

HIS MAJESTY THE KING (PLAIN-
 TIFF) } APPELLANT; 1911
 *March 8.
 *May 2.
 AND
 JANE MARY JONES (DEFENDANT) ... RESPONDENT.

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA.

Expropriation of land — Compensation — Transcontinental Railway Commission — Jurisdiction — "Railway Act" — "Exchequer Court Act," sec. 2 (d) — 3 Edw. VII. c. 71.

"The Transcontinental Railway Act," 3 Edw. VII. ch. 71, does not expressly empower the commissioners to deal with compensation for land taken for the railway, and section 15 giving them "the rights, powers, remedies and immunities conferred upon a company under the 'Railway Act'" does not confer such power.

The Transcontinental Railway is a public work within the meaning of section 2, subsection (d) of "The Exchequer Court Act," and proceedings respecting compensation for land taken for the railway may be taken by or against the Crown in the Exchequer Court.

Judgment of the Exchequer Court (13 Ex. C.R. 171) reversed.

APPEAL from a judgment of the Exchequer Court of Canada (1) dismissing the information of the Attorney-General of Canada on the ground that the court had no jurisdiction to entertain it.

The purpose of the information filed on behalf of His Majesty was to obtain a declaration that certain land belonging to the respondent taken for the Eastern division of the National Transcontinental Railway were vested in the King and to have the compensation therefor awarded.

*PRESENT:—Sir Charles Fitzpatrick C.J. and Davies, Idington, Duff and Anglin JJ.

(1) 13 Ex. C.R. 171.

1911
THE KING
v.
JONES.
—

The learned judge of the Exchequer Court held that under the provisions of "The Transcontinental Railway Act" and those of "The Railway Act" relating to expropriation of land the compensation for land taken for the purposes of the Transcontinental Railway must be ascertained by arbitration under "The Railway Act" and the Exchequer Court has no jurisdiction in the matter. The Crown appealed.

Newcombe K.C., Deputy-Minister of Justice for the appellant.

The respondent did not appear.

THE CHIEF JUSTICE.—I agree in the opinion stated by Sir Louis Davies.

DAVIES J.—This is an appeal from the judgment of the Exchequer Court dismissing the information filed by the Attorney-General of Canada for a declaration that certain lands taken for the Eastern Division of the National Transcontinental Railway were vested in the King, and that certain compensation should be awarded therefor to the owner (defendant).

The learned judge reached the conclusion that the Exchequer Court had no jurisdiction to entertain the information on the ground that the damages for the lands taken must be determined by proceedings on behalf of the Crown or the commissioners under the clauses of the Railway Act, R.S.C. 1906, ch. 37, relating to *the taking or using of lands and compensation and damages*, sections 172 to 215.

I have already had occasion to consider this question generally in the appeal of *Johnstone v. The King* (1), in which I reached the conclusion that so far as

damages or compensation for the taking of lands located by the Government for the Eastern Division of the Transcontinental Railway are concerned the commissioners were without jurisdiction to deal with them. Section 13 of the "Transcontinental Railway Act," 3 Edw. VII. ch. 71, relating to the expropriation of the lands required for the Eastern Division of that railway enacts that the deposit of the description and plan of the lands taken in manner therein provided

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 question at once arises where and how is that lawful claim to be prosecuted? If I am right in my holding in the case above referred to that the whole question of the adjustment and settlement of these land damages is *ultra vires* the commissioners, then it seems clear that section 15, which is relied upon as giving them jurisdiction to have these damages adjusted and settled under the land compensation clauses of the "Railway Act," would have no application. That section giving to the commissioners

the rights, powers, remedies and immunities conferred upon a company under the "Railway Act"

does so only

in so far as they are applicable to the said railway and in so far as they are not inconsistent with or contrary to the provisions of this Act.

These conceded rights, powers, etc., clearly relate only to matters over which the commissioners have jurisdiction given to them. Once it is conceded that they have no jurisdiction or power in the matter of land damages over the located line of the Eastern Division of the Transcontinental Railway, then the argument

1911
 THE KING
 v.
 JONES.
 ———
 Davies J.
 ———

1911

THE KING

v.

JONES.

Davies J.

that section 15 can be invoked to give them such jurisdiction must fail. That section can only be invoked over matters and in cases where jurisdiction exists in commissioners *abunde*.

The scheme of the general railway Act and that of the Eastern Division of the Transcontinental Railway relating to damages are entirely different. Under the general railway Act the company cannot enter upon and take possession of the lands until the damages are adjusted and either paid or tendered. Under the "Transcontinental Railway Act" the mere fying of the plans and descriptions operates as a dedication of the lands to the public and a vesting of them in the Crown

saving always the lawful claim of interested parties to compensation.

I cannot see how it is possible for the commissioners to take the necessary steps under the general railway Act to have the damages ascertained by the statutory arbitration proceedings, if they are without jurisdiction on the subject-matter.

The only remaining question is whether the Exchequer Court had jurisdiction under the Act constituting it and the Act respecting the expropriation of lands, chapter 143, Revised Statutes of Canada.

The latter Act, section 2, sub-section (d), defines a public work to mean and include *inter alia*

the works and properties acquired, constructed * * * at the expense of Canada, or by the acquisition or construction * * * of which any public moneys are voted and appropriated by Parliament and every work required for any such purpose.

The "Exchequer Court Act," ch. 140, R.S.C., sec. 20, gives that court exclusive jurisdiction over

(a) every claim against the Crown for property taken for any public purpose.

I agree with the contention of Mr. Newcombe that no adequate interpretation of these words can exclude the Eastern Division of the National Transcontinental Railway.

I think the only reasonable conclusion to be drawn from reading the "National Transcontinental Railway Act" and the agreement it ratifies and confirms is that the Eastern Division of that railway is a public work in the course of construction by the Government, but through the agency of the commissioners to the extent to which they are by statute authorized. It is a public work vested in the Crown, constructed at the expense of Canada, or for the construction of which public moneys have been voted and appropriated by Parliament within the meaning of section 2 para. (d), of the "Expropriation Act," and the procedure taken by the Crown in fying this information to determine the claim against the Crown for the lands taken falls within the language of the 20th section of that Act, and the claim itself is one coming, in my judgment, within sub-section (a) of section 20, of the Act constituting the Exchequer Court and defining its jurisdiction over

every claim against the Crown for property taken for any public purpose.

Altogether I entertain no doubt that the jurisdiction of the Exchequer Court covers the claim made and think the appeal should be allowed and the jurisdiction of the court affirmed.

INDINGTON J.—In this case some of the questions raised relative to the jurisdiction of the Exchequer Court are substantially the same as in the case of *Johnstone v. The King* (1), heard a few days ago.

1911
 THE KING
 v.
 JONES.
 —
 Davies J.
 —

1911

THE KING

v.

JONES.

Idington J.

I need not repeat here my reasons given there for holding the Crown and not the commissioners liable.

There are two other questions of an entirely different character raised herein touching the jurisdiction of said court to hear this case.

This is the case of an information filed at the suit of the Crown, seeking a declaration of title in the Crown in respect of certain lands taken from respondent, for the purposes of the right of way of the National Transcontinental Railway, and to have the compensation due the respondent therefor determined.

The respondent is not concerned apparently in what form this may be tried. As I understand the learned judge's reasoning it is that the statute under which the lands have been entered upon and taken incorporates so much of the "Railway Act," including its expropriation clauses, as to constitute arbitration proceedings, therein provided for, the exclusive means of determining the measure of compensation; and that even if such be not the case the Exchequer Court is not given authority to deal with such cases.

If anything can be clear in law it is quite clear that the Crown's representatives who took possession of the lands in question could not justify such a proceeding by virtue of anything in the "Railway Act."

How then can the provisions of that Act be applied in this case?

That Act provides for the expropriating party filing in the registry office plans sanctioned by the railway commission, defining what land is to be taken or power intended to be exercised with regard to the lands in question, and making a tender of

compensation, and then only after all this giving to the owner or interested party a notice.

If the land to be taken is required for the railway for right of way as claimed by the plan, there must be a certificate of an engineer accompanying the notice.

Other powers than those strictly relative to lands to be taken for right of way may also be, by leave of the Board of Railway Commissioners, exercised by way of expropriation.

All done under the "Railway Act" in these regards requires the sanction of the said board.

I cannot find that the board has any authority to deal with the project in question herein, save conditionally in respect of specified things which do not touch the power of the Crown or its commissioners relative to the taking of lands as herein.

It seems as if the powers to be exercised, and alleged in this information to have been exercised, by the commissioners under the Act now in question relative to the taking of lands and the mode of taking are incompatible with the powers furnished by the "Railway Act" for any like purpose.

The very foundation for the proceedings to take and compensate according to the methods prescribed by the "Railway Act" cannot exist in regard to this project. I fail to see how the rule of law relative to pursuing a remedy prescribed by an enabling statute can have given a semblance of authority for the Crown to pursue or apply the "Railway Act" to compensate for what has been done in question here.

The Act under which the Crown's commissioners are proceeding enacts by section 13 thereof, 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

1911
THE KING
v.
JONES.
Idington J.

1911
THE KING
v.
JONES.
—
Idington J.
—

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.

I see nothing in the "Railway Act" or in this Act to suggest that a part of the one can be dovetailed into the other so as to constitute a specifically prescribed method provided by Parliament for the coherent execution of the power and consequent determination of the amount of compensation to be given for the exercise of this power.

The provision of section 3 of the "Railway Act" incorporates its provisions with any special Act and the interpretation of "Special Act" is quoted in the judgment appealed from to shew that the road in question herein is one of such special Acts.

But section 3 provides that

the provisions of the special Act shall in so far as it is necessary to give effect to such special Act be taken to override the provisions of this Act,

i.e., the "Railway Act."

The expropriation provisions in the "Railway Act" seem by the said section 13 of this special Act to be overridden thereby.

It is to be observed also that the national trans-continental scheme is of such a composite character that we must guard against being supposed to express any opinion of any of the provisions bearing on other sections of that work than the one before us.

What the Crown's commissioners have done under said provision seems to have effectually vested the lands in question in the Crown and however satisfactory and convenient it may be to have the court de-

clare it properly done, it stands as complete, subject to the right to compensation.

The commissioners of the Crown are of right in possession by section 13 above quoted.

I cannot find or hold that the express provisions of section 15 have any relation to this subject-matter now under consideration.

When once we have concluded, as I do, that the method prescribed as suggested by the learned judge does not apply, what is our next duty ?

Whether or not that right to compensation can be enforced elsewhere than in the Exchequer Court, is not part of our present inquiry.

Our next inquiry must be to ascertain if the powers thus exercised having been thus completed, can the Exchequer Court be asked to fix the compensation due respondent by reason thereof?

I am not concerned with what is possible as the measure of compensation in one court as distinguished from what may be fixed in another. I am only concerned to know if, this expropriation having been accomplished, indemnity can be got in the Exchequer Court.

That question is within a narrow compass.

The Exchequer Court Act, sec. 20, provides as follows:—

20. The Exchequer Court shall also have exclusive original jurisdiction to hear and determine the following matters:—

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

(b) Every claim against the Crown for damage to property injuriously affected by the construction of any public work.

It seems clearly to follow from what I have already said that these two sub-sections cover all that is necessary to give the court jurisdiction.

1911

THE KING

v.

JONES.

Idington J.

1911
THE KING
v.
JONES.
Idington J.

Indeed, if I am right in my interpretation of section 13, quoted above from the "National Transcontinental Act," it seems too clear for argument that the above section 20, subsection (a) is sufficiently comprehensive.

Moreover, if this property so taken as above set forth, to form a part of the railway in question, and to become the property of the Crown, is not taken for a public purpose, it would be difficult to find one that has been.

Indeed, in face of section 13, above referred to, and this section 20, just now quoted, when we read its exclusive terms it seems hard to find room for the argument relative to the "Railway Act" having any application to this matter.

Nor do I see any reason for our resorting to the "Expropriation Act" in its relation to the question of jurisdiction. It may or it may not furnish the proper measure of damages to be adopted, or be applicable in any way. I repeat, all that is something that at present does not concern us.

I think the appeal must be allowed.

DUFF J.—I agree in the opinion stated by Sir Louis Davies.

ANGLIN J.—I agree that this appeal should be allowed. There should be no costs.

Appeal allowed without costs.

Solicitor for the appellant: *E. L. Newcombe.*

Solicitor for the respondent: *W. B. Chandler.*