1889
*June 14.
* Oct. 11.

THE CANADIAN PACIFIC RAILWAY COMPANY..... } APPELLANTS.

AND

THE LITTLE SEMINARY OF STE. THÉRÈSE..... } RESPONDENTS.

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

Appeal—Expropriation of land—Order by judge in chambers as to moneys deposited—R.S.C. ch. 135 *sec.* 28—43 *Vic. ch.* 9, *sec.* 9, *sub-sec.* 31—*Persona designata—R.S.C. ch.* 109 *sec.* 88 *sub-secs.* 26 *and* 31.

The College of Ste. Thérèse having petitioned for an order for payment to them of a sum of $4,000 deposited by the appellants as security for land taken for railway purposes, a judge of the Superior Court in chambers after formal answer and hearing of the parties granted the order under the Railway Act, R. S. C. ch. 109, sec. 8 sub-sec. 31. The railway company appealed against this order to the Court of Queen's Bench for Lower Canada (Appeal Side) and that court affirmed the decision of the judge of the Superior Court.

Held, that the order in question having been made by a judge sitting in chambers, and, further, acting under the statute as a *persona designata*, the proceedings had not originated in a Superior Court within the meaning of section 28 of the Supreme and Exchequer Courts Act, and the case was therefore not appealable.

Per Gwynne and Patterson JJ. That an abandonment of a notice to take lands for railway purposes must take place while the notice is still a notice and before the intention has been exercised by taking the lands. R. S. C. ch. 109, sec. 8 sub-sec. 26.

That the proper mode of enforcing an award of compensation made under the Railway Act is by an order from the judge.

Quære—Whether sub-sec. 34 of sec. 8 of ch. 109 R.S.C. permits possession to be given before the price is fixed and paid of any land except land on which some work of construction is to be at once proceeded with.

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*PRESENT :—Sir W. J. Ritchie, C.J., and Fournier, Taschereau, Gwynne and Patterson JJ.

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APPEAL from a judgment of the Court of Queen's Bench confirming a judgment of the Superior Court at Terrebonne, granting a petition of the respondents for the payment to them of a deposit of $4,000, made by the appellants in the Bank of Montreal, under the provisions of the Railway Act R. S. C. ch. 109, the petitioners claiming the right to be paid under an award of arbitrators rendered in certain expropriation proceedings between the parties under the said act.

The litigation in question in this case arose out of proceedings taken by the railway company to expropriate a piece of land to be used as a gravel pit. The company gave a notice of expropriation on the 18th August, 1886, expropriating the piece of land in question, and subsequently applied to the court under section 9, sub-section 38 of the Consolidated Railway Act, 1879 (sec. 9 Revised Statutes of Canada ch. 109) for a warrant of possession, and deposited, in accordance with the order of the judge granting the warrant, the sum of $4,000 in the Bank of Montreal, as security under the provisions of the last mentioned section. Arbitrators were appointed on both sides, and a third arbitrator chosen, and the arbitration proceedings went on; and the proprietors, respondents here, seemed to have closed their evidence, when, on the 11th Oct. 1887, a notice of discontinuance was served upon the proprietors and upon the arbitrators, under the provisions of sub-section 26 of section 8, by which notice the appellants declared they abandoned and desisted from the notice of expropriation, and from all proceedings for the expropriation of the property mentioned therein, declaring their willingness to pay to the respondents all damages and costs by them incurred in consequence of such notice and abandonment; and on the 14th of October the railway company served a notarial notice upon the respondents setting out the

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fact of their discontinuance, and that the railway company were removing from the property of the respondents their rails, plant and other materials, in order to restore the possession to them, and notifying the respondents that the railway company abandoned the possession and occupation of the land in question, and offering to pay all damages together with the value of the use and occupation of the property while in possession of the company, and all costs incurred in the expropriation proceedings. The company took possession, but on account of a verbal error made in the first notice of abandonment, as to the date of the notice of expropriation, a second notice of abandonment was served upon the proprietors and the arbitrators on the 22nd October, and on the same day a second notarial notification and protest was served upon the proprietors, respondents here, setting out all the facts in connection with the case, and tendering to the respondents, in full payment of all damages and costs incurred by them, $2,500.

On the 25th October, the appellants' instituted an action setting out all the facts in connection with the expropriation proceedings, whereby they declared their willingness to pay the costs and damages incurred by the proprietors, and renewed their tender of $2,500, further praying that it be declared that the functions of the arbitrators had ceased by the service of the notice of abandonment, and that they be prohibited and enjoined from further proceeding with the arbitration. Notwithstanding these proceedings, the arbitrators proceeded to and did render their award on the 27th October, by which they gave to the seminary, respondents here, $7,500 as indemnity for the land taken by the company and for all loss and damage resulting from its expropriation. Immediately thereafter the company, appellants, fyled an incidental or supplementary demand

to their action already taken, by which they asked that their award should be declared illegal and invalid, and be set aside.

The respondents subsequently presented the petition praying that an order should issue to the Bank of Montreal to pay to them the said sum of $4,000, in accordance with the terms and in part payment of the award. It is from the judgment granting this petition that the appeal was taken.

H. Abbott Q.C. for appellants.

[The learned counsel having stated the nature of the appeal the court raised a question as to their jurisdiction, for the reasons—1st, that the original cause of action did not arise in a Superior Court; 2nd, that it was not a final judgment; 3rd, that it was a matter within the judicial discretion of the judge; and counsel was requested to argue the question of jurisdiction.]

The statute requires the order to be made by a judge of a Superior Court, and in the Province of Quebec the judicial act of a judge in chambers is the act of the court. Then, as an appeal lies to the Court of Appeal in the Province of Quebec, it will lie to this court. *Wilkins* v. *Geddes* (1); *Shields* v. *Peak* (2); *Chevallier* v. *Cuvillier* (3); *Philbrick* v. *Ont. & Quebec Ry. Co.* (4); *McKinnon* v. *Kerouack* (5).

This order finally disposes of the right to the money in the bank which is a substantial matter between the parties, and it is a final judgment as to that money under the Supreme Court Act. *Herring* v. *Napanee & Tamworth Ry. Co.* (6); *Re* Leach (7); *Horton* v. *The Canada Central Ry. Co.* (8).

This is not a matter of judicial discretion. The judge

(1) 3 Can. S. C. R. 203.
(2) 8 Can. S. C. R. 579.
(3) 4 Can S. C. R. 579.
(4) 11 P. R. Ont. 373.
(5) 15 Can. S. C. R. 111.
(6) 5 O. R. 354.
(7) 8 O. R. 222.
(8) 45 U. C. Q. B. 143.

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must either make or refuse the order. He could not make a conditional order or impose terms.

Then as to the merits. The statute expressly gives a right to abandon the expropriation, and reading sections eight and nine together, it is clear that it applies as well in case of land taken for materials as for a road bed, and as well after taking possession as before it. *Grimshaw* v. *G. T. R. Co.* (1); *Moore* v. *Central Ontario Ry. Co.* (2); *Cawthra* v. *Hamilton & Erie Ry. Co.* (3). At common law appellants had a right to discontinue their proceedings in expropriation without regard to the provisions of the Railway Act, *Foisy & Déry* (4); Dillon's Municipal Corporations (5); *Hudson R. R. Co.* v. *Outwater* (6); *in re Anthony Street* (7); *in re Wall Street* (8); *in re Commissioners of Washington Park* (9); *People* v. *Trustees of Brooklyn* (10); *Mayor* v. *Musgrave* (11); Cripps on Compensation (12).

S. Pagnuelo Q.C. for respondent.

The order as to the money in the bank is to be made by a judge as *persona designata*. The statute might have directed any person to make the order and the fact of the person being a judge cannot make his act the act of the court.

The judge in making the order must exercise his discretion and sec. 27 of the Supreme Court Act therefore prohibits an appeal from his decision.

This is not a final judgment, for if the award should be set aside, the court would then rescind the order and direct re-payment of the money.

On the merits we contend the order was properly made. It is only in extra judicial awards, that is,

(1) 15 U. C. Q. B. 224.
(2) 2 Ont. Rep. 647.
(3) 35 U. C. Q. B. 581.
(4) Ramsay's Appeal Cases, p. 59.
(5) P. 473 and note 1, 474–5.
(6) 3 Sandford's N. Y. 689.
(7) 20 Wendell, 618.
(8) 17 Barbour 618.
(9) 56 N. Y., 144.
(10) 1 Wendell 318.
(11) 30 Am. Rep., 459.
(12) P. 235.

where the submission is voluntary, that an action is required, here no action on the award was necessary. Arts. 341, 345, 1343, C. C. P.

Under the statute only the notice, and not the expropriation itself, can be abandoned, and, moreover, the abandonment contemplated is only in case of the land being required for a road bed and not when it is for material, otherwise the land might be made valueless and the owner have no redress.

The owner has a right to compensation in the manner prescribed by the statute for what he has virtually sold, and cannot be deprived of such right by a mere notice of intention to abandon. Art. 1472 C. C. and Pothier *Vente* (1).

SIR W. J. RITCHIE, C.J.—I think this appeal should be quashed on the ground that a judge in chambers in Quebec, before whom the proceedings originated, is not a Superior Court, and therefore the case is not appealable. And I also think that under the Railway Act the judge is a *persona designata.*

FOURNIER J. was of the same opinion.

TASCHEREAU J.—This appeal must be quashed on two distinct grounds :—

1. The so-called judgment rendered in first instance was merely an order by a judge in chambers. Now, no appeal lies to this court but from a judgment rendered in first instance by a court. A judge in chambers does not constitute a court.

2. Under the Railway Act, the judge and not the court has exclusive jurisdiction in the matters now in contestation.

GWYNNE J. concurs with PATTERSON J.

(1) No. 25.

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PATTERSON J.—On the 17th of August, 1886, the company gave notice, under sub-section 38 of the 9th section of the Consolidated Railway Act, 1879, (which sub-section forms section 9 of the Railway Act in R.S. C. ch. 109) of intention to take land of the respondent for the purpose of obtaining gravel, &c., mentioning the price of $100 an acre, and naming an arbitrator to act in case the offer was not accepted. That arbitrator resigned and the company appointed another in his place. On the first of October following, the company obtained an order to enable possession to be at once taken, and on the same day took possession, paying into a bank $4,000 as security in pursuance of the order.

On the 28th of October, 1886, the two arbitrators appointed by the parties being unable to agree upon a third, an order was made by a judge appointing a third arbitrator.

Nearly a year later, namely on the 11th of October, 1887, the company, who had in the meantime exhausted the deposit of gravel and found it less in quantity than had been supposed, gave notice of abandonment of the notice of August, 1886, following up that step by a formal notice given through the agency of a notary, on the 14th of October, and by a tender, also made by the notary, on the 22nd of October, of $2,500, as compensation for damages sustained. The arbitrators had not yet made their award. They, or rather a majority of them, made an award on the 27th of October, 1887, assessing $7,000 as the price to be paid by the company.

The company had three days earlier, viz., on the 24th of October, 1887, instituted proceedings to restrain the arbitrators from making an award, on the ground of the abandonment of the notice, and those proceedings were afterwards made to include a prayer to have the award declared void.

The plaintiff, on the 2nd of December, 1887, petitioned for an order for payment to him of the $4,000 deposit and, after formal answer by the company and hearing the parties, the order asked for was made by a judge, and an appeal against it to the Court of Queen's Bench was dismissed.

From that decision the company appeals to this court.

It is argued on the part of the respondent that the provision authorizing the abandonment of the notice of intention to expropriate lands applies only to lands intended to be used for the railway, and not to lands required for gravel, sand, earth or water under section 9, or the former sub-section 38, and the court below seems to have adopted that construction of the statute.

The soundness of that view is seriously questioned, but leaving the discussion of that aspect of the question aside for the present, it is in my judgment very clear that under the circumstances of the transaction before us, the abandonment of the original notice was unauthorized and was entirely nugatory. The fallacy of the argument to the contrary, and as I respectfully venture to submit, of opinions expressed in one or two cases in Upper Canada which have been cited to us, arises from want of sufficiently close attention to the language of the statute, which is essentially and almost literally the same as in the General Railway Act of the late Province of Canada, 14 and 15 Vic., ch. 51, Con. Stats. Can., ch. 66, and in the Railway Act of Ontario.

What is the notice that the statutes require ? It is in the first place and principally a notice of the intention of the company to take land or to exercise some power. Subsidiary to this main object there is the offer to pay for it a certain price, with further intimation, conditional on the non-acceptance of the price offered, of the appointment of an arbitrator. The arbi-

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tration which may follow does so by virtue of the statutory mandate.

The notice is not correctly styled, as I find it styled in some of the papers before us, a notice to arbitrate. It is a notice of intention to expropriate land or to exercise some power of the company. The rule of the statute, when no special reason for taking the land at an earlier day exists, is that the land cannot be taken until the price has been fixed either by agreement or by arbitration and paid. Upon such payment "the award or agreement shall vest in the company the power forthwith to take possession of the lands, or to exercise the right, or to do the thing for which such compensation or annual rent has been awarded or agreed upon." Sec. 8, subs. 30 R. S. C. ch. 109.

When all this has been done and the land taken, the intention of which notice was given being carried out, the notice disappears. It has served its purpose and is effete.

Subs. 26: "Any such notice for lands as aforesaid—(mark the expression; it is notice for lands, not notice to arbitrate)—may be abandoned and a new notice given with regard to the same or other lands and to the same or any other person; but in any case the liability to the person first notified for all damages or costs by him incurred in consequence of such first notice and abandonment shall subsist."

This abandonment of the notice for lands, or notice of intention to take lands, must take place while the notice is still a notice and before the intention has been executed by taking the lands.

The abandonment is of the notice, not of the lands, and the damages and costs to which the company remain liable are those consequent on the notice and the abandonment of the notice. Mark again the language—There is not an allusion to damages caused by

taking and holding possession of lands that are afterwards abandoned.

When the company becomes entitled, by performance of the condition precedent of paying the price, to take the land, a judge may, if necessary, issue a warrant to a bailiff to put the company in possession.

Sec. 31:

Such warrant may also be granted by the judge, without such award or agreement, on affidavit to his satisfaction that immediate possession of the lands, or of the power to do the thing mentioned in the notice, is necessary to carry on some part of the railway with which the company is ready to proceed.

Then follow provisions for paying money as security into a bank, under direction of the judge, which is not to be repaid to the company or paid to the landowner without an order from the judge, which he may make in accordance with the terms of the award.

When land is taken under this provision in anticipation of the award, but only after payment of a sum supposed to be sufficient to cover the price ultimately awarded, the effect upon the right to abandon the notice appears to me to be precisely the same as in the ordinary case where the land is not taken until after the award.

The warrant can be issued only when the land is required for immediate use in carrying on some part of the railway with which the company is ready to proceed. The intention to take it, to "do the thing mentioned in the notice," as it is expressed with careful adherence to the main object of the notice, is carried out, and the notice ceases in this, as in the other case, to exist as a notice. The money may turn out less or more than the price fixed by the award. That contingency touches only the skill in estimating the amount ordered to be deposited. The principle is that the land is to be paid for before it is taken, and that principle

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is acted on when possession is given under these provisions before the award as well as when the award precedes the taking of possession. The right to abandon the notice after possession is taken, cannot, in the one case any more than in the other, be found either in the reading of sub-section 26 or the reason of the enactment. "The thing mentioned in the notice," has been done.

The cases referred to in which a difference of opinion was intimated are *Grimshaw* v. *The Grand Trunk Ry. Co.* (1), and *Moore* v. *Central Ontario Ry. Co.* (2). The latter of these was decided on the authorit of the former, which apart from the respect due to the eminent judges whose decision it was, would be followed as a matter of course in any court of first instance in the province.

In both cases, as I understand the reports, possession had been taken by the railway company whose right to desist from its notice before the making of the award was nevertheless affirmed. But I do not understand that in either of the cases possession had been taken under the statutory title acquired by force of the provisions of the provincial acts corresponding to those now in discussion, after paying or securing the price and obtaining the judge's warrant.

There is certainly reason to infer from the language of Sir J. B. Robinson in Grimshaw's case, that in his opinion possession, even if taken in pursuance of the statutable permission, would not destroy the right to desist from the notice, and that opinion appears to have been assented to by Sir M. C. Cameron in Moore's case. I may say, however, without at all impugning the correctness of the judgment of the court in either of those cases, that the considerations on which I have dwelt and which seem to me to show the fallacy of

(1) 15 U. C. Q. B. 224. (2) 2 Ont. 647.

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the views expressed upon the particular point cannot, as I apprehend, have been brought to the attention of the learned judges, and that the construction which appears to me to give proper effect to the provision touching " desisting " from the notice, as it was originally called, or " abandoning " the notice, which is the equivalent expression in the Dominion Statute, would possibly have been adopted, if the point had been so material as to call for the closer examination of the statute which this case has required.

In this case the company went far beyond merely taking possession. A considerable part of the property has been deported and distributed as ballast along the line, so that restoration of possession is impossible. Trees have also been cut down and destroyed.

These are striking changes in the character of land taken, but they are strictly of the nature contemplated by the statute when it confines the right to this early possession to cases where the land is necessary for immediate use in some work of construction which the company is ready to proceed with, and which may be a cutting which removes the land or an embankment which buries it. This palpable contemplation of a speedy change, which will make it impossible for the company by retiring from possession to restore what was taken in its former condition, strongly confirms the construction of sub-section 26 as applying only when the notice has not been acted on by taking possession.

The company must therefore fail on the fundamental point of the right, under the circumstances, to abandon the notice, and the judgment of the court below must be affirmed, if the judgment is appealable to this court.

In my opinion it is more than doubtful whether the matter was properly before the Court of Queen's Bench or is properly before us.

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The complaint is of the action of a judge of the Superior Court of the Province of Quebec in making the order for the payment to the land owner of $4,000 deposited as security under section 9, sub-section 31. which sum is less than the amount awarded by the arbitrators as compensation for the land and damages.

The question as to jurisdiction is whether the proceeding is in the Superior Court or merely the act of the judge as one of a class of persons designated by the statute for the particular duty.

Sec. 8 defines the expression "court" in that section as meaning a superior court of the district or province in which the lands are situate, and the expression "judge" as meaning a judge of such superior court. By the general Interpretation Act (1) the expression "superior court" means in the Province of Ontario, the Court of Appeal for Ontario and the High Court of Justice for Ontario; in the Province of Quebec, the Court of Queen's Bench and the Superior Court in and for the said Province," and so on.

In section 8 various functions are assigned to "the judge." He may appoint a surveyor (2), or an arbitrator (3); issue a warrant to give possession to the company of land paid for according to the terms of an award (4); grant a warrant for immediate possession to the company before award of compensation (4); fix fix the amount to be paid in by way of security (4); and after award make an order for payment out of the money (5).

All these functions may be exercised by any judge of any of the courts embraced by the definition of the expression "superior courts." They are functions which from their nature and object must be

(1) R. S. C. Ch. 1, S. 7 (31).
(2) R. S. C. Ch. 109, sec. 8 Sub-section. 18.
(3) Sub-sections 19, 25.
(4) Sub-section 30.
(5) Sub-section 31.

intended to be exercised in a summary manner and not liable to the delay incident to the appeals from court to court. From these considerations, as well as from the language of the statute, it is plain that the judge acts as *persona designata* and does not represent the court to which he is attached. See *Re Sheffield Waterworks* (1). It will be noticed that section 8 assigns to "the court" certain duties connected with adjudicating upon questions of title (2). "The court" there meant is, in the Province of Quebec, the Superior Court and not the Queen's Bench, as appears from sub-section 37. Whether an appeal would lie to the Queen's Bench from a decision of the Superior Court under these provisions we need not now consider. It is enough to notice the distinction preserved throughout section 8 between "the judge" and "the court."

In this view of the question of jurisdiction the present appeal should be quashed, even if the asserted right to abandon the notice had been well founded.

There are one or two other topics which were dwelt on in the argument before us which may be alluded to, but which it would be useless to discuss at much length.

One is the proper mode of enforcing an award of compensation made under the 8th section. The contention of the company, which was urged somewhat strenuously and on which the appeal was to a great extent based, being that a judgment of the court establishing the validity of the award is an essential preliminary to the power of the judge to make an order for the payment of the money awarded. The contention confounds together two things which are entirely distinct, namely, the effect of the award in determining the rights of the parties, and the enforcement of the

(1) L. R. 1 Exch. 54, 4 H. & C. 74. (2) Sub-section 33 *et seq.*

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rights which are determined by the award. An award determines the rights of the parties, but it can ordinarily be enforced only by an action or other equivalent proceeding. That rule applies to the awards in question, but the proceeding to give effect to them is that which the section provides, namely, the order of the judge.

The Railway Act of 1888, section 161, provides for an appeal from future awards exceeding $400, in addition to whatever mode of setting aside awards exists under the law or practice of any province. If proceedings to set aside an award are taken in good faith there must be a method, either by the assent of the judge or by the interference of a court, to stay the payment over of money pending the proceedings, but that is a different thing from such an appeal as is attempted in this instance, and inasmuch as it would involve merely an exercise of judicial discretion, could not be made the subject of appeal to this court.

I do not propose to discuss the grounds on which, in the court below, it was considered that sub-section 26, which authorises the abandonment of the notice for lands does not apply, under section 9, to lands required for gravel, &c. There would be no useful object served by doing so at present. I am sensible of the force of the argument presented by Mr. Abbott in favor of the more liberal reading of the section in cases when possession has not been taken. If the question should again arise it will be necessary to consider whether sub-section 31 permits possession to be given before the price is fixed and paid of any land except land on which some work of construction is to be at once proceeded with. It is not necessary now to enter upon that discussion. Mr. Abbott ingeniously argued that if section 9 has the more limited effect, the respondent can have no right to the order for payment of the $4,000. But the company is the appellant, and cannot reasonably ask

the active interference of the court on the ground that the state of affairs which in its own interest it has brought about is unauthorised and unreal.

I think the appeal should be quashed.

Appeal quashed without costs.

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

Solicitor for respondents: *S. Pagnuelo.*