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HER MAJESTY THE QUEEN (RESPONDENT) ..... } APPELLANT;

AND

WILLIAM ANDREW YULE AND OTHERS (SUPPLIANTS) ..... } RESPONDENTS.

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA.

Constitutional law—B. N. A. Act, 1867, *sec.* 111—*Debts of Province of Canada—Deferred liabilities—Toll bridge*—8 *Vict. ch.* 90 *(Can.)—Reversion to Crown—Indemnity—Arbitration and award—Condition precedent—Petition of right—Remedial process.*

A toll bridge with its necessary buildings and approaches was built and maintained by Y. at Chambly, in the Province of Quebec, in 1845, under a franchise granted to him by an Act (8 Vict. ch. 90), of the late Province of Canada, in 1845, on the condition therein expressed that on the expiration of the term of fifty years the works should vest in the Crown as a free bridge for public use and that Y., or his representatives should then be compensated therefor by the Crown, provision being also made for ascertaining the value of the works by arbitration and award.

Held, affirming the judgment of the Exchequer Court of Canada, (6 Ex. C. R. 103,) that the claim of the suppliants for the value of the works at the time they vested in the Crown on the expiration of the fifty years franchise was a liability of the late Province of Canada coming within the operation of the 111th section of the British North America Act, 1867, and thereby imposed on the Dominion; that there was no lien or right of retention charged upon the property; and that the fact that the liability was not presently payable at the date of the passing of the British North America Act, 1867, was immaterial. *The Attorney-General of Canada* v. *The Attorney-General of Ontario*, ([1897] A. C. 199; 25 Can. S. C. R. 434) followed.

Held also, that the arbitration provided for by the third section of the Act, 8 Vict. ch. 90, did not impose the necessity of obtaining

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*PRESENT:—Sir Henry Strong C.J. and Gwynne, Sedgewick, King and Girouard JJ.

an award as a condition precedent but merely afforded a remedy for the recovery of the value of the works at a time when the parties interested could not have resorted to the present remedy by petition of right, and that the suppliants claim for compensation under the provisions of that Act, (8 Vict. ch. 90,) was a proper subject for petition of right within the jurisdiction of the Exchequer Court of Canada.

APPEAL from the judgment of the Exchequer Court of Canada (1) in favour of the suppliants.

The judgment of the Exchequer Court upon the petition of right held that the suppliants, who are the representatives and assigns of John Yule, the younger, were entitled to recover from Her Majesty, as represented by the Government of Canada, the value of a bridge and its dependencies situated at Chambly, in the Province of Quebec, the value to be ascertained by three referees appointed by the judge. The referees, after hearing the evidence, reported the value to be $36,810.82, and upon their report the court adjudged the amount so found to the suppliants.

The claim arose under a statute of the late Province of Canada, 8 Vict ch. 90, by which John Yule was authorized to build a toll-bridge over the river Richelieu, in the vicinity of Chambly, and also to build a toll-house and turnpike with other dependencies on or near the bridge, and for this purpose he was empowered to take and use the lands on either side of the river upon making compensation to the owners and occupiers. The third section of the statute vested the bridge, etc., in said Yule, his heirs and assigns, for fifty years from the date of its assent, (29th March, 1845,) when it should revert to Her Majesty as a free bridge for public use, and provided that it should then be lawful for the said Yule, his heirs, etc., "to claim and obtain from Her Majesty, her

(1) 6 Ex. C. R. 103.

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heirs and successors, the full and entire value which the same shall, at the end of the said fifty years, bear and be worth exclusive of the value of any toll or privilege, the said value to be ascertained by three arbitrators, one of whom to be named by the Governor of the province for the time being, another by the said John Yule, the younger, his heirs, executors, curators or assigns, and the third by the said two arbitrators."

The Crown did not raise any question on the appeal as to the findings of the referees on the valuation of the property but denied any liability on the part of the Dominion of Canada under the British North America Act, 1867.

Newcombe Q C., Deputy of the Minister of Justice of Canada, for the appellant. The property consists of lands in the Province of Quebec, and passed to that province under sec. 109 B. N. A Act, "subject to any trusts existing in respect thereof and to any interest other than that of the province in the same." Trusts existed at the time the B. N. A. Act was passed and consisted, at least, of the obligation of the province to pay for the bridge upon assuming possession thereof *within* the period of fifty years, and in that case perhaps, the further obligation to hand it over to the inhabitants interested in case they should make the payments stipulated for by the Act (1). There was also the interest of Yule unless terminated by one of the modes authorized by the Act.

The liability on the part of the Crown to discharge any trust existing in respect of lands vested in the province under sec. 109 B. N. A. Act, and pay for any interest other than that of the province in the same, are not cast upon the Dominion under section 111, but are chargeable solely against the province to which the lands passed *Attorney-General for Canada* v.

(1) 8 Vict. ch. 90, sec. 3.

Attorney-General for Ontario (1), at pages 210 and 211. See also the observations of Lord Selborne, in *Attorney-General of Ontario* v. *Mercer* (2), at pp. 775 and 776. Even up to the present time the property stands in the Crown subject to a trust or interest in favour of the inhabitants concerned who may at any time acquire the property by paying the statutory valuation. Moreover, the property vested in the Province of Quebec subject to a contractual or legal duty on the part of the province to pay the value thereof, unless it had in the meantime been taken over by the inhabitants, and such contractual or legal duty in itself constituted a trust within the meaning of section 109.

In the circumstances as they have resulted the property itself is liable to make good the compensation by reason of the vendor's lien for the unpaid purchase money. At the time of constructing the bridge the fee simple in the lands occupied by the bridge and its dependencies was vested in Yule, who bore the whole cost of constructing and maintaining the bridge. The statute was not intended to take away this estate or property except upon payment of the statutory valuation. See *Walker* v. *Ware, Hadham and Buntingford Railway Co.* (3), per Romilly M. R. and Arts. 2009 and 2014 C. C.

Section 3 of 8 Vict. ch. 90 provides for compensation from Her Majesty for the value of the property *to be ascertained by three arbitrators*, one named by the Governor of the province, another by Yule, and the third by the two arbitrators. It was in any case intended that no liability should accrue until the ascertainment of the amount by an award obtained in the statutory manner, and thus the very first essential on which alone the liability might arise is wanting,

(1) [1897] A. C. 199. (2) 8 App. Cas. 767.
(3) L. R. 1 Eq. 195.

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and that without any act or default attributable to the Dominion. It is said that the provinces which constituted the late Province of Canada waived arbitration, but no cause of action arising out of that circumstance, or because the provinces declined to appoint an arbitrator, can constitute a debt or liability existing at the union, for such cause of action, if any, arose out of dealings long subsequent to the union, and which could not have been anticipated at that time. The proposition that the Dominion has waived its defence by granting a fiat upon the petition of right is quite untenable. The granting of a fiat does not take away any defence otherwise available. Consequently, as there has been no arbitration or award, no action will lie to recover the compensation money. *Viney* v. *Bignold* (1); *Babbage* v. *Coulburn* (2), (affirmed on appeal); Russell on Awards, (7 ed.) 60 to 63; *Elliott* v. *Royal Exchange Assurance Co.* (3); *Scott* v. *Corporation of Liverpool* (4); *Fox* v. *The Railroad* (5); *Scott* v. *Avery* (6); *Caledonian Insurance Co.* v. *Gilmour* (7) at page 90, per Herschell L. C., and again at page 95, per Watson L. J.

The statute has given the right and provided the remedy, and no other remedy can be invoked. *Murray* v. *Dawson* (8); *Hepburn* v. *Township of Orford et al.* (9); *Vestry of St. Pancras* v. *Batterbury* (10); *Berkeley* v. *Elderkin* (11); *Mayor of Montreal* v. *Drummond* (12). When a new statute prescribes a particular remedy no other can be taken. *Stevens* v. *Evans* (13) at page 1157; *Doe d. Bishop of Rochester* v. *Bridges* (14) at p. 859, per

(1) 20 Q. B. D. 172.
(2) 9 Q. B. D. 235.
(3) L. R. 2 Ex. 237.
(4) 3 DeG. & J. 334.
(5) 3 Wall. Jr. 243.
(6) 5 H. L. Cas. 811.
(7) [1893] A. C. 85.
(8) 17 U. C. C. P. 588.
(9) 19 O. R. 585.
(10) 2 C. B. N. S. 477.
(11) 1 E. & B. 805.
(12) 1 App. Cas. 384.
(13) 2 Burr. 1152.
(14) 1 B. & Ad. 847.

Lord Tenderden, and see reference to general doctrine in *Underhill* v. *Ellicombe* (1), per Erle J. in *Stevens* v. *Jeacocke* (2), at p. 741.

The word "debt" in sec. 112 B. N. A. Act, must be intended to include "debts and liabilities" under section 111 so far as Ontario and Quebec are concerned, and upon the construction of sections 109 to 112 inclusively, and having regard to sections 117, 120 and 142, it was not intended that Ontario should incur any liability in respect to unpaid purchase money of lands in Quebec becoming the sole property of Quebec at the Union. If that be so, the present claim is not included in section 111. For the award under sec. 142 see Sessional Papers of Canada, 1871, no. 21. Neither section 111 nor any other provision of the B. N. A. Act makes the Dominion directly responsible. The Dominion is only liable for such payments of this kind as are assumed by the Dominion. See sec. 120. The Dominion did not assume this payment or any obligation therefor.

Her Majesty has not taken possession of nor accepted the bridge or any of its dependencies but, on the contrary, the suppliants have remained in possession up to the present time, although their statutory authority expired on 29th March, 1895, and they cannot maintain this action while remaining in possession of the property and exacting tolls.

The Exchequer Court had no jurisdiction as the claim does not arise under any law of Canada within the meaning of section 16 (*b*) of the Exchequer Court Act.

Lafleur Q.C. and *Sinclair* for the respondents. The obligation here is not a conditional one, but an obligation with a term, *debitum in præsenti solvendum in futuro*, at the date of Confederation, and clearly was

(1) McCle. & Yo. 450. (2) 11 Q. B. 731.

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made a liability imposed upon the Dominion by the 111th section of the B. N. A. Act, and the date on which payment would become due, viz., the expiration of the term of the franchise, was absolutely certain, being fixed by statute. This is more evidently within that clause of the B. N. A. Act than the claim for payment of the increased annuities to the Indians in the cases of *The Attorney General of Canada* v. *The Attorney General of Ontario* (1), which depended upon an uncertain event. Section 109 can have no possible application to the present case. The lands there referred to are those belonging to the several provinces at the time of the union, and these words apply only to ungranted lands.

We refer to *The Fisheries Case* (2), at pages 514 and 515. It is manifest that during the term of fifty years the Yules were absolute owners of the property and could have dealt with it as proprietors subject to the defeasance of their title at the expiration of the charter. They have in fact been regarded as owners of the fee and have been taxed as such; *Yule* v. *Corporation of Chambly* (3). There was no trust existing in respect of this land chargeable to the Province of Quebec, under section 109 of the B. N. A. Act. The amount to be paid to the Yules as representing the value of the bridge and dependencies is in no sense a payment to be made out of the lands. The lands vested in the Crown before the payment of the indemnity was exigible, and the suppliants have only a bare claim for compensation which can in no sense be said to be a lien or privilege on the land. The Crown was under no legal or contractual duty to pay the Yules out of the beneficial estate of the bridge or its proceeds. There was to be simply a personal payment by the Crown to the Yules.

(1) [1897] A. C. 199; 25 Can. S. C. R 434.

(2) 26 Can. S. C. R. 444.

(3) 2 Stephens Dig. 122.

The jurisdiction of the Exchequer Court is complete as the present claim arises both under a law of the old Province of Canada and under the 111th section of the B. N. A. Act, which is undoubtedly a "Law of Canada."

The Legislature did not make reference to arbitration a condition precedent to the right of action. There was not at the time any court having jurisdiction by petition of right or otherwise to hear and determine claims against the Crown, and the proceeding prescribed by the statute for determining the value of the bridge and its dependencies was not one that could have been invoked without the Crown's consent. There could not have been any intention to exclude ordinary legal remedies and procedure which were not then in existence. The statute first creates the right and then provides a mode of ascertaining the amount of the claim, indicating a special mode of proof, but making no conditions precedent to the assertion and exercise of the right. When the Exchequer Court Act came in force all the old remedies were superseded and a new mode of enforcing the claim became available.

The obligation is severable from the provision for reference to arbitration. *Ulrich* v. *National Insurance Co.* (1); *Collins* v. *Locke* (2); *Dawson* v. *Fitzgerald* (3). If reference to arbitration is insisted upon as a condition precedent to the action, the liability to pay must be taken to be admitted and all other defences abandoned. *Hughes* v. *Hand-in-Hand Ins. Co.* (4); *Goldstone* v. *Osborn* (5). But there has been a complete waiver of the right to arbitrate. The suppliants, before proceeding, requested the Dominion Government to appoint arbitrators. That request was thereupon communicated to the Provinces of Ontario and

(1) 42 U. C. Q. B. 141; 4 Ont. App. R. 84.
(2) 4 App. Cas. 674.
(3) 1 Ex. D. 257.
(4) 7 O. R. 615.
(5) 2 C. & P. 550.

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Quebec and, in accordance with the express wish of both provinces, arbitrators were not named but the suppliants were invited to urge their claim by a petition of right and the Crown, deferring to the wishes of the provinces, granted its fiat and abstained from appointing an arbitrator.

The judgment of the court was delivered by:

THE CHIEF JUSTICE.—We are of opinion that the judgment of the Exchequer Court is entirely right and that the appeal fails.

The suppliant's title is not disputed, nor has the amount found by the referee been made a subject of appeal; on the contrary we find in the record a statement that

> the appellant does not in this appeal raise a question as to the valuation of the property as found by the referees.

The first question raised by the appeal is whether or not this claim is a liability of the late Province of Canada coming within section 111 of the British North America Act. The object of that section was to give the creditors of the old Province of Canada an ascertained debtor against whom they might seek the recovery of their debts without being compelled to await the result of the arbitration provided by the statute for the apportionment of such liabilities. It is impossible to conceive a clearer case for the application of that section than the present. By the third section of the Act, 8 Vict. ch. 90, under which the bridge was built, it is enacted that at the end of fifty years from the passing of the Act (the 29th March, 1845) the bridge, toll-house, turnpike and dependencies, and the ascents and approaches thereto, should be vested in Her Majesty, Her heirs and successors, and be free for public use, and it then proceeds to provide for compensation in the following terms:

And it shall then be lawful for the said John Yule, the younger, his heirs, executors, curators and assigns, to claim and obtain from Her Majesty, Her heirs and succcessors, the full and entire value which the same shall at the end of the said fifty years bear and be worth, exclusive of the value of any toll or privilege ; the said value to be ascertained by three arbritrators, one of whom to be named by the governor of the province for the time being, another by the said John Yule, the younger, his heirs, executors, curators or assigns, and the third by the said two arbitrators.

No mention is made of any charge or lien upon, or right of retention of, the property itself, nor was there any need for any since the builder of the bridge, John Yule, and his representatives had the best security which could have been assured to them, the declared statutory liability of the Crown. That it was not a presently payable liability at the date of the passing of the British North America Act can make no difference since the case of the *Attorney General of Canada* v. *The Attorney General of Ontario* (1) determines that contingent and deferred as well as present liabilities come within the 111th section. Had the amount of the valuation been made a charge on the property itself there might be some ground for saying that the Province of Quebec took the bridge at the time at which the statute vested it in the Crown *cum onere* but as I have said, there can be no pretence for this as is shown by the case in the Judicial Committee, already cited, relating to the Indian annuities. The liability was purely and simply a debt of the late Province of Canada imposed at Confederation on the Dominion.

Then it is said that the ascertainment of the amount by arbitration was a condition precedent to any right of the suppliant to recover payment. I had occasion to say at the argument that after the correspondence which we find printed in the case between the

(1) [1897] A. C. 199.

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executive officers of the Dominion and the two provinces, this objection seems a harsh proceeding on the part of the Dominion Government. That Government has really no interest in the question since under the British North America Act it is to be recouped by the provinces for any advance which it may have to make to pay this claim, and the provinces upon whom or upon one of whom this liability must ultimately fall insist upon a proceeding in this form by petition of right and object to a reference to arbitration. I am of opinion, however, that apart from any consent the objection is not maintainable. As the learned judge of the Exchequer Court has pointed out, at the time of the passing of the Act, 8 Vict. ch. 90, there was in Canada no procedure by which the Crown could without its consent be sued. In neither of the divisions of Upper and Lower Canada into which the Province of Canada was practically divided for judicial purposes could the remedy by petition of right be resorted to. The preliminary steps indispensable for obtaining the royal sign manual to the requisite indorsement of a petition of right could not be taken here. The remedy of the subject in this form whether in the provinces or in the Dominion, as is well known, now depends altogether on legislation since Confederation. Therefore it is reasonable to infer that the provision about arbitration contained in the third section of 8 Vict. ch. 90, is not to be considered as imposed by way of condition precedent but merely to afford the party in whose favour it was manifestly introduced a remedy for the recovery of the value of the bridge, and the only remedy which up to the date of Confederation he had. Then it is not without significance that the arbitration is not in terms made a condition precedent but according to the plain import of the words added as a remedial proceeding. Further, this is not a proceed-

ing to enforce the original liability but a liability imposed upon the Crown as representing the Dominion by a subsequent statute, the British North America Act. That it is a debt of Canada within the meaning of that expression in the Exchequer Court Act there cannot be a doubt, if I am right in holding that it comes within the 111th section of the British North America Act. Upon this point I agree with and adopt the observations of the learned judge of the Court of Exchequer.

On the whole we are of opinion that the claim of the suppliant is in all respects a valid, legal and subsisting claim which is a proper subject of a petition of right within the jurisdiction of the Exchequer Court, and that after the correspondence between the Dominion and the provinces which has been made part of the record, and after the Act of the Dominion in assenting to the petition of right, the objection that the suppliant's only remedy is by arbitration is one without any foundation and ought not to have been insisted on.

The appeal is dismissed with costs.

*Appeal dismissed with costs.**

Solicitor for the Attorney-General of Canada: *E. L. Newcombe.*

Solicitor for the respondents: *R. V. Sinclair.*

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*The Judicial Committee of the Privy Council refused leave to appeal from the judgment in this case.