

1961  
\*Nov. 2

CANADIAN NATIONAL RAILWAY }  
COMPANY (*Defendant*) ..... }

APPELLANT;

1962  
Feb. 6

AND

DAME OLIVINE TRUDEAU (*Plain-* }  
*tiff*) ..... }

RESPONDENT.

ON APPEAL FROM THE COURT OF QUEEN'S BENCH, APPEAL SIDE,  
PROVINCE OF QUEBEC

*Courts—Jurisdiction—Construction of elevated railway line—Obstruction of view—Action for injurious affection in Superior Court—Declinatory exception—Exclusive jurisdiction of Exchequer Court—The Railway Act, R.S.C. 1952, c. 234—The Canadian National Railways Act, 1955 (Can.), c. 29—The Expropriation Act, R.S.C. 1952, c. 106—The Exchequer Court Act, R.S.C. 1952, c. 98—Civil Code, art. 407—Code of Civil Procedure, arts. 40, 48.*

The defendant railway company constructed on expropriated land an elevated railway line directly in front of and alongside the plaintiff's property, and thereby obstructed the plaintiff's view of the St. Lawrence River and surroundings. The plan of expropriation registered in accordance with s. 17(1) of the *Canadian National Railways Act* had originally included the plaintiff's land, but notice of abandonment respecting that land was subsequently filed as permitted by s. 24 of the *Expropriation Act*. The plaintiff alleged that the value of her land had been depreciated and claimed before the Superior Court damages under art. 407 of the *Civil Code*. The defendant railway made a declinatory exception in which it alleged that the action was in connection with certain works done pursuant to an expropriation made by virtue of the railway's incorporating statute and the federal *Expropriation Act*, and submitted that the Superior Court was without jurisdiction.

The trial judge held that the Superior Court had jurisdiction since no indemnity was claimed for lands taken or for damages caused by reason of the expropriation. This view was upheld by the Court of Queen's Bench, Appeal Side. The railway company appealed to this Court.

*Held* (Kerwin C.J. and Taschereau, Fauteux and Abbott JJ. dissenting):

The appeal should be allowed and the action dismissed.

*Per* Locke, Cartwright, Martland, Judson and Ritchie JJ.: The Superior Court was without jurisdiction to entertain the action. The railway's undertaking being a work for the general advantage of Canada, its rights and powers were declared by federal legislation, and the right to

\*PRESENT: Kerwin C.J. and Taschereau, Locke, Cartwright, Fauteux, Abbott, Martland, Judson and Ritchie JJ.

exercise such powers could not be prevented or interfered with by Acts of a provincial legislature. The right of the plaintiff to recover damages for injurious affection, if it existed, must be founded upon s. 166 of the *Railway Act*, R.S.C. 1952, c. 234, which provides that the railway shall, in the exercise of its powers granted by this Act or the Special Act (*the Canadian National Railways Act*), make compensation "in the manner herein and in the Special Act provided to all persons interested for all damage by them sustained by reason of the exercise of such powers". Section 17(1)(c) of the *Canadian National Railways Act* provides that the compensation payable in respect of any lands taken by the company shall be ascertained in accordance with the *Expropriation Act*, and that, for that purpose, the Exchequer Court has jurisdiction "in all cases relating to or arising out of any such expropriation or taking". While s. 17(1)(c) does not in terms declare that the jurisdiction of the Exchequer Court is exclusive, compensation can only be recovered when provided by the statutes and in the manner provided by them: in this case by proceedings in the Exchequer Court.

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*Sisters of Charity of Rockingham v. The King*, [1922] 2 A.C. 315; *Hammer-smith Railway Company v. Brand*, L.R. 4 H.L. 171; *Jones v. Stanstead Railroad Company*, L.R. 4 P.C. 98; *The Mayor, Alderman and Citizens of the City of Montreal v. Drummond*, 1 App. Cas. 384, referred to. *The Corporation of Parkdale v. West*, 12 App. Cas. 602, and *North Shore Railway v. Pion*, 14 App. Cas. 612, distinguished.

*Per* Cartwright, Martland, Judson and Ritchie JJ.: Having conceded that there was no fault or negligence on the part of the railway, the plaintiff's only claim was for compensation the right to which was created by Act of Parliament which prescribed the manner in which that right was to be asserted and adjudicated. The jurisdiction to deal with the plaintiff's claim was conferred by Parliament exclusively upon the Exchequer Court.

*Per* Kerwin C.J. and Taschereau, Fauteux and Abbott JJ., *dissenting*: Section 17(1)(c) of the *Canadian National Railways Act* refers only to compensation for land "therein taken" and its provisions do not apply to what occurred in this case. There is nothing in the *Railway Act*, the *Canadian National Railways Act*, the *Expropriation Act*, the *Exchequer Court Act*, that purports to confer exclusive jurisdiction upon the Exchequer Court. In fact s. 44 of the *Canadian National Railways Act* permits actions against the railway in respect of its undertaking or in respect of its operation or management in "any Court of competent jurisdiction in Canada". Consequently, by virtue of arts. 40 and 48 of the *Code of Civil Procedure*, the Superior Court had jurisdiction.

APPEAL from a judgment of the Court of Queen's Bench, Appeal Side, Province of Quebec<sup>1</sup>, affirming a judgment of Marier J. dismissing a declinatory exception. Appeal allowed, Kerwin C.J. and Taschereau, Fauteux and Abbott JJ. dissenting.

*Chateauguay Perreault*, Q.C., for the defendant, appellant.

<sup>1</sup> [1960] Que. Q.B. 1141.

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*Wm. S. Tyndale*, for the plaintiff, respondent.

The judgment of Kerwin C.J. and of Taschereau, Fauteux and Abbott JJ. was delivered by

THE CHIEF JUSTICE (*dissenting*):—By leave of this Court Canadian National Railway Company appeals against a judgment of the Court of Queen's Bench (Appeal Side) of the Province of Quebec<sup>1</sup> affirming the judgment of Marier J. which had dismissed a declinatory exception filed by the appellant in which it was alleged that the Superior Court had no jurisdiction either to hear the action or to refer it to the Exchequer Court of Canada. By my direction notice of the appeal to this Court was served upon the Attorney General of Canada and the Attorney-General of each of the Provinces so that they might have an opportunity to intervene. The only one who desired to do so was the Attorney-General of Ontario, who was given leave, but he finally filed a notice of withdrawal.

The declinatory exception recites that the action by the present respondent against the appellant "is in connection with an expropriation made by Canadian National Railway Company by virtue of its incorporating statute and The Federal Expropriation Act and with respect to works done pursuant to said expropriation although none of plaintiff's property remained taken by the expropriation at the time of the institution" of the action. As has been pointed out in the Court of Queen's Bench (Appeal Side) this statement is not correct. While the appellant at one time had filed a notice of expropriation of the respondent's property that notice was withdrawn. In her declaration the respondent alleged that the defendant had constructed an elevated railway line directly in front of and alongside her property to a height of thirty feet; that prior to the construction of the elevated railway line her property had commanded an unrestricted view of the St. Lawrence River and environments and that as a result of the construction the value of her property had been depreciated, for which she claimed damages. It is true that the elevated line has been erected upon property of another which the appellant expropriated, but the respondent's claim is not based on any expropriation by the appellant of her property.

<sup>1</sup>[1960] Que. Q.B. 1141.

By art. 40 of the *Code of Civil Procedure* the Superior Court is one of the Courts having jurisdiction in civil matters in the Province, and by art. 48

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The Superior Court has original jurisdiction in all suits or actions which are not exclusively within the jurisdiction of the Magistrate's Court or of the Exchequer Court of Canada and particularly in all suits or actions for alimentary pension; saving the special jurisdiction of the Municipal Courts, the Commissioners' Court and the Court of Justices of the Peace.

In *Southern Canada Power Company Ltd. v. Mercure*<sup>1</sup>, the Court of Queen's Bench (Appeal Side) of Quebec, held that the Superior Court is authorized to consider every case which is not within the exclusive jurisdiction of another Court and this was approved by this Court in *Fortier v. Longchamp*<sup>2</sup>. At common law the same rule was expressed many years ago in England in *Peacock v. Bell and Kendal*<sup>3</sup>: and the rule for jurisdiction is, that nothing shall be intended to be out of the jurisdiction of a Superior Court, but that which specially appears to be so.

This was adopted by Mr. Justice Willes, speaking on behalf of all the judges summoned in *The Mayor and Aldermen of The City of London v. Cox*<sup>4</sup>, and in *Board v. Board*<sup>5</sup>, the statement of Willes J. was referred to with approval and adopted by the Judicial Committee.

There is nothing in the *Railway Act*, the *Canadian National Railways Act*, the *Expropriation Act*, the *Exchequer Court Act* or any Rules passed under the authority of the last mentioned Act that purports to confer exclusive jurisdiction upon any other Court in the circumstances of this case. In fact s. 44 of the *Canadian National Railways Act*, 3-4 Eliz. II, c. 29, reads as follows:

44. (1) Actions, suits or other proceedings by or against the National Company in respect of its undertaking or in respect of the operation or management of Canadian Government Railways, may, in the name of the National Company, be brought in and may be heard by any judge or judges of any court of competent jurisdiction in Canada, with the same right of appeal as may be had from a judge sitting in court under the rules of court applicable thereto.

(2) Any defence available to the respective corporations, including Her Majesty, in respect of whose undertaking the cause of action arose shall be available to the National Company, and any expense incurred in

<sup>1</sup> (1940), 70 Que. K.B. 353 at 355.

<sup>2</sup> [1942] S.C.R. 240 at 243, 4 D.L.R. 564.

<sup>3</sup> (1667), 1 Wms. Saund. 73, 85 E.R. 84.

<sup>4</sup> (1867), L.R. 2 H.L. 239 at 259.

<sup>5</sup> [1919] A.C. 956 at 963, 43 D.L.R. 13.

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connection with any action taken or judgment rendered against the National Company in respect of its operation or management of any lines of railway or properties, other than its own lines of railway or properties, may be charged to and collected from the corporation in respect of whose undertaking such action arose.

(3) Any court having under the statutes or laws relating thereto jurisdiction to deal with any cause of action, suit or other proceeding, when arising between private parties shall, with respect to any similar cause of action, suit or other proceeding by or against the National Company, be a court of competent jurisdiction under the provisions of this section.

Sections 164 and 166 of the *Railway Act*, R.S.C. 1952, c. 234, so far as relevant read:

164. (1) The company may, for the purposes of the undertaking, subject to the provisions in this and the Special Act contained

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(d) make, carry or place the railway across or upon the lands of any person on the located line of the railway;

\* \* \*

(k) make or construct in, upon, across, under or over any railway, tramway, river, stream, watercourse, canal, or highway, which it intersects or touches temporary or permanent inclined planes, tunnels, embankments, aqueducts, bridges, roads, ways, passages, conduits, drains, piers, arches, cuttings and fences;

166. The company shall, in the exercise of the powers by this or the Special Act granted, do as little damage as possible, and shall make full compensation, in the manner herein and in the Special Act provided, to all persons interested, for all damage by them sustained by reason of the exercise of such powers.

By s. 16 of the *Canadian National Railways Act* the procedure to fix compensation referred to in ss. 207 to 246 of the *Railway Act* is declared to be inapplicable. By s. 17:

17. (1) The Expropriation Act applies *mutatis mutandis* to the National Company, subject as follows:

(a) any plan deposited under the Expropriation Act may be signed by the Minister of Transport on behalf of the National Company, or by the President or any Vice-President of the National Company, and no description need be deposited;

(b) the land shown upon such plan so deposited thereupon vests in the National Company, unless the plan indicates that the land taken is required for a limited time only or that a limited estate or interest therein is taken, in which case the right of possession for such limited time or such limited estate or interest vests in the National Company upon the deposit of the plan;

(c) subject to paragraph (d), the compensation payable in respect of any lands or interests therein taken by the National Company shall be ascertained in accordance with the Expropriation Act, and for that purpose the Exchequer Court has jurisdiction in all cases relating to or arising out of any such expropriation or taking and may make rules and regulations governing the institution, by or against the National Company, of judicial proceedings and the conduct thereof;

- (d) notwithstanding section 16, in any case where the offer of the National Company does not exceed two thousand five hundred dollars, compensation may be ascertained under the Railway Act, beginning with notice of expropriation to the opposite party; and
- (e) the amount of any judgment awarding compensation is payable by the National Company.

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(2) Lands or interests in lands required by any company comprised in Canadian National Railways may be acquired for such company by the National Company under the provisions of this Act.

The words underlined in subs. 1(c), “therein taken” make it clear that the provisions do not apply to what occurred in this case. If this be the correct interpretation, then such cases as *Sisters of Charity of Rockingham v. The King*<sup>1</sup>; *Hammersmith Railway Company v. Brand*<sup>2</sup>; *Jones v. Stanstead Railroad*<sup>3</sup> and *The Mayor, Aldermen and Citizens of the City of Montreal v. Drummond*<sup>4</sup>, have no application. It may be that under the provisions of s. 27 of the *Expropriation Act* appellant could initiate proceedings in the Exchequer Court to have that Court fix the amount due by it as compensation for the injurious affection of respondent’s property, but it is unnecessary to pursue that matter further because no such proceedings were taken.

The appeal should be dismissed with costs.

The judgment of Locke, Martland, Judson and Ritchie JJ. was delivered by

LOCKE J.:—This is an action for damages brought by the respondent in the Superior Court of Quebec against the appellant whose lines of railway are declared by s. 18 of the *Canadian National Railways Act*, 1955 (Can.), c. 29, to be works for the general advantage of Canada. The declaration alleges that the property of the respondent in St. Lambert has suffered damage by the construction of an elevated railway line by the appellant “directly in front of and alongside plaintiff’s said property”, which obstructs the view from such property of the St. Lawrence River and surroundings.

Paragraph 8 of the declaration reads:

That the said elevated Railway line has been constructed contrary to the zoning and building by-laws of the City of St. Lambert and in virtue of the statutory powers of expropriation of the Defendant.

<sup>1</sup> [1922] 2 A.C. 315, 67 D.L.R. 209, 28 C.R.C. 308.

<sup>2</sup> (1868), L.R. 4 H.L. 171.

<sup>3</sup> (1872), L.R. 4 P.C. 98.

<sup>4</sup> (1876), 1 App. Cas. 384.

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Paragraph 11 alleged, *inter alia*, that the said damages "resulted from the building of said elevated Railway line which is permitted by the statutory powers of the Defendant."

No defence has been entered but the appellant has filed a declinatory exception alleging that the said action:

is in connection with an expropriation which was made by Defendant by virtue of its incorporating statute and the Federal Expropriation Act, and with respect to works done pursuant to said expropriation

and asks the dismissal of the action on the ground that the Superior Court is without jurisdiction.

Evidence was called by the appellant as to the expropriation proceedings referred to in the declaration and the declinatory exception. Marc Dancose, a land surveyor employed by the appellant, identified a blue print of the plan which showed the area to be expropriated by the railway company which had been registered in the appropriate registry division on March 5, 1946, accompanied by a certificate signed by a Vice-President of the Railway Company, as required by the *Canadian National Railways Act*. The lands thus taken included the lands of the respondent and other lands lying between that property and the St. Lawrence River.

There was also put in evidence a notice of abandonment of the expropriation in so far as it included the respondent's and certain other properties dated December 28, 1956, signed by the said Vice-President, which was filed in the said registry office on December 31, 1956. Accompanying this was a plan showing the portions of the original lands which had been expropriated in connection with which the proceedings were abandoned. Such an abandonment is permitted by s. 24 of the *Expropriation Act*, R.S.C. 1952, c. 106, applicable to proceedings of this nature by the appellant. The witness confirmed that the railway line had been constructed upon the expropriated lands.

Marier J., by whom the motion was heard, in written reasons said that the Superior Court had jurisdiction to entertain actions for damages against the appellant and that it was not necessary to decide if, in cases of expropriation, the Exchequer Court alone had jurisdiction or if its jurisdiction is concurrent with that of the Superior Court, since in the action no indemnity was claimed for lands taken or for damage caused by reason of the expropriation.

On appeal<sup>1</sup>, this view of the matter was upheld, St. Jacques J., with whose judgment Choquette and Montgomery JJ. concurred, said in part:

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Il s'agit d'une action en dommages ne résultant en aucune façon, ni directement ni indirectement, d'une expropriation de terrain, mais uniquement d'un avantage spécial dont jouissait la propriété de la demanderesse, jusqu'au jour où la Compagnie des chemins de fer nationaux a érigé cette voie élevée et a privé cette propriété de cet avantage qui lui donnait, suivant elle, une valeur marchande particulière.

With great respect, it is my opinion that the nature of the cause of action pleaded has been misconceived by these learned judges. The matter has been treated in both Courts as if a claim against a railway company for compensation for injurious affection such as this, resulting from the expropriation of lands and the construction of a railway line upon such lands, was to be dealt with upon the same footing as if, by way of illustration, some individual had acquired land lying between the respondent's property and the river and built a tall building upon it which obscured the view, the loss of which is the cause of action asserted in the declaration. This is not such a case.

The Canadian National Railway Company's undertaking extends throughout Canada and, being a work for the general advantage of Canada, its rights and powers are declared by federal legislation and the right to exercise such powers may not be prevented or interfered with by Acts of a provincial legislature.

The right to recover compensation for lands taken or injuriously affected is statutory and depends on statutory provisions: *Sisters of Charity of Rockingham v. The King*<sup>2</sup>.

The right of a claimant such as the respondent to recover damages for injurious affection, if it exists, must be founded upon s. 166 of the *Railway Act*, R.S.C. 1952, c. 234, which reads:

The company shall, in the exercise of the powers by this or the Special Act granted, do as little damage as possible, and shall make full compensation, in the manner herein and in the Special Act provided, to all persons interested, for all damage by them sustained by reason of the exercise of such powers.

<sup>1</sup> [1960] Que. Q.B. 1141.

<sup>2</sup> [1922] 2 A.C. 315, 67 D.L.R. 209, 28 C.R.C. 308.



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This provision first appeared in the *Railway Act* as s. 92 of the Act of 1888 (c. 29). If it were not for this provision, there could be no claim for injurious affection resulting from the expropriation of lands or the construction of works under statutory authority, as pointed out in the judgment of the House of Lords in *Hammersmith Railway Company v. Brand*<sup>1</sup>, Blackburn J. at 196, other than claims based on a negligent exercise of such powers.

The question as to the forum in which such claims shall be adjudicated is one of substance and not a technical one. In *Jones v. Stanstead Railroad Company*<sup>2</sup>, an appeal taken from the Court of Queen's Bench in Lower Canada, the action was brought for damages against a railroad company constituted by an Act of the provincial Legislature for damage claimed to have been suffered by the construction of a railroad bridge, to which the company pleaded that the Acts of the Legislature empowered them to build the bridge and that there was no violation of the appellant's statutory rights. Sir Montague Smith, in delivering the judgment of the Judicial Committee, said in part (p. 115):

The claim for damages in an action in this form assumes that the acts in respect of which they are claimed are unlawful, whilst the claim for compensation under the Railway Acts supposes that the acts are rightfully done under statutable authority; and this distinction is one of substance, for it affects not only the nature of the proceedings, but the tribunal to which recourse should be had.

In *The Mayor, Aldermen and Citizens of the City of Montreal v. Drummond*<sup>3</sup>, the above quotation from the *Stanstead Railroad Company* case was repeated in the judgment of the Judicial Committee and it was further said in part at p. 410:

Upon the English legislation on these subjects, it is clearly established that a statute which authorizes works makes their execution lawful, and takes away the rights of action which would have arisen if they had been executed without such authority. Statutes of this kind usually provide compensation and some procedure for assessing it; but it is a well understood rule in England that though the action is taken away, compensation is only recoverable when provided by the statutes and in the manner prescribed by them. In practice it is generally provided in respect of all acts by which lands are "injuriously affected"—words which have been held by judicial interpretation of the highest authority to embrace only such damage as would have been actionable if the work causing it had been executed without statutable authority.

<sup>1</sup> (1868), L.R. 4 H.L. 171 at 196.      <sup>2</sup> (1872), L.R. 4 P.C. 98.

<sup>3</sup> (1876), 1 App. Cas. 384.

In that action, brought in the Superior Court of Quebec, damages were claimed against the defendant for damage alleged to have been occasioned to the plaintiff's property by the closing of a street which interfered with access to his property. The head note reads in part:

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The special Acts relating to this corporation must be read in connection with 27 & 28 Vict. c. 60, which prescribes the particular mode in which the compensation payable to any party "by reason of any act of the council for which they are bound to make compensation" should be ascertained. But actions of indemnity for damage in respect of such acts are excluded by necessary implication; for they assume that the acts in respect of which they are brought are unlawful, whilst the claim for compensation under the statute supposes that the acts are rightfully done under statutable authority.

*Jones v. Stanstead Railway Company*, approved.

Sections 207 to 246 of the *Railway Act* which provide the manner in which a railway company may expropriate lands required for the purpose of its undertaking and defines the manner in which compensation for the value of such lands or lands injuriously affected are declared inapplicable to the National Company by s. 16 of the Special Act and, in lieu thereof, the provisions of the *Expropriation Act* apply *mutatis mutandis* by virtue of s. 17 of the Special Act. Section 217 of the *Railway Act* declares in terms that questions of this nature are to be settled in the manner defined, that is, in case of disagreement, by arbitration. It could not, therefore, be suggested that if the claim advanced in the present matter were against the Canadian Pacific Railway Company the Superior Court would have jurisdiction. The question to be determined is whether it is otherwise in the case of the National Company.

The Act of 1955 continues the corporate existence of the Canadian National Railway Company incorporated by c. 13 of the Statutes of 1919. By s. 16 all the provisions of the *Railway Act* apply to the company, except those therein mentioned, including those referred to in the last paragraph. Section 17 declares that the *Expropriation Act* shall apply *mutatis mutandis* to the National Company and subs. (c) that the compensation payable in respect of any lands taken by the company shall be ascertained in accordance with the *Expropriation Act* and that, for that purpose, the Exchequer Court has jurisdiction "in all cases relating to or arising

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out of any such expropriation or taking" and may make rules governing the institution by or against the National Company of judicial proceedings.

Section 44 provides that actions against the company in respect of its undertaking or in respect of the operation or management of Canadian Government railways may be brought and heard by any judge of any Court of competent jurisdiction in Canada. Thus, actions for damages for torts or delicts or breach of contract and suits of that nature are dealt with in the provincial Courts. This section has no bearing upon or relation to the determination of compensation of the nature referred to in s. 17.

The manner in which the National Company may obtain title to lands differs from that provided by the expropriation sections of the *Railway Act*. Under s. 17 of the 1955 Act, upon the deposit of a plan in the manner provided by the *Expropriation Act*, signed by the Minister of Transport on behalf of the National Company or by the President or any Vice-President of that company, the lands shown vest forthwith in the National Company. It is this procedure that was followed in the present matter.

The compensation to be paid in respect of lands or property taken or injuriously affected by the construction of the work is determined in the manner provided by s. 27 of the *Expropriation Act*. That section speaks of an information exhibited by the Attorney General of Canada but, applying the Act *mutatis mutandis*, such information would presumably be exhibited by the National Company. In the information the names of the persons considered to be interested are given and the sums of money which the Crown or the company is ready to pay in respect of their interest is stated. Such parties may appear in the proceedings as provided by ss. 28 and 29 and the judgment of the Court as to the manner in which the compensation is to be allotted is binding upon all such parties. In the case of such an action being brought without naming some person who claimed to be interested, that person may apply to the Court to be added as a party and to have his rights determined.

There is no evidence in the present matter indicating whether or not any proceedings were taken by the National Company to determine the compensation payable in respect

of the lands taken for the line in question. The witness Dan-  
cose merely said that the railway had been built upon that  
line and that no offer of compensation had been made to the  
respondent.

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As shown by subs. (c) of s. 17 of the Act above men-  
tioned, the Exchequer Court has jurisdiction in all cases  
arising out of expropriations made by the National Com-  
pany and that Court is authorized to make rules governing  
the institution, either by or against the company, of judicial  
proceedings. The respondent might, therefore, by petition  
of right have claimed compensation or damages for injurious  
affection, if so advised. Illustrations of such actions brought  
by persons claiming injurious affection when none of the  
claimant's property has been taken are *Autographic Regis-  
ter Systems Ltd. v. Canadian National Railway Co.*<sup>1</sup>  
and *Renaud v. Canadian National Railway Co.*<sup>2</sup> The  
*Exchequer Court Act*, s. 18, declares the exclusive jurisdic-  
tion of that Court in respect of claims against the Crown for  
property taken for any public purpose or for damage to  
property injuriously affected by the construction of any  
public work. The case of *Sisters of Charity of Rockingham*,  
above mentioned, was such an action. While s. 17(c) which  
declares the jurisdiction of the Exchequer Court does not  
in terms declare that such jurisdiction is exclusive s. 166 of  
the *Railway Act* above quoted, upon which any such claim  
must be based, provides that it shall be made "in the man-  
ner herein and in the Special Act provided," and the Special  
Act in this case is the *Canadian National Railways Act* of  
1955. As was said by the Judicial Committee in *Drum-  
mond's* case, compensation is only recoverable when pro-  
vided by the statutes and in the manner prescribed by them.  
In this matter the manner prescribed is by proceedings in  
the Exchequer Court. If this were not thus made clear,  
actions for damages would, in my opinion, be excluded by  
necessary implication, for the reasons given in that case  
and summarized in the head note above quoted.

The cases of *Corporation of Parkdale v. West*<sup>3</sup> and *North  
Shore Railway v. Pion*<sup>4</sup>, do not touch the question in the  
present case. In each of those cases there had been a failure  
to comply with the statutory provisions, the performance

<sup>1</sup>[1933] Ex. C.R. 152.

<sup>2</sup>[1933] Ex. C.R. 230.

<sup>3</sup>(1887), 12 App. Cas. 602.

<sup>4</sup>(1889), 14 App. Cas. 612.

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of which was a condition precedent to the right of the appellants to possession and they were in no better position than trespassers: *Saunby v. Water Commissioners*<sup>1</sup>. The declaration in this case contains no such allegation and the evidence of the witness Dancose shows that possession was taken in the manner prescribed by the Special Act.

The question to be decided is of importance in all of the provinces in Canada since in all of them the provincial Superior Courts of original jurisdiction are invested with powers similar to those of the Superior Courts in Quebec described in art. 48 of the *Code of Civil Procedure*.

I would allow this appeal, set aside the judgments below and direct that judgment be entered upon the declinatory exception dismissing the action, with costs throughout. The dismissal should not affect the right of the respondent to take such proceedings in the Exchequer Court as she may be advised. I express no opinion as to whether the respondent has any enforceable right in respect of the matters alleged in the declaration.

The judgment of Cartwright, Martland, Judson and Ritchie JJ. was delivered by

CARTWRIGHT J.:—I agree with the reasons and conclusion of my brother Locke and wish to add only a few words.

From reading the respondent's declaration it appears that the only claim asserted is one for compensation for diminution in value of her property, number 145 Riverside Drive, resulting from the lawful act of the appellant in constructing an elevated railway in proximity to her property. The declaration alleges that this construction would have been unlawful by reason of municipal zoning and building by-laws but for the fact that it was authorized by Act of Parliament. There is no allegation of negligence in the exercise of the statutory power or of any unlawful act or omission on the part of the appellant.

In case any doubt should be entertained as to whether the above is a correct statement of the nature of the respondent's claim I quote the following excerpts from her counsel's factum:

We readily concede that respondent's action is not based on fault or negligence or Articles 1053 and following of the Civil Code.

\* \* \*

<sup>1</sup>[1906] A.C. 10.

Respondent's claim is based, not on articles 1053 C.C. and following, nor on expropriation; it is based on article 407 of the Civil Code and on sections 164, 166 and 392 of the Railway Act.

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TRUDEAU

\* \* \*

Appellant, exercising without negligence its special statutory powers, has deprived respondent, at least in part, of the enjoyment of her property; she is therefore entitled to a just indemnity, Article 407 C.C., as interpreted by the authors and the courts, is ample to found respondent's action.

Cartwright J.

\* \* \*

Granted that appellant is lawfully exercising its said powers, section 166 of the Railway Act clearly provides that appellant "shall make full compensation, in the manner herein and in the Special Act provided, to all persons interested for all damage by them sustained by reason of the exercise of such powers."

The only claim asserted in the declaration is for compensation the right to which is created by an Act of Parliament which prescribes the manner in which that right is to be asserted and adjudicated. Article 407 of the *Civil Code* does not purport to enlarge or diminish that right, and it is unnecessary to consider whether if it did so it would be *pro tanto* ineffective.

Counsel for the respondent submits that we are not, at this stage of the proceedings, concerned with the question whether the claim set up in the declaration is well founded; if this be conceded the fact remains that we are required to ascertain the nature of that claim and to decide whether the Superior Court of the Province of Quebec has jurisdiction to adjudicate upon it and to fix the compensation, if any, to which the respondent is entitled. The reasons of my brother Locke seem to me to make it clear that jurisdiction to deal with the respondent's claim has been conferred by Parliament exclusively upon the Exchequer Court.

I would dispose of the appeal as proposed by my brother Locke.

*Appeal allowed with costs.*

*Attorneys for the defendant, appellant: Perrault, Angers & Pinsonnault, Montreal.*

*Attorneys for the plaintiff, respondent: Howard, Cate, Ogilvy, Bishop, Cope, Porteous & Hansard, Montreal.*