chandler.*

(1) L. R. 12 A. C. 602.