

1888 ~~~~~ *Oct. 25, 26. ~~~~~ 1889 ~~~~~ *Mar. 18. ~~~~~	THE KINGSTON & PEMBROKE RAILWAY COMPANY (DEFEN- DANTS).....	}	APPELLANTS.
AND			
*Mar. 18. ~~~~~	CATHERINE BAKER MURPHY AND OTHERS (PLAINTIFFS).....	}	RESPONDENTS.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Railway Company—Expropriation of land—Description in map or plan filed—42 Vic. ch. 9.

A company built its line to the termini mentioned in the charter and then wished to extend it less than a mile in the same direction. The time limited for the completion of the road had not expired but the company had terminated the representation on the board of directors which, by statute, was to continue during construction and had claimed and obtained from the City of K. exemption from taxation on the ground of completion of the road. To effect the desired extension it was sought to expropriate lands which were not marked or referred to on the map or plan filed under the statute.

Held, affirming the judgment of the court below, that the statutory provisions that land required for a railway shall be indicated on a map or plan filed in the Department of Railways before it can be expropriated applies as well to a deviation from the original line as to the line itself, and the company, having failed to show any statutory authority therefor, could not take the said land against the owner's consent.

Held, also, that the proposed extension was not a deviation within the meaning of the statute 42 Vic. ch. 9 sec. 8, sub-sec. 11 (D).

Per Ritchie C.J., Strong, Fournier and Taschereau JJ., that the road authorized was completed as shown by the acts of the company, and upon such completion the compulsory power to expropriate ceased.

Per Gwynne J., that the time limited by the charter for the completion of the road not having expired the company could still file a map or plan showing the lands in question, and acquire the land under sec. 7, sub-sec. 19. of the act 42 Vic. ch. 9.

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

APPEAL from a decision of the Court of Appeal for Ontario affirming a judgment in the Chancery Division for the plaintiffs (1) by which the defendant company were restrained from expropriating plaintiffs' land.

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There were two actions in in this case which were tried and argued together in the court below and in this court. In the one action it was alleged that the defendants were taking proceedings before a County Court Judge to be put in possession of plaintiffs' land; in the other, that the defendants had been making application to different judges in Toronto for the same purpose.

The defendants had completed and were running their road when they obtained additional powers from Parliament as to the land they could hold in Kingston; they then obtained a lease of Government land from the Province of Ontario and wishing to build a new station and freight house proceeded to expropriate plaintiffs' land adjoining the land so leased. Plaintiffs' land was not in the maps and plans filed in the Railway Department under the Consolidated Railway Act.

The plaintiffs claim that under these circumstances the defendants could not expropriate such land without their consent. The Court of Appeal upheld this contention, affirming the Chancellor's judgment to that effect and maintaining the injunction to restrain the defendants from proceeding with the expropriation. From the decision of the Court of Appeal the defendants have appealed to the Supreme Court of Canada.

Robinson Q.C. and *Cattanach* for the appellants.

S. H. Blake Q.C. and *Britton Q.C.* for the respondents.

SIR W. J. RITCHIE C.J.—It appears very clear that the road was constructed and completed before the

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company sought to expropriate the land in question. This having been established by two courts, and such a conclusion justified by the evidence, this court ought not to disturb the finding. Indeed it is hard to conceive how the company, having claimed and obtained from the City of Kingston a certain stipulated exemption from taxation from the 1st of January, 1885, on the ground of the completion of the road, and having in consequence terminated the representation on the board of directors which, by 34 Vic. ch. 49, was to continue during the construction of the road, can now with a view to the expropriation in this case set up its non-completion. The company's map or plan shows the terminus of the property in Kingston and the evidence shows that the road was constructed from that terminus and operated for several years, but the plan did not show the land now sought to be expropriated, and the company have failed to show any statutory authority for taking land not shown on the map or plan.

I am also of opinion that having completed the road as authorized by the charter the ordinary compulsory powers of the company ceased, and their remedy, if any, must be left to the special powers to be exercised under the sanction of the Minister of Public Works on a proper case being made out.

I think the appeal should be dismissed.

STRONG J.—For a statement of the facts which have given rise to the action now under appeal I refer to the reports of this and another case relating to the same question and between the same parties to be found in the 11th volume of the Ontario Reports (1).

The present appeal appears to me to be quite unfounded and at the conclusion of the argument I

had formed the opinion that it ought to be dismissed ; a careful examination of the pleadings and evidence, the several judgments pronounced in the courts below and the well considered arguments of counsel on the hearing of the appeal in this court, have tended rather to confirm than to shake this original opinion.

I so fully adopt the reasons given by the learned judges in the Court of Appeal that to state at length the considerations which have led me to the conclusions I have arrived at would only be to reiterate what has already been well said in judgments in which I entirely agree. It is, therefore, sufficient to say that for the reasons given by the learned Chief Justice of Ontario and Mr. Justice Osler I am of opinion that the power to expropriate lands as here claimed only existed during the construction and ceased upon the completion of the railway, and that the fact of the completion is conclusively shown by the appellants' own acts in claiming the payment of money granted to them by way of bonus and which was only payable upon the completion of the undertaking.

I also agree that this proposed extension of the railway was not a deviation at all, or at least not such a deviation as was contemplated by the statute.

And further, that the statutory preliminaries which authorized lands to be taken on a deviation to be shown on the plan had not been complied with.

Lastly, in addition to the foregoing reasons, which are all set forth in the judgments in the court below, I would add that it appears to me that however convenient and advantageous to the railway company the acquisition of this land of the respondent might be, it is not "necessary" in the sense in which land required for a work like this must under the provisions of the Railway Act be requisite before a railway com-

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pany is empowered to exercise the right of expropriation as regards it.

The appeal must be dismissed with costs.

FOURNIER J. concurred.

TASCHEREAU J.—I would dismiss this appeal. The company's road was completed before they attempted to expropriate the plaintiff's land, and what they propose is not a deviation within the meaning of the statute. It is conceded that the plaintiff's land is not laid out, marked out, or referred to in the plan and books of reference filed by the company in conformity with the requirements of the statute.

The appellants contend that even if the respondents were entitled to an injunction in this case the order goes too far in restraining them from taking any steps or doing anything for the purpose of expropriating said land—notwithstanding that the appellants can expropriate the land by proceeding under sections 10 to 14, 42 Vic. ch. 9, and the judgment and order appealed from should be amended accordingly to permit such steps being taken.

If necessary this amendment may be ordered. The respondents, however, do not contend that the order goes further than to stop proceedings under secs. 8-9, 42 Vic. ch. 9.

GWYNNE J.—I concur in the view which was pressed upon us by the learned counsel for the respondents—that the 11th sub-section of section 8 of the Railway Act, 42 Vic. ch. 9, is not an enabling clause, but is a clause enacted for the purpose of imposing restrictions upon the powers of the railway company to make a deviation from the line of railway as originally shown on the map or plan of survey

required to be made and deposited in the office of the clerk of the peace of the several counties through which the railway is to pass, and that, therefore, authority to make any deviation from such line must be sought for in some other section of the act; and this authority is found under the head of "powers" in section 7, sub-sections 5 and 19, the former of which enacts that, "the company" (authorised by the special act to construct the railway)

shall have power and authority to make the railway across or upon the lands of any corporation or person on the line of the railway, or within the distance from such line stated in the special act, although, through error or other cause, the name of such party has not been entered in the book of reference hereinafter mentioned, or although some other party has been erroneously mentioned as the owner of or entitled to convey or is interested in such lands.

And sub-section 19 enacts that

any railway company desiring at any time to change the location of its line of railway in any particular part, for the purpose of lessening a curve, reducing a gradient, or otherwise benefiting such line of railway, or for any other purpose of public advantage, may make such change: and all and every the clauses of this act shall refer as fully to the part of such line of railway so at any time changed or proposed to be changed as to the original line; but no railway company shall have any right to extend its line of railway beyond the termini mentioned in the special act.

Now this latter subsection in express terms prescribes that a railway company in making a deviation from the original location of its line under this section must not only do so within the termini mentioned in the special act, but that all the clauses in 42 Vic. ch. 9 as to plans and surveys prescribed in relation to the original line must be complied with in relation to any such deviation. Now for the purpose of determining the precise location of the railway and works by the special act, section 5, sub-section 16, authorised to be constructed, provision is made, under the head "Plans and Surveys," by section 8, which enacts as follows:—

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Subsec. 1. Surveys and levels shall be taken and made of the lands through which the railway is to pass, together with a map or plan thereof and of its course and direction and of the lands intended to be passed over and taken therefor, so far as then ascertained, and also a book of reference for the railway in which shall be set forth :

(a) A general description of such lands ;
 that is of the lands intended to be passed over and taken ;

(b) The names of the owners and occupiers thereof
 that is of the lands intended to be taken

so far as they

that is such owners and occupiers

can be ascertained ;

(c) Everything necessary for the right understanding of such map or plan.

Sub-section 2. The map or plan and book of reference shall be examined and certified by the Minister of Public Works or his Deputy, and a duplicate thereof so examined and certified shall be deposited in the office of the Department of Public Works, and the company shall be bound to furnish copies of such map or plan and book of reference or of such parts thereof as relate to each district or county through which the railway is to pass, to be deposited in the offices of the Clerks of the Peace for such districts or counties respectively.

Sub-section 3. Any person may resort to such copies and make extracts therefrom or copies thereof, as occasion requires, paying to the Clerks of the Peace at the rate of ten cents for every hundred words.

Sub-section 4. Such map or plan and book of reference so certified or a true copy thereof certified by the Minister of Public Works or by the Clerks of the Peace, shall be good evidence in any court of law and elsewhere.

Sub-section 5. Any omission, mis-statement or erroneous description of such lands or of the owners or occupiers thereof in any map or plan or book of reference may, after giving ten days notice to the owners of such lands, be corrected by two justices on application made to them for that purpose, and if it appears to them that such omission, mis-statement or erroneous description arose from mistake the justices shall certify the same accordingly.

Sub-section 6. The certificate shall state the particulars of any such omission and the manner thereof, and shall be deposited with the clerks of the peace of the districts or counties respectively in which such lands are situate, and be kept by them along with the other documents to which they relate ; and thereupon such map or plan or book of refer-

ence shall be deemed to be corrected according to such certificate, and the company may make the railway according to the certificate.

Now from these provisions it appears to me to be very obvious that the line of the railway which is authorised by the special act to be constructed must be correctly shown on such map or plan, and that no lands can be taken for the railway unless they are shown as intended to be taken upon the map or plan as originally registered or as corrected under the provisions contained in the above sub-sections 5 and 6 or upon a map or plan prepared and registered under sub-section 19, and the company are, by the sub-section 6, only authorised to make the railway in accordance with the original or corrected map or plan and book of reference; and as no map or plan can be registered until the location of the line as shown thereon has been adopted, it is also obvious that any deviation from the line which may be authorised by the special act, equally as one made under sub-section 19, can only be made after the original map or plan showing the line of railway at the place where the deviation is intended to take place is registered; and such deviation must be by way of substitution for some part of the line as originally located and not by way of addition to such line, although such proposed addition should be within the extreme points designated as the termini of the railway as authorized by the special act.

The policy of the act is that all lands intended to be taken shall be shown on a map or plan made and registered as required by the statute, and this policy is as applicable to the case of lands proposed to be taken by way of deviation from the line as originally located as to lands proposed to have been taken for the original line itself; accordingly, and, as it appears to me, for the express purpose of providing for the case of a deviation, if authorised by the special act, being proposed to be

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substituted for any part of the line as originally located and shown upon a registered plan, the 7th sub-section of section 8 was enacted, which provides that :—

If any alterations from the original plan or survey are intended to be made in the line or course of the railway, a plan and section of such alterations as have been approved of by Parliament, on the same scale and containing the same particulars as the original plan and survey, shall be deposited in the same manner as the original plan, and copies of or extracts from such plan or section so far as they relate to the several districts or counties in or through which such alterations have been authorised to be made, shall be deposited with the Clerks of the Peace of such districts or counties.

And sub-section 8 provides that :

Until such original map or plan and book of reference or the plans and sections of the alterations have been so deposited, the execution of the railway, or of the part thereof affected by the alterations as the case may be, shall not be proceeded with.

The provision in this sub-section that a plan or section of such alterations as have been approved by Parliament shall be deposited with the Clerk of the Peace of the several counties through which such alterations have been authorised to be made can, in my judgment, have reference only to the provision in section 7, sub-section 5, empowering the company to make their railway across or upon the lands of any person on the line of railway or within the distance from such line stated in the special act and, therefore, relate to such deviations, if any, which may have been authorised by the special act, while sub-section 19 makes like provision as to plans and surveys for any deviation from the original line by that sub-section authorised ; thus establishing beyond all doubt, as it appears to me, that no land can be taken for a line of railway as originally located, or for any deviation therefrom at any point therein, until the provisions as to plans and surveys prescribed as to the original line are complied with as to every such deviation.

Now, deviations being authorised only under these

sub-sections of section 7 in which are comprised the “powers” of the company by the special act authorised to construct the railway, sub-sections 11 and 12 of section 8 are introduced by way of restriction and qualification of the powers of deviation so as aforesaid conferred ; they are as follows :—

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Sub-section 11. No deviation of more than one mile from the line of the railway or from the places assigned thereto in the said map or plan and book of reference or plans and sections shall be made into, through, across, under or over any part of the lands not shown in such map or plan and book of reference or plans, or within one mile of the said line and place, save in such instances as are provided for in the special act.

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Sub-section 12. The railway may be carried across or upon the lands of any person on the line or within the distance from such line as aforesaid, although the name of such person has not been entered in the book of reference through error or any other cause, or though some other person is erroneously mentioned as the owner of, or entitled to convey, or is interested in such lands.

The provisions of the above sub-sections are taken from the Consolidated Statutes of Canada, 22 Vic. ch. 66, section 10, sub-sections 11 and 12 which omitted from the 11th sub-section the word “nor” as it appeared in the original statute, 14-15 Vic. ch. 51, section 10, sub-section 7, which ran thus :—

No deviation of more than one mile from the line of the railway or from the places assigned thereto in the said map or plan and book of reference of plans and sections shall be made “nor” into, through, &c.

making a contrast between the lands outside of, and those inside of, one mile from the line of railway as originally located, namely, that no deviation should be made outside of a mile from the line of railway as originally located, (although authorised by the special act) and that within a mile they should only be made as authorised by the special act—as for example, if by the special act they should only be authorised to be made within a quarter of a mile from the line as

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originally located or, in one place within a quarter of a mile and, at another or other places, at different distances within the one mile, then they should be made only within the respective distances, at such points, prescribed by the special act. The consolidators of the Statutes of Canada carelessly and unintentionally, as I have no doubt, omitted the word "nor" from the consolidated statute, 22 Vic. ch. 66, section 10, sub-section 11, from which sub-section 11, of section 8, of 42 Vic. ch. 9, as well as the corresponding section of the Railway Act of 1868, have been taken. If the whole of the two sub-sections after the words "shall be made" had been omitted it would have been much better, for then the redundancy, tautology, and confusion which the residue creates would have been avoided. The 12th sub-section is but an unnecessary repetition of the provision contained in section 7, sub-section 5, and the insertion of the words

into, through, across, under or over any part of the lands not shown on such map or plan and book of reference, or plans or sections,

whether with or without the word "nor" prefixed, is equally redundant and unnecessary, for, as already shown, no line, whether original or by way of deviation from (or alteration of) a line as originally located, can be made across any lands not shown on a map or plan and book of reference, registered as required by the act; and the last words of sub-section 11

or within a mile of such line or place save in such instances as provided for in the special act

if construed literally are calculated to create a doubt whether they might not have the effect of neutralising sub-section 19 of section 7.

The only intelligent construction, as it appears to me, which can be put upon these sub-sections, 11 and 12, of section 8, is obtained by reading them in immediate connection with the provision as to deviation contained

in section 7, sub-section 5, omitting what is redundant and unnecessarily repeated, thus :—

The company shall have power and authority to make carry or place the railway across or upon the lands of any corporation on the line of the railway or within the distance from such line stated in the special act although, through error or other cause, the name of such party has not been entered in the book of reference hereinafter mentioned as the owner, or entitled to convey or as interested in such lands, provided that no deviation of more than one mile from the line of railway or from the places assigned thereto on the map or plan and books of reference by this act required to be registered shall be made ; or within one mile of the said line save as provided for in the special act, when deviation is provided for in such act,

leaving sub-section 19 to have the operation which, as it appears to me, it was originally designed to have, namely, to make provision for deviation in cases where none should be provided for in the special act, qualified only by the restriction that no deviation could be made under sub-section 19 outside of one mile from the line of railway as originally located ; and for extension of the line as originally located provided that such extension be made within the termini mentioned in the special act. Sub-section 12 of section 9, which prescribes a form of notice to be served upon an owner when his land is required to be taken for the railway, also supports the view already expressed as being established by the other sections already alluded to, namely, that no land can be taken from any person by process of expropriation unless it be shown as intended to be taken on a map or plan and book of reference registered under the act. Section 9, sub-section 11, provides, first that the deposit of a map or plan and book of reference as required by the act and a notice of such deposit published in the manner directed by sub-section 10 shall be deemed a general notice to all parties of the lands which will be required for the railway and works ; then by sub-section 12 it is provided that a notice shall be served upon the party whose land is proposed to be taken which shall contain :

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(a) A description of the lands to be taken ; (b) a declaration of readiness to pay a certain sum as compensation for such lands ; (c) the name of a person to be appointed as arbitrator of the company if their offer should not be accepted ; and such notice shall be accompanied by the certificate of a sworn disinterested provincial surveyor that the land shown on the said map or plan (that is the map or plan deposited as required by the statute and referred to in sub-section 11) is required for the railway or is within the limits of deviation hereby allowed.

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These latter words "or is within &c.," appear to be quite redundant for no lands, whether lands upon which the line has been originally located, or lands intended to be substituted for any part of such line within the limits of deviation allowed by the act, can be taken unless required for the railway, which word "Railway" as is declared by the interpretation clause, section 5, sub-section 16 :

"Shall mean the railway and works by the special act authorised to be constructed.

All, therefore, that is or can be substantially necessary to be established in any case to entitle the company to acquire land sought to be expropriated, whether such lands be lands shown as intended to be taken on the map or plan registered of the line as originally located or land shown on a map or plan registered for the purpose of designating a deviation from such line, and the lands intended to be taken for such deviation, is that the land of the person for the time being dealt with, and on whom notice is served, is shown on a registered map or plan under which the company are proceeding to construct the railway, and that the lands shown on such registered map or plan are required for the railway and works which the company are authorised to construct. I am of opinion, therefore, that in the absence of such a map or plan registered and showing the lands sought to be expropriated in the present case it was not competent for the company to acquire the land by process of expropriation by arbitration ; but I am also of opinion that inasmuch as the time given by their act for completion of their

railway had not and has not yet expired it was com-
 petent for them, upon registering a map or plan under
 the act, to have expropriated the land under the 19th
 sub-section of section 7, the proposed extension (which
 the contemplated alteration is, and not a deviation)
 being within the termini mentioned in the special act;
 and that what has taken place in relation to the
 acquiring lands for station grounds at Barracks street,
 or the fact that the road had been some years in opera-
 tion from that station, offers no impediment to the com-
 pany acquiring better and more convenient and suitable
 station grounds which, in fact, they have acquired be-
 tween Brock and Clarence streets in the city of Kings-
 ton, or to their acquiring the piece of land sought to be
 acquired by expropriation process under sub-section 19
 of section 7 if the piece of land be necessary for, or be
 conducive to, the more beneficial and perfect enjoyment
 of such their new station, and as the decree as framed
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and from taking any steps and from doing anything whatsoever for
 the purpose of expropriating the said lands, or any part thereof,
 and so in effect restrains them from acting under the
 above sub-section 19, this appeal should be dismissed
 but the decree should be varied so as to declare simply
 that under the circumstances appearing, namely, that
 the company have never registered, as required by
 the act, a map or plan showing their intention to con-
 struct any part of their railway across the land in ques-
 tion, they are not entitled to proceed to acquire the
 same by process of expropriation by arbitration and re-
 straining them merely from taking any further pro-
 ceeding under the notice already served.

Appeal dismissed with costs.

Solicitors for appellants: *Kirkpatrick & Rogers.*

Solicitors for respondents: *Britton & Whiting.*