THE CALGARY AND EDMONTON RWAY CO. (PLAINTIFF) .... APPELLANT;

1919
*Oct. 27.
*Nov. 10.

AND

THE SASKATCHEWAN LAND AND HOMESTEAD CO. (DEFENDANT) . RESPONDENT.

ON APPEAL FROM THE APPELLATE DIVISION OF THE SUPREME COURT OF ALBERTA.

Railways—Arbitration—Costs—Award less than costs—Limitation—"Railway Act," R.S.C. 1906, c. 37, s. 199.

The taxable costs, incurred on an arbitration pursuant to the "Railway Act," are constituted by section 199 a debt recoverable by action; and the liability for these costs of the expropriated party is not limited to the amount of the compensation. Idington and Duff JJ. dissenting.

Per Anglin, Brodeur and Mignault JJ.—The judge, when taxing the costs under the statute, acts as *persona designata* and no appeal lies from his decision.

Per Anglin J.—So far as the right of the appellant to certain items allowed depended upon findings of fact, it was within the jurisdiction of the learned judge to make such findings and they cannot be reviewed for the purpose of establishing that in making the allowances he exceeded his jurisdiction. Brodeur J. dubitante and Mignault J. expressing no opinion.

Judgment of the Appellate Division (14 Alta. L.R. 416; 46 D.L.R. 357; [1919] 2 W.W.R. 297) reversed, Idington and Duff JJ. dissenting.

APPEAL from the judgment of the Appellate Division of the Supreme Court of Alberta (1), reversing the judgment of the trial judge, Ives J. (2), and dismissing the appellant's, plaintiff's, action with costs.

The material facts of the case and the questions in issue are fully stated in the above head-note and in the judgments now reported.

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*PRESENT:—Idington, Duff, Anglin, Brodeur and Mignault JJ.

(1) 14 Alta. L.R. 416; 46 D.L.R. 357; [1919] 2 W.W.R. 297.
(2) 44 D.L.R. 133; [1919] 1 W.W.R. 1.

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Idington J.

W. N. Tilley K.C. for the appellant.
Frank Ford K.C. for the respondent.

IDINGTON J. (dissenting)—This appeal must depend on the construction of section 199 of the "Railway Act" which reads as follows:—

199. If, by any award of the arbitrators or of the sole arbitrator made under this Act, the sum awarded exceeds the sum offered by the company, the costs of the arbitration shall be borne by the company; but if otherwise they shall be borne by the opposite party and be deducted from the compensation.

2. The amount of the costs, if not agreed upon, may be taxed by the judge.

Had the intention been to give unlimited costs there was no object or sense in adding to what would have given that, subject to taxation, the words "and be deducted from the compensation."

When using language which would without these words have given the right of action insisted upon some meaning must be given thereto.

The most reasonable interpretation seems to imply a limitation of the amount of costs and the most direct method of asserting the method and right of recovery.

It is an illustration of the rule that "where the Legislature has passed a new statute giving a new remedy that remedy alone can be followed."

Of course the judge taxing the costs can only allow such as can be so recovered.

The appeal should be dismissed with costs.

DUFF J. (dissenting)—The compensation awarded the respondents is much less than the amount of the taxed costs. In these circumstances the question arises whether the appellant company has a right of action against the respondents for the amount by which the costs exceed the compensation.

The proceedings for determining compensation are prescribed in sections 192 *et seq*. of the "Railway Act." By section 193, the notice to treat is, among other things, to contain a declaration of readiness to pay a named sum as compensation; and by section 195, if the "opposite party" is absent from the county or district in which the lands lie or if he cannot be found, authority is given to a judge to order that the notice to treat may be delivered by publication in a newspaper published in the district or county or, if no newspaper is published therein, then in a newspaper published in some adjacent district or county. Then by section 196, if within ten days after the service of the notice to treat or within one month after the first publication of it, the "opposite party" does not give notice to the company that he accepts the sum offered, the judge shall, on the application of the company or of the "opposite party," appoint an arbitrator for determining the compensation. Section 199, upon which the point in dispute turns, is in the following words:—

199. If, by any award of the arbitrators or of the sole arbitrator made under this Act, the sum awarded exceeds the sum offered by the company, the costs of the arbitration shall be borne by the company; but if otherwise they shall be borne by the opposite party and be deducted from the compensation.

2. The amount of the costs, if not agreed upon, may be taxed by the judge.

The effect of this enactment, according to the construction for which the appellant company contends, is that any person whose lands have been taken by a railway company and who does not within the time mentioned in section 195, as above mentioned, give notice to the railway company accepting the company's offer of compensation, becomes, if that offer prove to have been sufficient, liable to pay the

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whole of the costs of the proceedings for determining the amount of compensation, even though the costs should exceed the compensation itself; and this although the person whose lands are taken may never have heard of the proceedings.

The penalty seems an extreme one. Cases must not infrequently happen in which some investigation is required in order to determine within reasonable limits the extent of the damage the owner is likely to suffer and it truly is a little difficult to understand even in cases where the notice is actually served upon the owner personally why his failure to notify acceptance of compensation should expose him, however reasonable his conduct may have been not only to the penalty of having his compensation applied in payment of costs but should subject him to personal liability as well. I repeat, it seems an extreme penalty.

And in the case where the owner has never heard of the proceedings and through no fault of his own the proceedings are taken behind his back such a penalty could hardly be characterized otherwise than as a palpable injustice.

There are two principles of construction which may properly be applied. 1st.—The principle resting on the presumption that Parliament will not impose a palpably unjust burden upon the subject, the best example, perhaps, of the application of this principle being *The River Wear Commissioners* v. *Adamson*(1), where the Court of Appeal and the House of Lords agreed that unqualified language must be qualified in order to give effect to this presumption. The second is that the enactment to be construed should be read as a whole.

(1) 1 Q.B.D. 546; 2 App. Cas. 743.

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It is quite true that section 199 plainly evinces an intention that, in some degree at all events, the owner may have the compensation awarded him, however reasonable his conduct may have been, applied towards payment of the costs incurred by the railway company in connection with the arbitration. The justice of this may well be doubted; but up to this point the language is clear. Is it quite clear also that the section not only appropriates the compensation in payment of costs but may further subject the owner who has heard nothing of the proceedings and through no fault of his own, to a personal liability?

Coming to the language of section 199—it is clearly enough an admissible view of this section that it does not contemplate cases in which the costs exigible at the instance of the company exceed the amount of the compensation awarded; it is possible that is to say, to read the phrase "borne by the opposite party" as explained by what follows; and, having regard to the considerations just mentioned, I think that it is the better construction.

> It is not a satisfactory mode of arriving at the meaning of a compound phrase to sever it into its several parts and to construe it by the separate meaning of each of such parts when severed. *Mersey Docks & Harbour Board* v. *Henderson* (1).

I have not overlooked Mr. Tilley's argument that this construction has the effect of deleting the words "shall be borne by the opposite party." As the section stands in its present form this is perhaps so but I incline to think an explanation of these words is afforded by the history of the section, an explanation which would meet the objection. I will not go into that but merely say that redundancy even tautology of expression is so common in Dominion statutes and especially in railway legislation as to

(1) 13 App. Cas. 595, at pp. 599, 600.

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deprive this argument of much of the weight it otherwise might have.

The appeal should be dismissed.

ANGLIN J.—I am, with great respect, of the opinion that section 199 of the "Railway Act" created a debt on the part of the respondent for the taxable costs incurred by the appellant on the arbitration. I can attach no other meaning to the words "shall be borne by the opposite party." They must have a purport and effect corresponding to that of the preceeding words "shall be borne by the company."

The ordinary remedy when Parliament creates an obligation to pay is by action. *The Queen* v. *The Hull & Selby Railway Co.*(1); *Booth* v. *Trail*(2). That remedy is open unless it is taken away or some other exclusive remedy is given. *Hutchinson* v. *Gillespie*(3), per Martin B. Do the added words "and be deducted from the compensation" provide such an exclusive remedy? If they do the statute is to be construed either as if the words

> they shall be borne by the opposite party

were deleted from it, or as if it read—

> they shall be borne by the opposite party (to the extent of) and be deducted from the compensation.

Is there justification either for such deletion or for the interpolation of the bracketted words? I think not, having regard to "the provisions and object of the enactment." *Vallance* v. *Falle*(4).

The general rule certainly is that

> where an Act of Parliament creates a right and points out a remedy, no other remedy exists.

But is the provision for deduction from the compensation intended as a remedy? I doubt it. Its purpose

(1) 13 L.J.Q.B. 257.
(2) 12 Q.B.D. 8.
(3) 25 L.J. Ex. 103, at p. 109.
(4) 13 Q.B.D. 109, at p. 110.

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may well have been to require the company to resort to the compensation money as the fund for payment of its costs until exhausted and to restrict its right to maintain suit and to levy execution to any balance of the costs not thus satisfied. As a remedy for the realization of the debt expressly created by the preceeding clause it would sometimes, as in the present case, prove grossly inadequate. It does not cover the whole right. The fact affords a *primâ facie* indication that it was not intended to be exclusive or substitutional. *Shepherd* v. *Hills*(1); *Vestry of St. Pancras* v. *Batterbury*(2); *Atkinson* v. *Newcastle Waterworks*(3). The giving of a special remedy does not always take away the remedy by action. *Batt* v. *Price*(4), per Lush J. I agree with the learned trial judge and McCarthy J. that in this case the right of action is not taken away either expressly or by implication as to so much of the taxed costs as cannot be satisfied out of the compensation.

I am also of the opinion that the learned judge who approved the taxation acted as *persona designata* and that we cannot review the allowances made on the grounds pressed by Mr. Ford without in fact entertaining an appeal from the taxation. So far as the right of the appellant to certain items allowed depended upon findings of fact, it was within the jurisdiction of the learned judge to make such findings and they cannot be reviwed for the purpose of establishing that in making the allowances he exceeded his jurisdiction.

I would allow the appeal and restore the judgment of the learned trial judge with costs here and in the Appellate Division.

(1) 11 Exch. 55.
(2) 2 C.B.N.S. 477, at p. 487.
(3) 2 Ex. D. 441, at p. 449.
(4) 1 Q.B.D. 264, at p. 269.

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Brodeur J.

BRODEUR J.—We have to construe in this case section 199 of the "Railway Act," which reads as follows:

> 199. If, by any award of the arbitrators or of the sole arbitrator made under this Act, the sum awarded exceeds the sum offered by the company, the costs of the arbitration shall be borne by the company, but if otherwise they shall be borne by the opposite party and be deducted from the compensation.

Several years ago, the appellant railway company desired to expropriate a piece of land belonging to the respondent company. An offer of $733.05 was made by the railway company; but the offer was not accepted by the Saskatchewan Land Company which, on the other hand made a claim of $339,000.00. The award was for $733.05 only and what appears to be the exorbitant claim of the Saskatchewan Land Company was dismissed. Now the Railway Company sues for its costs, which have been taxed by Mr. Justice Simmons at $5,116.20.

The trial judge maintained the action(1); but the Appellate Division(2), Mr. Justice McCarthy dissenting, reversed this judgment and dismissed the action on the grounds that the company could not recover more costs than the amount which had been awarded.

In view of the large amount which was claimed by the respondent company on the arbitration proceedings, it is no wonder that the costs incurred by the railway company were much larger than the amount awarded. But it is no concern of ours since, as required by sections 2 of section 199, those costs have been duly taxed. The provisions of section 199 seem to me to be clear as enunciating that the railway, company having offered a certain sum of money, if the offer is not accepted, the company will be bound to pay the costs if the amount which is later on granted

exceeds the sum offered; but if otherwise, if the amount which is granted is not in excess of the amount offered, then the costs shall be borne by the opposite party, with the additional right however for the railway company to deduct the costs from the award. In such a case, the railway company might, of course, not avail itself of the privilege of deducting those costs and take an independent action to recover the whole amount. But if the railway company wants to deduct those costs from the award, the statute entitles it to make such deduction; but such a deduction will not affect its right to recover by a direct action the balance which might be due.

There is no doubt, I think, in view of the decision in *Metropolitan Railway Company* v. *Sharpe*(1) that the provision that the costs shall be borne by one or the other of the parties creates a debt recoverable by action.

It has been contended by the respondent in this case that the decision of the judge who is *persona designata* taxing the costs is subject to review in a case where he would have exceeded his jurisdiction. I could have understood such a contention; but it cannot be said that in the present case the judge has exceeded his jurisdiction in taxing the costs but he has simply exercised a discretion which he had under the statute.

For these reasons, I am of the opinion that the appeal should be allowed with costs of this court and of the court below and the judgment of the trial judge restored.

MIGNAULT J.—Two questions arise on this appeal:

1. Can the costs of an arbitration under the "Railway Act" to fix compensation for the taking of land

(1) 5 App. Cas. 425.

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exceed the amount of the arbitrators' award where the costs are borne by the owner?

2. Can the taxation of such costs by a judge be revised?

The first question involves the construction of section 199 of the "Railway Act," which is as follows:

> 199. If by any award of the arbitrators or of the sole arbitrator made under this Act, the sum awarded exceeds the sum offered by the company, the costs of the arbitration shall be borne by the company; but if otherwise they shall be borne by the opposite party and be deducted from the compensation.
>
> 2. The amount of the costs, if not agreed upon, may be taxed by the judge.

The whole question is as to the meaning of the words:

> but if otherwise they (the costs) shall be borne by the opposite party and be deducted from the compensation.

I think it is impossible to deny that when the statute says that the costs shall be "borne" by a party a right of action exists against that party to recover the same, and obviously the whole of the costs can be recovered in such an action.

The construction which the respondent places on section 199 is equivalent to striking out the words "shall be borne by the opposite party."

For if the costs can only be deducted from the compensation, all that would be necessary would be to say "but if otherwise they (the costs) shall be deducted from the compensation."

I cannot think that the intention of Parliament was to render the company liable for all costs when its offer was below the amount awarded, and to limit the liability for costs of the opposite party to an amount not exceeding the compensation, when the offer of the company equalled or was higher than the award. Were that the case, the costs would not be borne by the opposite party, or only indirectly so, but would be borne or paid out of the amount awarded.

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Giving therefore to each word in this section its proper and natural meaning, my opinion is that the liability for costs of the opposite party is not restricted to the amount of the compensation.

It follows that the judgment of the Appellate Division cannot be sustained on this part of the case, and that the judgment of the learned trial judge should be restored.

The second question should, in my opinion, be answered in the negative. The judge under section 199 acts as *persona designata* when he taxes costs, and no appeal lies from his decision; *Canadian Pacific Rly. Co.* v. *Little Seminary of Ste. Thérèse*(1).

This rule was not disputed by the learned counsel for the respondent, but he contended that, although there was no appeal, when the judge in taxing the costs acted according to a wrong principle of law, his order could and should be set aside by the court.

On due consideration of the reasons adduced by the respondent as constituting a wrong principle of law for the taxation of the costs of the arbitration, I think that while they might be proper grounds of appeal, they would not come under the rule which the respondent asks us to apply, and as to which it is unnecessary to express an opinion.

The appeal should be allowed with costs.

Appeal allowed with costs.

Solicitor for the appellant: *G. A. Walker.*
Solicitors for the respondent: *Emery, Newell, Ford & Lindsay.*

(1) 16 Can. S.C.R. 606.