THE SANDON WATER WORKS AND LIGHT COMPANY (DEFENDANTS)..... APPELLANTS;

1904
*Oct. 19, 20.
*Nov. 21.

AND

THE BYRON N. WHITE COMPANY, (PLAINTIFFS)..... RESPONDENTS.

ON APPEAL FROM THE SUPREME COURT OF BRITISH COLUMBIA.

Practice—Pleading—B. C. Rule 168—*New points raised on appeal—Condition precedent—Construction of statute*—59 *V. c.* 62 *ss.* 9, 25, (*B.C.*) *—Mineral claim—Expropriation—Watercourses—Trespass—Damages —Waiver—Injunction.*

The B. C. Sup. Ct. Rule 168, provides that "any condition precedent, the performance of which is intended to be contested, shall be distinctly specified in his pleadings by the plaintiff or defendant (as the case may be), and, subject thereto, an averment of the performance or occurrence of all conditions precedent, necessary for the case of the plaintiff or defendant, shall be implied in his pleadings." In an action for trespass and a mandatory injunction, the defendants pleaded the right of entry under a private Act, and the consent or acquiescence of the plaintiffs. The plaintiffs replied setting up the failure of defendants to comply with certain conditions precedent to the exercise of the privileges claimed but did not set up another condition precedent upon which the judgment appealed from proceeded though it was not referred to at the trial.

Held, Killam J. contra, that the rule refers rather to cases founded on contract than to those where statutory authority is relied upon and that the plaintiffs need not have replied as they did, but having done so without setting up the condition specially relied upon in appeal, thereby possibly misleading the defendants, they were properly punished by the court below by being deprived of their costs in appeal.

Per Killam J.—It was improper for the court appealed from to allow the absence of proof to be set up for the first time on the appeal.

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* PRESENT :—Sedgewick, Girouard, Davies, Nesbitt and Killam JJ.

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Where a trespasser, by taking proper steps to that effect, would have the right to expropriate the lands in dispute, an injunction should be withheld in order to enable the necessary proceedings to be taken and compensation made. *Goodson* v. *Richardson* (9 Ch. App. 221), and *Cowper* v *Laidler* ([1903] 2 Ch. 337) applied. But where there has been acquiescence equivalent to a fraud upon the defendant the injunction ought not to be granted, even where the legal right of the plaintiff has been proved. *Gerrard* v. *O'Reilly* (3 Dr. & War. 414); *Wilmot* v. *Barber* (15 Ch. D. 96): *Johnson* v. *Wyatt* (2 DeG. J. & S 17); and *Smith* v. *Smith* (L. R. 20 Eq. 500), referred to.

By the defendants' charter [59 Vict. ch. 62, ss. 9, 25, (B. C.)], it was provided that the powers to enter, survey, ascertain, set out and take, hold, appropriate and acquire lands should be subject to the making of compensation and that the powers, other than the powers "to enter, survey, set out and ascertain," should not be exercised or proceeded with until approval of the plans and sites by the Lieutenant Governor in Council. The defendants entered upon lands of the plaintiffs, made surveys and constructed works thereon without making compensation or obtaining such approval. Some time after entry the defendants obtained the necessary order in council approving of the plans and sites of the land to be expropriated.

Held, that making of compensation was not a condition precedent to making the survey and taking possession of the land, and as the said order in council was not dealt with at the trial the rights of the parties could not properly be determined on the material presented; the injunction, should, therefore, be refused and the parties left to take proceedings as they should respectively see fit.

Per SEDGEWICK and KILLAM JJ.—That as approval of the plans had not been obtained till some time after the defendants had taken possession and appropriated the land, there was a trespass for which the plaintiffs were entitled to recover, but after the approval had been obtained the defendants remained rightfully in possession and could not be compelled by a mandatory injunction to replace the land in its former position.

Judgment appealed from (10 B. C. Rep. 361) varied.

APPEAL from the judgment of the Supreme Court of British Columbia, (1), reversing the decision of Irving J. at the trial, and maintaining the action of the plaintiffs with costs of the trial court.

(1) 10 B. C. Rep. 361.

The plaintiffs own a mill-site near Sandon, B.C., called lot 590 and that part of the Wyoming Mineral Claim, lot 754, lying to the east of Sandon Creek, and claim that the defendants wrongfully went upon the same in 1897 and built a tank and pipe line, and that the plaintiffs require the space thus taken for the deposit of tailings, etc.; they limited their claim for relief, in the statement of claim, to that for a mandatory injunction compelling the defendants to restore the land to its former condition, and to general damages for trespass.

The defendants claim:

1st. That they, acting under the authority of a private Act of Parliament to erect and operate a water and light plant for the citizens of Sandon, went there under the powers given by their private Act (being chapter 62 of the Statute of British Columbia, 1896), and that they are properly in possession.

2nd. That they went upon such lands with the full knowledge and consent or, in the alternative, the acquiescence of the respondents.

3rd. That it was necessary for the appellants to go upon said lands in order to make their water and light system effective.

4th. That the "Wyoming" being a mineral claim, the respondents have no surface rights on the same, hence cannot object to the appellants' possession.

5th. That the respondents by their delay, or their acquiescence above named, have waived their right to object to the appellants' conduct; or in the alternative the limitation clauses of the appellants' private Act, chap. 62 of 1896, preclude the present action.

The respondents in reply claim that the appellants did not comply with the following conditions precedent in their private Act contained to enable them

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to take advantage of their private Act, reading as follows:

"In further answer to paragraphs four and five of the amended statement of defence the plaintiffs say that prior to the trespass complained of the defendants did not comply with the following conditions precedent under the said 'Sandon Water Works and Light Company Act, 1896,' to entitle them to enter upon the lands in question:

"(*a*) They did not file and have approved by the Lieutenant Governor in Council the plans and sites of their works under section 9.

"(*b*) They did not serve upon the plaintiffs any notices to treat or any other notice under the said Act, nor did they obtain the consent of the Chief Commissioner of Lands and Works under section 25.

"And the plaintiffs say that without compliance with the said conditions precedent the defendants obtained no right or privilege under the provisions of their said Act as against them."

On the appeal another and new condition precedent was urged as to which no amendment was asked or opportunity to give evidence was allowed, and no admission was made, viz.: "That the defendants did not show on the trial that they had a water record for Sandon Creek; and hence no right to enter the plaintiffs' lands under the private Act"; and upon this point alone the appeal was allowed.

HUNTER C. J. in the Supreme Court of British Columbia gave judgment as follows, the other members of the court concurring therein.

"The court is unanimously of the opinion that the appeal should be allowed. This is a common law action of trespass by the Byron N. White Company against Sandon Water Works and Light Company. The Water Works Company were entitled to go upon the

lands and do what they did under the powers given by their Act, provided they proved strict compliance with the conditions imposed, because that was their only authority for interfering, as they did, with the property of the plaintiffs. It was not shown at the trial that the Lieutenant Governor in Council had authorized the diversion of the water, and that, in my opinion, was a preliminary essential, or a condition, to the exercise of the power of interfering with the soil of the plaintiffs.

"It is not necessary to decide on this occasion whether the authority of the Lieutenant Governor to divert the water was a condition precedent to the right of entry, but it was certainly a condition precedent to the right of interference with the soil of the plaintiffs. It was open, on the pleadings, to the plaintiffs to take advantage of any failure of proof by the defendants of their case, and although the attention of the learned judge was not directed to the fact that there was no proof that the authority of the Lieutenant Governor in Council to divert the water had been obtained, I do not think that precluded the plaintiff from taking advantage of the point of law, especially as this is a court of re-hearing.

"As to the defence raised on the ground of laches, it is quite clear that there were no laches which would raise any equity on behalf of the defendants. If we were to hold, on the facts which are before us on this occasion, that there were laches which preclude the plaintiffs from enforcing their legal rights we would wipe out the statute of limitations. To raise an equity in favour of the defendants in such circumstances as appear here, it would have to be shown that they were induced to make the expenditure they did by some equivocal conduct on the part of the plaintiffs. It is quite clear they were not in any way misled when

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they entered on the property, and they have only themselves to thank for the consequences. I think only nominal damages ought to be allowed, say $10, and I think the right ought to be further aided by the issue of a mandatory injunction, not to be drawn up, however, for six months, in order to enable the parties if possible to come to some understanding.

"As to the costs: The appeal, in strictness, is not successful, as the defendants are defeated on the ground not taken at the trial, or in the notice of appeal. Therefore, while the plaintiffs should have succeeded at the trial and, therefore, should have the costs of the action, there should be no costs of the appeal."

Davis K.C. and *Taylor K.C.* for the appellants. The plaintiffs allege that defendants did not file plans nor serve notice of expropriation. But having obtained the order in council approving of the plans and site after being some years in possession it should be presumed that all necessary preliminaries had been observed.

They claim, also, that defendants could not enter without first making payment but that is not a condition precedent under their Act of incorporation. See *Harding* v. *Township of Cardiff* (1); *Stonehouse* v. *Township of Enniskillen* (2). Moreover the plaintiffs acquiesced in such possession. *Kelsey* v. *Dodd* (3); *Sayers* v. *Collyer* (4), at pp. 106-8.

Plaintiffs could not set up violation of one condition after pleading that of two others only. *Collette* v. *Goode* (5).

Bodwell K.C. and *Lennie* for the respondents. Performance of the conditions alleged in plaintiffs' reply is an essential preliminary to defendants' right to

(1) 29 Gr. 303.
(2) 32 U. C. Q. B. 562.
(3) 52 L. J. Ch. 34.
(4) 28 Ch. D. 103.
(5) 7 Ch. D. 842.

interfere with the premises. *Corporation of Parkdale* v. *West* (1); *North Shore Railway Co.* v. *Pion* (2).

Defendants could not take possession without making compensation. *Harding* v. *Township of Cardiff* (3).

Defendants did not ask for consent of plaintiffs to their entry and cannot rely on acquiescence. *Fullwood* v. *Fullwood* (4); *Willmot* v. *Barber* (5), at p. 105; *Archbold* v. *Scully* (6) at p. 388. Mandatory injunction is the proper remedy. *Smith* v. *Smith* (7), at p. 504; *Goodson* v. *Richardson* (8), at pp. 223, 227; *County of Welland* v. *Buffalo and Lake Huron Railway Co.* (9); Kerr on Injunctions, 4 ed. p. 33.

SEDGEWICK J.—I concur in the judgment allowing the appeal, in part, without costs, and ordering that the judgment appealed from should be varied by refusing the injunction for the reasons stated by my brother Killam.

GIROUARD J. agreed with Mr Justice Nesbitt.

DAVIES J.—I have given much consideration to this case and have had the additional advantage of reading the conclusions reached by my brothers Nesbitt and Killam. I concur in the disposition of the appeal proposed by my brother Nesbitt, and in the reasons given by him.

NESBITT J. — The plaintiffs, a mining company, brought an action of trespass against the defendants' the Sandon Water Works and Light Company.

(1) 12 App. Cas. 602.
(2) 14 App. Cas. 612.
(3) 29 Gr. 308.
(4) 9 Ch. D. 176.
(5) 15 Ch. D. 96.
(6) 9 H. L. Cas. 360.
(7) L. R. 20 Eq. 500.
(8) 9 Ch. App. 221.
(9) 31 U. C. Q. B. 539.

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The defendants are incorporated under a special Act of the legislature of British Columbia, ch. 62, of the statutes of 1896.

The plaintiffs are the owners of a mill site near Sandon, B C., on lot 590, and also part of the Wyoming Mineral Claim, lot 754, lying to the east of Sandon Creek, and allege that the defendants wrongly went upon their land in 1897, and built a tank and pipe line.

The action was commenced on the 16th of July, 1902, and is for damages for trespass and a mandatory injunction compelling the defendants to restore the land to its former condition.

The defendants pleaded the private Act I have mentioned, and that they went upon the land under the authority of the private Act and with the full knowledge and consent, or, in the alternative, with the acquiescence of the plaintiffs, and also claimed that the "Wyoming" being a mineral claim the plaintiffs have no surface rights on the same, and the possession of the defendants did not interfere with the rights of the plaintiffs.

The plaintiffs replied setting up failure upon the part of the defendants to comply with certain conditions in the private Act which they claimed were conditions precedent to enable the defendants to obtain any right or privilege under the private Act. The plaintiffs did not reply another alleged condition precedent upon which the judgment in the Court in appeal proceeded, the learned Chief Justice saying:—

It is not necessary to decide, on this occasion, whether the authority of the Lieutenant Governor to divert the water was a condition precedent to the right of entry, but it was certainly a condition precedent to the right of interference with the soil of the plaintiff. It was open on the pleadings to the plaintiff to take advantage of any failure of proof by the defendants of their case, and although the attention of the learned judge was not directed to the fact that there

was no proof that the authority of the Lieutenant Governor in Council to divert the water had been obtained, I do not think that precluded the plaintiff from taking advantage of the point of law, especially as this is a court of rehearing.

The defendants in this court objected to the course which was taken in the Supreme Court of British Columbia relying upon rule 168 which provides that:

> Any condition precedent, the performance or occurrence of which is intended to be contested, shall be distinctly specified in his pleadings by the plaintiff or defendant (as the case may be) and, subject thereto, an averment of the performance or occurrence of all conditions precedent, necessary for the case of the plaintiff or defendant, shall be implied in his pleadings.

I think that this rule rather has reference to contracts than to cases such as this where the party relied upon the statute as justifying his action, and that in such a case it would not be necessary for the plaintiff to reply as was done here, but as he has seen fit to do so and thereby not only not drawing attention to something he relies upon but perhaps misleading the defendant, he was properly punished by the court below by being deprived of his costs in appeal.

To deal then with the various defences raised, I think that the plaintiffs have shewn that they are entitled to the use and possession of all the property in dispute. The other questions involved are more difficult.

I think that the authority of the Lieutenant Governor in Council to divert the water is a condition precedent to the expropriation of lands for the purpose of utilizing the water so alleged to be diverted, and in this I agree with the court below. I think, however, it would be most unsatisfactory to have the rights of the parties ultimately determined upon what at present appears before the court. Counsel strenuously argued upon the one side that it was for the defendant to shew that such an order in council existed; and

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upon the other side it was argued that the defendants, owing to the course of the pleading, had a perfect right to assume that this was not the question, and pointed to the order in council which approved of the plans and site as shewing that when such order was issued some years after the works were erected, the Council had before them the affidavit shewing that the company had continuously from 1897 to March, 1902, been using the water, and shewing the various works in use, and that, therefore, it should be presumed that all necessary consents of all public authorities of the province were given. If this case is to be determined upon that point I think the facts would appear rather to justify such presumption, but, in the view that I take, I think that the proper course is to refuse an injunction and leave the parties to their respective rights, the plaintiffs if they are so advised to bring trespass or ejectment, and the defendants to take immediate proceedings to expropriate, when it can be properly determined whether they have complied with the necessary conditions precedent to enable them to expropriate, and if they have not no doubt plaintiffs will, upon making a proper case, be entitled to have their rights protected and recover possession of their property.

The next question for consideration was whether payment or tender of the money was a condition precedent to taking of possession. The private Act relied upon is very difficult of construction. There is no doubt that the rule is plain that parties shall not be deprived of the use and possession of their property before payment unless by express words or necessary implication in the statute conferring rights of expropriation.

I have examined, in addition to the cases mentioned by the parties, a number of authorities including *Boyfield* v. *Porter* in 1811 (1) ; *Doe dem Robins* v. *Warwick Canal Co.* in 1836 (2) ; *Lister* v. *Lobley* in 1837 (3) ; *Earl of Harborough* v. *Shardlow* in 1840 (4) ; *Peters* v. *Clarson* in 1844 (5) ; *Johnson* v. *Ontario, Simcoe & Huron Railroad Co.* in 1853 (6), and I have come to the conclusion that, on the true construction of this Act, the making of compensation is not a condition precedent to taking possession.

It will be observed that looking at clause 9 the power is to

survey, ascertain, set out, and take hold, appropriate and acquire * * * * (subject, however, to making compensation therefor in manner hereinafter mentioned).

And had that been the only language used in the Act I would have held it was necessary to make compensation before taking possession. But the statute then proceeds :

The powers other than the powers "*to enter, survey, set out and ascertain*" conferred by this section, shall not be exercised or proceeded with until the plans and sites are approved of.

It will be seen that while the surveying, setting out, ascertaining, taking, etc., are all grouped together (subject to making compensation) they are dissevered when you come to the necessity of obtaining the approval of the plans and site, which is clearly a condition precedent, and as it could never be intended that for the mere purposes of surveying, etc., there should be payment as a condition precedent, I take it that the legislature by necessary implication put surveying and expropriation on the same footing as to payment since it joined all these processes in speaking of payment, and therefore payment is not a condition pre-

(1) 13 East 200.
(2) 2 Bing. N. C. 483.
(3) 7 A. & E. 124.
(4) 7 M. & W. 87.
(5) 8 Scott N. R. 384.
(6) 11 U. C. Q. B. 246.

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cedent to the taking possession of the land either to survey or take. The legislature has clearly stated that expropriation cannot take place until the plans and site are approved of and apparently imply that, when such approval is given, then possession may be taken subject to making payment and either party can set the law in motion for obtaining payment. I refer also to clause 13 as indicating that in the case of clearing lands and underwood it is plain that payment is to follow the work.

I am unable to derive any light upon the subject from a consideration of clauses 22 and 23 relied on by Mr. Davis. Much argument was devoted to the question of acquiescence as affecting the granting of the injunction. Even assuming the court below was right in holding that the right to divert was a condition precedent compliance with which was necessary by the plaintiff, in the view I take of the case that the injunction should not go on the present record it is perhaps unnecessary to discuss the point, but as the same question has arisen more than once recently I desire to say that in cases where a legal right is established the general rule is that laid down in *Goodson* v. *Richardson* (1) in 1873, viz.: that where the invasion of the right is for the purpose of a continuing trespass which is in effect a series of trespasses from time to time to the gain and profit of the trespasser without the consent of the owner of the land, this is a proper subject for an injunction. See also *Cowper* v. *Laidler* (2), where the rules to date are stated by Buckley J.

Where, however, the case is one in which the party trespassing would, if proper steps had been taken, have the right to expropriate, I think the better course is to withhold the issue of the injunction in order to

(1) 9 Ch. App. 221. (2) [1903] 2 Ch. 337.

enable the necessary steps to be taken and payment made. See *Corporation of Parkdale* v. *West* (1), pp. 613-15-16; *Pion* v. *North Shore Railway Co.* (2), pp. 629-30; *County of Welland* v. *Buffalo and Lake Huron Ry. Co.* (3).

There is another class of case in which it may be that an injunction will not be granted even where the legal right is proved, viz.: where there has been acquiescence practically amounting to a fraud upon the defendant. See as an example the observation of Lord St. Leonards in *Gerrard* v. *O'Reilly* (4), pp. 433-4; and see rules expressly laid down by Fry J. in *Willmott* v. *Barber* (5), pp. 105-06.

As it is the duty of the court to decide upon the rights of the parties and the dismissal of the bill upon the grounds of acquiescence amounts to a decision that a right which has once existed is absolutely and forever lost, (see per Turner, L. J. in *Johnson* v. *Wyatt* (6), p. 25, I would hesitate to say the court could refuse the injunction at the trial were legal right established unless in case of fraud. See also *Smith* v. *Smith* (7), at pp. 504-505, per Jessel M. R. Had the case been clearly proved here I think an injunction should have gone, the order not to issue if within a limited time the defendants had put matters in train for expropriation, but in view of the doubt whether the defendants can now put themselves in position to expropriate I would allow the appeal so far as an injunction is concerned, but as the defendants could have applied to the court for a suspension of the order to enable them to set the proceedings for expropriation in motion, and also have failed in their argument that the authority to divert was not a condition pre-

(1) 12 App. Cas. 602.
(2) 14 App. Cas. 612.
(3) 30 U. C. Q. B. 147; 31 U. C. Q. B. 539.
(4) 3 Dr. & War. 414.
(5) 15 Ch. D. 96.
(6) 2 DeG. J. & S. 18.
(7) L. R. 20 Eq. 500.

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cedent, I think there should be no costs to either party and both should be left to their remedies which I have pointed out.

The order should be to vary judgment below by refusing the injunction.

KILLAM J.—If, as found by the Supreme Court of British Columbia, no objection was made at the trial to the want of strict proof of a formal order in council authorising the defendant company to divert and use the water of the creeks mentioned in the statute, I do not think that the absence of such proof should have been allowed to be set up on appeal. It is possible that upon the point being raised the evidence could have been supplied. See *Eyre* v. *Highway Board* (1); *Page* v. *Bowdler* (2); *Graham* v. *The Mayor etc., of Huddersfield* (3); *Kennedy* v. *Freeth* (4); *Armstrong* v. *Bowes* (5); *Proctor* v. *Parker* (6); *Hughes* v. *Chambers* (7).

The defendant company, for over four years, operated its works through and over the plaintiff company's lands and used the waters of the creeks for the purpose. With notice of this the Lieutenant Governor in Council approved of the plans of the works. The plaintiff company had no interest in the waters, which were vested in the Crown, and no right other than that of an ordinary citizen to object to any allowance by the executive of their diversion and use. The plaintiff company, by its pleadings, expressly set up several conditions precedent to the defendant company's right to take and use the plaintiff's lands under the statute, but not the absence of authority to use the water. It appears to me that it was proper to assume

(1) 8 Times L. R. 648.
(2) 10 Times L. R. 423.
(3) 12 Times L. R. 36.
(4) 23 U. C. Q. B. 92.
(5) 12 U. C. C. P. 539.
(6) 12 Man. Rep. 528.
(7) 14 Man. Rep. 163.

that any necessary formal authority for the use of the water had been given.

In *The North Shore Ry. Co.* v. *Pion* (1), where the company had built its railway along the fore-shore of a river, cutting off the plaintiff's access to the water, although, as appears by the reports of the case in this court (2), and in the courts of Quebec (3), the formal authority to the railway company to use the shore was neither set up in the pleadings nor directly proved, Lord Selborne, in delivering the judgment of the Judicial Committee of the Privy Council, said:

> Their Lordships do not in this case proceed upon the assumption that the consent of the Lieutenant Governor in Council of Quebec was not duly given to the use made by the railway company of the foreshore of the river St. Charles for the construction of their works. If it were necessary to determine that point the facts would appear to their Lordships rather to justify the presumption that all necessary consents of all the public authorities of the province were given.

And in the *Corporation of the County of Welland* v. *The Buffalo and Lake Huron Ry. Co.* (4), it was presumed, from the use by a railway company for a number of years of a strip of land of the Crown and its crossing, near by, of a canal for which the authority of the Governor in Council was required, that the company had obtained the authority of the Governor in Council to so use the land.

No evidence of the want of authority was given at the trial and no motion was made against the judgment of the trial court on evidence of the want of such authority in fact. While it is claimed in the respondents' factum that, upon the argument in the full court, the defendant company conceded that the Lieutenant Governor in Council had not allowed, granted or approved of the diversion of the water,

(1) 14 App. Cas. 612.
(2) 14 Can. S.C.R. 677.
(3) 12 Q.L.R. 205.
(4) 30 U. C. Q. B. 147; 31 U. C. Q. B. 539.

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this does not appear in the printed case; and the judgment of the court did not proceed upon any such admission, but upon the supposed want of evidence in that respect.

Upon careful perusal of the various statutes of British Columbia relating to the diversion and use of the natural waters, and of the appellant company's Act of incorporation, I am of opinion that the payment of compensation was not a condition precedent to the right to enter upon and use the plaintiff company's lands. Under the Land Act, C. S. B. C. (1888) c. 66, ss. 39 to 52, payment of compensation in advance was expressly required in the cases in which parties were thereby authorized to acquire the right to divert and use water and to enter and use the lands of others for the purpose. Under the Water Privileges Act, 1892, 55 Vict. ch. 47 (B C.), it was necessary to obtain the authority of a judge in order to enter upon and use the lands of others. The judge ascertained the compensation in advance and could impose such terms as he thought fit respecting payment or security.

Under the Water Clauses Consolidation Act, 1897, 60 Vict. ch. 45, R. S. B. C ch. 190, the power to enter upon, use or expropriate the lands of others was to be governed by The Lands Clauses Consolidation Act, 1897, 60 Vict. ch. 20, R. S. B. C. ch. 112, which expressly required payment of or security for compensation before entry, except for the purpose of surveying, taking levels, etc.

By the appellants' Act of incorporation, 59 Vict. ch. 62, s. 9, the company was authorized to enter into and upon the lands of other parties

> to survey, set out, ascertain, and take, expropriate, hold and acquire such parts thereof as it may require, etc., subject, however, to making compensation therefor in manner hereinafter mentioned, but the powers (other than the powers to enter, survey, and set out and

ascertain what parts thereof are necessary for the purposes aforesaid, or for making the plans hereinafter mentioned) conferred by this section shall not be exercised or proceeded with until the plans and sites of the said works have been approved by the Lieutenant Governor in Council.

It will be noticed that, in this section, the portion beginning "subject, however" applied to surveying, setting out and ascertaining, as well as to taking, expropriating, holding and acquiring. If, then, this portion should be interpreted as expressing a condition precedent it would be applicable to entry for the purpose of surveying and ascertaining the parts to be taken, as well as to the permanent acquisition and use of the property. It is usual in such Acts to allow, as in The Lands Clauses Act just referred to, entry for the purpose of surveying and ascertaining the land to be taken without previous compensation, which cannot well be estimated until the land has been ascertained. This Act authorized either the company or the owner to initiate arbitration proceedings to fix the compensation. By section 22 the owner was bound to convey upon payment or tender of the compensation. By section 23

the lands, rights and privileges which shall be ascertained, set out and appropriated by the said company for the purposes aforesaid, shall, so long as the said company use the same for the purposes of this Act, be vested in the said company.

By section 9 one condition precedent was expressly imposed for the permanent acquisition of the land, and to that it was expressly limited. It seems, then, not unreasonable to construe the Act as not imposing the payment of compensation as a condition precedent for any purpose, except for formal conveyance.

As the approval of the plans was an express condition precedent to the right to appropriate and use the plaintiff company's lands, and as the plans were not approved until long after the appellant company

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had taken possession and appropriated the lands, there was clearly a trespass for which the plaintiff company was entitled to recover. But after the approval of the plans the appellant company remained rightfully in possession.

In my opinion the portion of the judgment appealed from awarding an injunction should be struck out, and the respondent company should pay the costs of the appeal.

Appeal allowed, in part, without costs.

Solicitors for the appellants: *Taylor & O'Shea.*

Solicitors for the respondents: *Elliott & Lennie.*