THE CORPORATION OF THE CITY OF LONDON ..... APPELLANT;

AND

HOLEPROOF HOSIERY COMPANY OF CANADA, LIMITED ..... RESPONDENT.

1933.
* June 14.
* June 16.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Appeal—Jurisdiction—Final judgment—Appeal from pronouncement by Court of Appeal for Ontario on questions submitted in case stated by arbitrator under Arbitration Act, R.S.O., 1927, c. 97, s. 26—Construction by Court of Appeal in England of English statutory enactment reproduced in Canadian statute.

The appeal was from the pronouncement of the Court of Appeal for Ontario, given in exercise of that court's jurisdiction under s. 26 of the *Arbitration Act*, R.S.O., 1927, c. 97, in answer to certain questions of law submitted to it by the arbitrator, arising in the course of a reference to determine the amount of compensation from appellant city to be awarded to respondent (in pursuance of the *Municipal Act* and the *Municipal Arbitrations Act*, R.S.O., 1927, c. 233 and c. 242) for alleged damages resulting from respondent's lands being injuriously affected by certain works. On motion by appellant to affirm the jurisdiction of this Court:

Held: This Court had not jurisdiction to entertain the appeal, as the pronouncement of the Court of Appeal was not a final judgment in the sense that it bound the parties to it and concluded them from

* PRESENT:—Duff C.J. and Rinfret, Lamont, Smith, Cannon, Crocket and Hughes JJ.

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taking exception to any ultimate award by the arbitrator founded thereon. *In re Knight and Tabernacle Permanent Bldg. Soc.*, [1892] 2 Q.B. 613; *British Westinghouse Electric & Manufacturing Co. Ltd.* v. *Underground Electric Rys. Co. of London Ltd.*, [1912] A.C. 673, at 686, cited.

The observations in *Trimble* v. *Hill*, 5 App. Cas. 342, at 344-345, as to the authority which in this Court should be ascribed to the decision of the Court of Appeal in England upon the construction and effect of an English statutory enactment which has been reproduced in a Canadian statute, commented on as being a little too absolute. (*Robins* v. *National Trust Co.*, [1927] A.C. 515, at 519, referred to.)

MOTION on behalf of the Corporation of the City of London for an order affirming the jurisdiction of this Court to hear its appeal from the judgment of the Court of Appeal for Ontario (1). The motion was referred by the Registrar to the Court, under the enabling provision in Rule 1 of the Rules of the Court.

The proceedings arose out of a claim of the respondent (Holeproof Hosiery Co. of Canada Ltd.) for $50,000 for compensation for damages resulting from its lands being injuriously affected by reason of grade separation of the Canadian National Ry. Co.'s tracks through the city of London, resulting in street-closing and other acts. The respondent applied to the Senior Judge of the County Court of the County of Middlesex for an appointment to determine the amount of compensation to be awarded to it in pursuance of the *Municipal Act*, R.S.O., 1927, c. 233, and the *Municipal Arbitrations Act*, R.S.O., 1927, c. 242.

In the arbitration proceedings the learned County Court Judge stated a case for the opinion of the Court, pursuant to the *Arbitration Act*, R.S.O., 1927, c. 97, and particularly s. 26 thereof; and submitting two questions for the opinion of the Court.

The parties to the arbitration agreed, but only for the purpose of having settled the questions of law raised, that it be presumed that the lands of respondent had been injuriously affected by the acts referred to in certain admissions of fact set out in the stated case.

The reasons for judgment of the Court of Appeal, stating the facts, the questions submitted, and its answers thereto, was as follows:

The City of London, Ontario, having requested the C.N.R. to build a new station in that city, the C.N.R. agreed to do so, and an agreement to that effect was entered into, January 6, 1930; on the application of

(1) [1933] Ont. W.N. 139.

the city this was given statutory authority by the Act (1930), 20 Geo. V, cap. 86 (Ont.), the agreement appearing as Schedule "B" to that Act.

In and by this agreement, the C.N.R. was obligated to do certain work; and the statute empowered the city to "pass the necessary by-laws for carrying out the terms and conditions of the agreement" sec. 4.

The C.N.R. proceeded to implement its agreement, thereby as is on this motion admitted, occasioning injury to the Holeproof property—the city, however, did not pass the by-laws which were technically necessary for the formal closing of certain streets required for the work. There was, however, no interference with the practical and effective closing of the streets on the ground by the C.N.R.; nor, indeed, could there be, if the C.N.R. was to carry out its agreement.

The Holeproof Hosiery Company claimed compensation from the city; and the matter came on before His Honour Judge Wearing as arbitrator. On objection by the city that it was not responsible, as it had not closed the streets, the arbitrator stated a case under R.S.O., 1927, cap. 97, sec. 26, as follows:—

"1. Am I right in holding that the lands of the claimant have been injuriously affected by the exercise of any of the powers of The Corporation of the City of London under The Municipal Act, being R.S.O., 1927, chapter 233, or under the authority of any general or special act in consequence of which I am empowered by The Municipal Act, being R.S.O., 1927, chapter 233, sections 342 and 350, to determine as arbitrator the amount of the compensation to be made?

"2. If question Number One be answered in the affirmative, am I right in holding that the damage caused by any part of the work physically effected by the Canadian National Railway Company, may be attributed to The Corporation of the City of London and compensation assessed against that corporation accordingly?"

In view of the objection of the Court to answer hypothetical questions [cases referred to], we might regularly decline to answer these questions, as it is not stated that the injury complained of was in fact the result of the operations stated; but, as it is admitted for the purposes of this application that such is the case, we may accede to the request, confident that this consent will not be withdrawn for other purposes.

The statute under which the Holeproof Company claims the right it asserts is R.S.O., 1927, cap. 233, sec. 342, which reads:

"Where land * * * is injuriously affected by the exercise of any of the powers of a corporation under the authority of this Act or under the authority of any general or special Act, * * * the corporation shall make due compensation to the owner * * *"

We are, of course, to take the actual language of the Legislature, and have no concern with alleged hardship, moral right, etc.; the modern method of interpreting and applying statutes is to consider that the legislators knew what they wished to enact, and had sufficient knowledge of the English language to enable them to employ the correct terminology to carry out their intention.

Whatever may have been the case before the legislation of 1930, the aforesaid "Special Act," cap. 86, gave power to the municipality to have the agreed work done; this power was exercised by the municipality; and I am unable to see that the work which injuriously affected the land spoken of, was not an exercise of the power so given, so as to come within the very words of the statute, as quoted.

The question 1, then, must be answered in the affirmative.

The answer to question 2 is obvious from the remarks above.

The City of London should pay the costs of this application.

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It may be added that it was not and could not successfully be contended that the railway company performed the work complained of under statutory obligation; it is clear that the validation of an agreement by the Legislature has the effect only of making it as effective as if it had been valid *ab initio*, and the parties to it may deal with it by insisting on it being carried into effect, by modifying it or by entirely abrogating it. "The agreement between the parties though ratified by an Act of the Legislature still remains a private contract;" [cases referred to].

The appellant gave security for costs on the appeal to this Court, and the same was allowed as good and sufficient security, reserving, however, to the respondent the right to object to the jurisdiction of this Court to hear the appeal.

The appellant then moved the Court of Appeal for special leave to appeal to this Court, and the motion was dismissed "without prejudice to any motion that has been or may hereafter be made to the Supreme Court of Canada."

The appellant moved before the Registrar for an order affirming the jurisdiction of this Court to hear its appeal, which motion was referred by the Registrar to the Court as above stated.

R. S. Robertson, K.C., and *K. G. Morden* for the motion.

G. F. Macdonell, K.C., contra.

The judgment of the Court was delivered by

DUFF C.J.—This is an application to affirm the jurisdiction of this Court to entertain an appeal from a pronouncement of the Court of Appeal for Ontario dated 17th of February, 1933.

The pronouncement of the Court of Appeal was given in exercise of that court's jurisdiction under s. 26 of the *Arbitration Act*, ch. 97 (R.S.O., 1927), which is in these words:

> An arbitrator or an umpire may at any stage of the proceedings and shall, if so directed by the court, state in the form of a special case for the opinion of the court any question of law arising in the course of the reference and an arbitrator or umpire appointed under the authority of a statute or by a court or judge shall, when so directed by the court, state the reasons for his decision and his findings of fact and of law.

This section originally appeared in the *Arbitration Act* of 1897 (60 V., c. 16) as s. 41, reading as follows:

> Any County Judge, referee, arbitrator or umpire may at any stage of the proceedings under a reference, and shall, if so directed by the Court or a Judge, state in the form of a special case for the opinion of the Court any question of law arising in the course of the reference.

By an amendment in 1927, the section was altered and brought into the form in which it appears in the Revised Statutes of Ontario, 1927, as quoted above. The amendment does not materially affect the point I am about to discuss. The section, in its original form, in s. 41 of c. 16 of the Statutes of 1897, was taken almost verbatim from s. 19 of the *Arbitration Act* of 1889 (Imp.), the only difference being that,

> Any referee, arbitrator, or umpire may at any stage of the proceedings * * *

in s. 19, was altered to read,

> Any County Judge, referee, arbitrator, or umpire may at any stage of the proceedings * * *

in s. 41.

In 1892, the Court of Appeal had to consider in *In re Knight and Tabernacle Permanent Building Society* (1) whether an opinion pronounced by a Divisional Court in exercise of the jurisdiction given by s. 19 of the *Arbitration Act* of 1889 was a judgment from which an appeal would lie to the Court of Appeal. The Court, Lord Esher, M.R., Bowen and Kay, LL.J., held that it was not. Lord Esher points out that the question of law is not under the statute stated "for the 'determination' or 'decision' of the Court," and he held that no determination or decision amounting to an appealable judgment was contemplated by the section.

Bowen, L.J., said (p. 619) that the submission of the case is

> an interlocutory proceeding in the reference, and I do not think that it can have been intended that, whenever a case is stated under this section for the opinion of the Court, such opinion when taken is to be treated as an absolute determination of the rights of the parties with the result that there may be an appeal from it which may be carried to the House of Lords.

Kay, L.J., said (p. 621),

> I think that it is impossible, looking to the language of the Arbitration Act, to say that the opinion given on the special case stated under s. 19 is a judgment or order. I do not think that the section contemplates that the Court should give any judgment or make any order, but simply that it should express an opinion.

These views, expressed by the judges of the Court of Appeal, constitute the ratio of the decision in that case.

As we have seen, s. 41 of the Ontario *Arbitration Act* of 1897 reproduces with no material modification the words of

(1) [1892] 2 Q.B. 613.

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s. 19. The note in the margin shows the origin of s. 41. Indeed, the *Arbitration Act* of 1897 is in great part a reproduction of the English *Arbitration Act* of 1889.

It is now, perhaps, permissible to say that the observations of Sir Montague Smith in *Trimble* v. *Hill* in the Judicial Committee (1), as to the authority which in this Court should be ascribed to the decision of the Court of Appeal upon the construction and effect of an English statutory enactment which has been reproduced in a Canadian statute, are a little too absolute. *Robins* v. *National Trust Co.* (2). Nevertheless, it is difficult to suppose that the framers of the *Arbitration Act* of 1897 were unaware of the construction which had been attributed to s. 19 of the English *Arbitration Act* of 1889; and, be that as it may, the reasoning of the eminent judges who considered s. 19 in 1892 appears to me to be unanswerable.

It follows that the pronouncement of the Court of Appeal for Ontario in this matter is not a final judgment in the sense that it binds the parties to it and concludes them from taking exception to any ultimate award by the arbitrator founded on that opinion.

It may be observed further that this view is confirmed by the judgment of Lord Haldane in *British Westinghouse Electric & Manufacturing Co. Ltd.* v. *Underground Electric Railways Co. of London Ltd.* (3).

The application must be dismissed with costs.

Application dismissed with costs.

Solicitor for the appellant: *T. G. Meredith.*

Solicitors for the respondent: *Ivey, Elliott & Gillanders.*

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(1) (1879) 5 App. Cas. 342, at 344-345.

(2) [1927] A.C. 515, at 519.

(3) [1912] A.C. 673, at 686.