THE ATLANTIC AND NORTH-WEST RAILWAY COMPANY..... } APPELLANTS;

AND

FREDERICK THOMAS JUDAH.....RESPONDENT.

1894

*Feb. 28.
*Mar. 1.
*May 1.

ON APPEAL FROM THE COURT OF QUEEN'S BENCH FOR LOWER CANADA (APPEAL SIDE).

Railway Expropriation—Award—Additional interest—Confirmation of title—Diligence—The Railway Act, 1888, *secs.* 162, 170, 172.

On a petition to the Superior Court, praying that a railway company be ordered to pay into the hands of the prothonotary of the Superior Court a sum equivalent to six per cent on the amount of an award previously deposited in court under sec. 170 of the Railway Act, and praying further that the company should be enjoined and ordered to proceed to confirmation of title with a view to the distribution of the money, the company pleaded that the court had no power to grant such an order and that the delays in proceeding to confirmation of title had been caused by the petitioner who had unsuccessfully appealed to the higher courts for an increased amount.

Held, reversing the judgment of the court below, that by the terms of sec. 172 of the Railway Act, it is only by the judgment of confirmation that the question of additional interest can be adjudicated upon.

Held, further, that assuming the court had jurisdiction, until a final determination of the controversy as to the amount to be distributed the railway company could not be said to be guilty of negligence in not obtaining a judgment in confirmation of title. Railway Act, sec. 172. Fournier J. dissenting.

APPEAL from a judgment of the Court of Queen's Bench for Lower Canada (appeal side) confirming a judgment of the Superior Court, ordering the appellants to pay into court $6,420.75, as interest on a sum of $30,575.00 deposited by the appellants on the 24th July, 1888, under section 170 of the Railway Act, 1888.

The material facts in question are as follows :—

The appellants expropriated a piece of property belonging to the respondent and by award rendered

* PRESENT :—Fournier, Taschereau, Gwynne, Sedgewick and King JJ.

1894

THE ATLANTIC AND NORTH-WEST RAILWAY COMPANY v. JUDAH.

on the 17th July, 1888, the arbitrators appointed under the act awarded to the respondent the sum of $30,575 as compensation for the land taken and damages. On the 24th July, 1888, appellants tendered this amount, together with a deed of sale of the property, to the respondent, who refused the tender on the ground that he intended to appeal from the award of the arbitrators. Thereupon, on the same day, the appellants applied to the Superior Court, under section 162 of the Railway Act, for a warrant of possession, depositing the amount of the award together with six months' interest thereon, as required by section 170, in all the sum of $31,492. The respondent appealed from the award, and the litigation consequent thereon continued until a judgment was rendered by the Court of Queen's Bench, at Montreal, on the 24th January, 1891, which confirmed the award of the arbitrators. The respondent appealed to this court where his appeal was quashed for want of jurisdiction; he, however, obtained leave to appeal to Her Majesty in her Privy Council, but finally discontinued this appeal on the 16th November, 1891. On the 14th December, 1891, the respondent by petition to the Superior Court, prayed that the appellants be ordered to pay into the hands of the prothonotary of the Superior Court a sum equivalent to six per cent on the capital amount of $30,575, from the 17th January, 1889, until such time as the capital and interest should have been fully distributed, and, further, that they should be enjoined and ordered to proceed to confirmation of title, in order to the distribution of the money. The court by judgment of the 28th January, 1892, ordered the payment of the sum of $6,420.75, being interest from the 24th January 1889, up to six months from the 24th January, 1892, reserving to the respondent the right to apply for a further deposit should the moneys not be distributed within such delay; and further ordered

appellants to proceed forthwith to the confirmation of title and distribution of the moneys, but at the cost and charges of the respondent, and in default authorized the respondent to do so at his own expense.

H. Abbott Q.C. for appellants contended, 1st, that the court of first instance had jurisdiction to render the judgment complained of; that the question of additional interest ould only be dealt with when the judgment of confirmation was obtained under sec. 172 of the Railway Act, and

2nd. That it was through no error, fault or neglect of the appellants that a judgment of confirmation of title was not obtained within the six months, but it was entirely due to the acts of the respondent in refusing to accept and appealing from the award of the arbitrators, the amount of which was tendered to them. The learned counsel referred to secs. 162, 170 and 172 of The Railway Act.

Branchaud Q.C. for respondent: As to the question of jurisdiction, there is nothing in the statute regulating this matter that prevents the Superior Court from granting such an order as the one that has been made in the present case. The petition also concluded that the appellants be ordered to proceed to the confirmation of title in order to effect the distribution *à qui de droit* of the moneys deposited; and that, in their default to do so within the delay fixed by the court, the respondent be authorized to take the means indicated by the statute for the distribution of these moneys.

By adopting the mode of payment indicated in section 170 of the Railway Act, the appellants became bound to follow all the requirements of the section, in order to free themselves from the payment of any further interest. The money as thus deposited became locked up entirely under the control of the appellants, the respondent being left powerless to take possession

1894

THE ATLANTIC AND NORTH-WEST RAILWAY COMPANY v. JUDAH.

of this amount awarded to him, while he was dispossessed of his property. The taking possession of the expropriated land subjected the appellants to payment of interest on the amount of the award until the same should have been fully paid, just as the purchaser of a property susceptible of producing civil fruits is bound to pay interest on the unpaid price from the time of entering into possession of it.

This section 170 clearly shows that the appellants were bound to proceed forthwith in the *confirmation of title*, in order that the award be paid *à qui de droit*. Though it is not stated in the section 170 by whom the proceedings in *confirmation of title* should be taken, yet under the common law a proprietor alone can exercise that right. The appellants were, in consequence of the deposit of the amount of compensation and of the award itself in the hands of the prothonotary, proprietors of the land expropriated, the award taking the place of the title; but more than that, section 172 of the same Railway Act imposes beyond doubt upon the appellants the obligation of taking the necessary proceedings to obtain the *confirmation of title* required by section 170.

H. Abbott Q.C., in reply, cited art. 1162 C.C., and *Ex parte Hart.* (1)

FOURNIER J.—The respondent was expropriated by the appellants under the provisions of the Railway Act of 1888.

On the 17th July, 1888, the majority of the arbitrators awarded to the respondent, as compensation for the damages sustained by him in consequence of such expropriation, the sum of $30,575.

On the 20th July, 1888, the appellants tendered to the respondent the amount of the award, but it was

(1) 3 L.C. Jur. 40.

not acted upon as they never renewed it, nor deposited the money in court so as to enable the respondent to get it when he wished to do so. Art. 1162, C.C.

In order to avail themselves of this tender the appellants should, with their petition for a warrant of possession, have deposited the amount. They, on the contrary, preferred to adopt the mode indicated in sec. 170 which concerns matters in expropriation for the province of Quebec, under the Railway Act. On the 24th July, 1888, they deposited with the prothonotary the sum of $30,575, the amount of the award, together with the sum of $917.25 for six months' interest in advance, as required by this section, and obtained a writ of possession to enable them to take possession of the expropriated land.

By adopting the mode of payment indicated by this section the appellants were obliged to conform to all its requirements, in order to free themselves from the payment of any interest in the future. The money so deposited remained entirely under the control of the appellants, and the respondent was powerless to get possession of the amount awarded to him, while he was dispossessed of his property.

Under sec. 170 the appellant company by taking proceedings in confirmation of title, were the *Dominus litis*, and it was upon them to proceed to judgment with the least possible delay. Moreover they alone, as proprietors, had the right to take those proceedings. And it is upon the party who makes the deposit that the obligation rests of taking the proceedings in confirmation of title. After regulating the manner in which the deposit is to be made, the section goes on "and proceedings shall thereupon be had for the confirmation of title." It is not, therefore, upon the respondent, the ex-proprietor, that this obligation is laid, but upon the party making the deposit "and proceedings shall there-

1894

THE ATLANTIC AND NORTH-WEST RAILWAY COMPANY v. JUDAH.

Fournier J.

upon be had &c., &c." Moreover, sec. 172 declares that if the judgment of confirmation is obtained in less than six months from the date of the payment of the compensation to the prothonotary, the court shall direct a proportionate part of the interest to be returned to the company. And if, by the fault, negligence or error of the company, the judgment is not obtained until after the expiration of the six months, the court shall order the company to deposit the interest for such further period as is right. It is also clear from that section that it is the party demanding the judgment in confirmation of title who must take proceedings to obtain it. If he obtains it within the six months it is to him that the difference in interest will revert, but if, on the other hand, by his fault or neglect, it is not obtained until after the six months have expired then he will have to pay the surplus interest.

Sec. 172 is as follows :—

That if the judgment of confirmation is obtained in less than six months from the payment of the compensation to the prothonotary, the court shall direct a proportionate part of the interest to be returned to the company, and if, from any error, fault or neglect of the company it is not obtained until after the six months have expired, the court shall order the company to pay the prothonotary the interest for such further period as is right.

The respondent could not take proceedings for confirmation of title. The only parties who can be accused of neglect are the appellants, because upon them rested the obligation to proceed. They have taken no such proceedings, and the money which they deposited is still in the hands of the prothonotary, and the appellants have been ever since in possession of the property expropriated.

True, the appellants contend the contrary, and say that there was neither fault, error nor neglect on their part to justify the order to make a second deposit, and that, if they have not taken proceedings to obtain a judgment in confirmation of title it was the fault of

the respondent, who refused the offer made to him of the amount of the award. Now, the respondent did refuse this offer, but gives as a reason that he wished to appeal from that award, the amount of which he considered quite insufficient. In consequence he appealed to the Superior Court, and obtained a judgment increasing the award to $52,000. On a further appeal to the Court of Queen's Bench by the present appellants, the amount of that judgment was reduced again to $30,575. The appellants now contend that they were again prevented from proceeding by the respondent's appeal to this court and to the Privy Council. They contend that during all these proceedings, and up to the time of the presentation of the petition for an order to have a further sum deposited, they were prevented from proceeding for the confirmation of title, and could not be considered guilty of negligence.

The question is, therefore, reduced to this: Which of the two parties was to blame for not proceeding to the confirmation of title during the proceedings above mentioned? I have already said that the obligation rests upon the prosecuting party. The appellants, therefore, and not the respondent, must be declared in fault. Was the respondent to renounce his right of appeal in order to allow the appellants to proceed? His action was sufficiently important that he succeeded in getting the amount of the award increased from $30,575 to $52,000. The judgment of the Court of Queen's Bench subsequently reduced the award to the original amount. But is he then to blame if he sought to have this judgment annulled by the Supreme Court? Certainly not; he had an indisputable right which he ought not to sacrifice.

It is to be observed that the confirmation of title mentioned in sec. 170 was not added in order to give a greater right to the property expropriated, because

1894

THE ATLANTIC AND NORTH-WEST RAILWAY COMPANY v. JUDAH.

Fournier J.

the deposit of the award and of the amount of compensation made by the appellants gave them a perfect title to the property. This confirmation of title is only for the purpose of purging the hypothecs which might affect the property.

The appellants have taken no proceedings for the confirmation of their title. The money is still in the hands of the prothonotary, and the property is in the possession of the appellants, and has been so ever since they first took possession. They have always had control over both the price and the property.

Then, again, the appellants seek to excuse their negligence on the ground that the appeal to the Superior Court taken by the respondent against the award prevented their so proceeding. But this ground is futile, inasmuch as that appeal was entirely independent of, and distinct from, the proceedings taken by the appellants for the deposit of the amount of the compensation and interest to enable them to take possession of the expropriated lands. These proceedings form separate and distinct issues, bearing different numbers in the records of the court.

The appellants having a perfect title under the award at no time could have had less to pay than the amount fixed by it.

Then, being in possession of the property the respondent's appeal could not prevent their proceeding to the distribution of the money under sec. 170. By adopting this course the appellants (even if the respondent had succeeded in having the amount increased to $52,000) would have been discharged in proportion to the amount of the award. In that case the appellants would only have had to pay the difference between the amount distributed and the amount ordered by the Court of Queen's Bench if the appeal were maintained.

They have contended that the Superior Court in the present action had no jurisdiction to order a second deposit of interest if the first was exhausted before the termination of the proceedings in confirmation of title but that the Court which heard the case in confirmation of title alone had such jurisdiction. But the Railway Act does not make this distinction, and the jurisdiction is not defined or limited by the incidents which may be submitted. It is a court specially created by the Railway Act for the purpose of deciding any actions which may be brought under that act, and this is made very clear by sections 170, 172 and several others, as well as by the definition of the word "Court" given in the 2nd section of the act. "The expression 'the Court' means a Superior Court of the province or district"; therefore the Superior Court of the Province of Quebec is clearly designated as the court having jurisdiction by virtue of this act.

The respondent's appeal to the Superior Court could not hinder the appellants proceeding in confirmation of title, as required by section 170, any more than the procedure on the appeal could delay or prevent a judgment of confirmation. The two actions were distinct and separate, and had each a special object in view. There was no incompatibility between them, nor any reason which could prevent the two actions from being brought to judgment.

At the most, the appellants would have been caused some slight inconvenience; should the judgment of confirmation be obtained before judgment was given on the appeal, and the judgment of the Superior Court, which had increased the award to $52,000, had then been confirmed, it would only have been necessary to deposit the amount of the original award and then proceed to a second distribution. But the appellants could easily have avoided this inconvenience by

1894

THE ATLANTIC AND NORTH-WEST RAILWAY COMPANY v. JUDAH.

Fournier J.

obtaining an order from the Superior Court suspending the proceedings in confirmation until judgment on the appeal should have been rendered. The court would probably have granted them a short delay, while, as it is, several years have passed and no proceedings have been taken. As I have already said, the company could easily have proceeded to the confirmation of their title and to the distribution of the amount deposited. Their position could only have been affected by an obligation to deposit the amount adjudged in excess of the award. It is not a rare occurrence in the Superior Court that several distributions are made of the monies arising out of a sale of immoveables sold by the sheriff; often the distribution is only partly made by the court, and the party to whom the surplus belongs may appeal. An order of the court is sufficient to give to a party what is not contested, and admitted to be due, whilst the party who is forced into a contestation retains the right to have the judgment on appeal reversed. That might have been done in this case without the least inconvenience.

For all these reasons, I am of opinion that the judgment of the Court of Queen's Bench should be maintained, and the appeal dismissed with costs.

TASCHEREAU J.—In my view of this case there is error in the judgment appealed from by which the appellants were ordered to pay into court over $6,000 as interest on the amount of an award deposited by them into court under sec. 170 of the Railway Act of 1888.

The facts of the case are not in dispute and are not complicated. The arbitrators appointed under the act on an expropriation by the company of the respondent's land, awarded him $30,575. Upon tender, the respondent refused that sum, and appealed to the Superior Court, where he succeeded in getting the award

increased to $52,000, but on appeal by the company to the Court of Queen's Bench, the arbitrators' award was restored. Thereupon the respondent took proceedings for a further appeal, but abandoned them on the 16th November, 1891.

Previously, immediately upon the refusal by the respondent of the amount tendered, the company had obtained possession, upon depositing the said amount with six months' interest, under secs. 162 and 170 of the act. Two months after the end of the proceedings on the appeals above mentioned, the respondent petitioned the Superior Court for an order upon the appellant to deposit the interest upon the amount in court accrued since the expiration of the six months after the deposit. The Superior Court granted the prayer of that petition, the Court of Queen's Bench confirmed that judgment, and the appellants now complain of that condemnation.

I fail to see that the Superior Court had jurisdiction to at all entertain that petition. It seems to me by the terms of sec. 172 of the act that it is only by the judgment of confirmation that this question of interest can be adjudicated upon.

But, assuming that the respondent's petition was before the proper tribunal, where is the error, fault or neglect of the company that caused this confirmation of title not to be obtained? I cannot see any. It may be that strictly speaking, they might have initiated the necessary proceedings for that purpose, notwithstanding the respondent's appeal from the award. But the court would then certainly have ordered a suspension of those proceedings till a final determination of the controversy as to the amount of that award. The judgment appealed from says that the company should have proceeded to the distribution of the money deposited. I cannot see that such a course could have been pursued before the

1894

THE ATLANTIC AND NORTH-WEST RAILWAY COMPANY v. JUDAH.

Taschereau J.

amount to be distributed was determined, and that could not be determined before the appeals on the award had themselves been completely determined. The respondent says that the company has the possession of this property, and consequently should pay this interest which represents the revenues of the property. But that is forgetting that the company has duly paid for that property all what it had to pay. If the respondent loses the interest on that payment it is his own fault, and not through any error, fault or neglect of the company that I can see. He must now be taken to have been wrong in not accepting the tender made to him, and is the cause, the only cause, of his loss in the matter. According to his contentions, his moneys were safely deposited at six per cent interest during all the time he felt inclined to exercise his litigious inclinations, unfounded though they have been held to have been. He is in error. He cannot get interest when it is because he refused the amount tendered to him that he did not touch his capital. His refusal lasted during all his proceedings on appeal. It was a persistent daily refusal of the sum tendered to him till he dropped his appeal to the Privy Council; and yet he would now contend that it is through the neglect of the company that he was all that time deprived of his moneys.

I would allow the appeal with costs and dismiss his petition with costs.

As to the judgment of the Court of Queen's Bench, of January, 1891, we have here nothing to do with it.

GWYNNE, SEDGEWICK and KING JJ. concurred with TASCHEREAU J.

Appeal allowed with costs.

Solicitors for appellants: *Abbotts, Campbell & Meredith.*

Solicitors for respondent: *Judah, Branchaud & Kavanagh.*