1917
March 6

THE KING, ON THE INFORMATION OF THE ATTORNEY-GENERAL OF CANADA.....PLAINTIFF;

AND

GEORGE LEE.....DEFENDANT.

Expropriation—Compliance with statute—Description—Curative statute—Constitutionality—Jus Tertii.

No title passes to land taken under an expropriation proceedings in which the statutory requirements as to the description of the land were not complied with. The curative provisions of Act 1881 (R.S.C. 1906, c. 36, s. 82) only apply where the lands are taken possession of.

Where the Dominion parliament has power to authorize the expropriation of provincial lands for a Dominion railway, it has the like power to enact a curative statute relieving *nunc pro tunc* for a non-compliance with the strict provisions of the statute under which the expropriation is made.

Setting up a conveyance to show that the plaintiff had no title does not involve the *jus tertii*.

INFORMATION to declare a piece of land the property of the Intercolonial Railway vested in the Crown.

Tried before the Honourable Mr. JUSTICE CASSELS, at Halifax, N.S., May 22, 1914, June 9, 10, 1915.

H. W. Sangster, for plaintiff; *R. T. McIlreith*, K.C., and *C. F. Tremaine*, for defendant.

CASSELS, J. (March 6, 1917) delivered judgment.

An information exhibited on behalf of the Crown for the purpose of having it declared that a certain piece of land, shown on the plan attached to the information, is part of the lands, the property of the Intercolonial Railway, and vested in His Majesty.

The action is one in trespass, and is instituted against the defendant, representing the municipality, to have the question of title adjudicated.

A great mass of evidence has been adduced, and as promised I have carefully perused all of it and considered it with the various exhibits. Counsel are to be congratulated on the immense amount of time they must have di-

1917

THE KING v. LEE.

Reasons for Judgment.

rected to the consideration of the case, and the production of the evidence a considerable portion of which has been more than duplicated. In the view I take of the case a considerable portion of it is irrelevant.

In 1854 (Cap. I, 17 Vict.) a statute was passed by the Governor, Council and Assembly of the Province of Nova Scotia, which in part recites, as follows:

"1. The lines of railway to be constructed under the "provisions of this act, shall be public provincial works . . . Sec. 10 provides:

"The commissioners or contractors are authorized to "enter upon and take possession of any lands required "for the track of the railways, or for stations, and they "shall lay off the same by metes and bounds, and record "a description and plan thereof in the registry of deeds "for the county in which the lands are situate, and the "same shall operate as a dedication to the public of such "lands; the lands so taken shall not be less than four "rods nor more than six rods in breadth for the track, "exclusive of slopes of excavations and of embankments, "except where it may be deemed advisable to alter the "line or level of any public or private carriage road, or "divert any stream or river, in which case it shall be "competent for the commissioners to take such further "quantity as may be found necessary for such purposes; "also, at each station a sufficient extent for depot and other "station purposes; provided always, that, excepting at the "termini or junction of the railways, the quantity so appro- "priated shall not exceed five acres."

In intended pursuance of the provisions of this statute, in the year 1855 the Commissioners laid out the route of the railway at the point in question, and a map (Exhibit No. 12) was duly recorded in the Registry of Deeds. No description of the lands by metes and bounds was recorded.

The lands in dispute are near Windsor Junction. The track of the railway where the dispute arises, is situate north west of the station, and the railway is now part of the main line of the Intercolonial Railway from Halifax to Truro.

The railway was constructed in the year 1856, and on each side of the railway right of way, which comprises a

1917

THE KING v. LEE.

Reasons for Judgment.

piece of land 99 feet in width, a fence was constructed, and such fences have continued with renewals from time to time on the same location as the original fences constructed in 1856.

While there is a controversy as to whether the main right of way of the railway was located on the line as laid out by the Commissioners, there is no question raised as to the lands comprised within the fences erected in 1856; and considering the continuous occupation from 1856 to the present time, no contention as to the title to this main right of way could now be successfully maintained. It is claimed by the Crown that a strip of land to the west, and adjoining the westerly fence of the railway and comprising a piece of land of about 900 feet in length with a width of from 22 to 28 feet wide was expropriated for the railway at the same time as the main right of way. This land is shown on the plan attached to the information. The letters "A," "B" on the north west, and "C," "D" on the south east show the northern and southern boundaries of the land. The eastern boundary is the western fence of the railway right of way, and the western boundary a fence erected to mark the eastern boundary of the adjoining lands. The land is shown enclosed in red lines on the plan annexed to the information.

In 1902, the land enclosed between the fences forming the western boundary of the railway right of way, and the fence on the west side of the road in question was, pursuant to the statutes of Nova Scotia in that behalf, dedicated as a highway. The validity of the proceedings to have this highway dedicated is attacked, but in my opinion the right to question the validity of the proceedings is not open to the Crown.

The railway constructed by the Province of Nova Scotia, pursuant to the statute of 1854, at the time of Confederation became Dominion property and part of the Intercolonial Railway of Canada.

It is conceded by counsel for both parties that if in fact the land in dispute was properly expropriated and vested in the Crown under the proceedings taken in 1855, it would require 60 years adverse occupation to oust the title of the Crown. The proceedings taken under the Statutes of

Nova Scotia in that behalf to form a highway would be void if an attempt were made to expropriate lands the property of the Crown represented by the Dominion. It is unnecessary to elaborate this proposition. I would merely refer to the case of *The King v. Burrard.*[1] Therefore, if the lands are vested in the Crown, the claim of the municipality would fail. On the other hand, if the Crown is not entitled to the land in dispute, then there is no right on its behalf to question the validity of the proceedings taken to dedicate this highway. So with regard to the old Hopkins Road, I fail to apprehend the bearing of the contest in regard to this road, except perhaps as regards the topography of the surrounding lands. Whether it was a public highway or a private road is of little consequence. With the exception of the southern end of this road, for a distance of perhaps 200 feet next to the McGuire crossing this Hopkins road was away from the lands in dispute. What difference can it make whether it was a public road or a private road if in fact the Crown owns the lands in dispute. The title of the Crown could not be ousted by occupation for a less period than 60 years, and there is no contention that the road was used for any such period; and, on the other hand, if the Crown does not own the lands in dispute, of what concern is it whether the old Hopkins Road was dedicated and became a public highway or not.

The real question in issue and to be decided in this action is whether the piece of land in question, and described on the plan attached to the information by the letters A, B, C and D, ever became vested in the Crown by virtue of the proceedings taken pursuant to the statute of Nova Scotia referred to.

In my judgment the Crown has failed to prove its title. Certain facts are I think beyond dispute. 1st. When Exhibit No. 12, the original plan was recorded in the Registry Office, no description by metes and bounds was filed. 2nd, There is no starting point shown on this plan from which any measurements can be made. The scale is so minute that it is almost impossible to arrive at any

[1] 12 Can. Ex. 295; 43 Can. S.C.R. 27; [1911] A.C. 87.

1917

THE KING v. LEE.

Reasons for Judgment.

measurements with accuracy. If Exhibit No. 3 is taken as a correct copy of Exhibit No. 12, made before the practical destruction of Exhibit No. 12, any measurements are merely conjectural depending on disputed starting points and at best it becomes a matter of guess work

3rd. At the time of the expropriation the railway right of way was fenced in on both sides and has continued to be fenced on the same lines to the present day.

4th. The railway has never been in possession of the lands now claimed. These lands were never fenced in, nor were they ever shown to be the property of the railway by any marks on the ground, nor has the railway ever asserted any acts of ownership over the said lands until shortly before the commencement of the present action.

If ever there were a case in which the provisions of the statute as to giving a description by metes and bounds should have been complied with, the present is one. The statute provides that a plan and description shall be recorded. It states, "and they shall lay off the same by "metes and bounds, and record a description and plan "thereof in the registry of deeds for the county in which "the lands are situate, *and the same shall operate as a "dedication to the public of such lands.*" This provision never was complied with, and the result, according to my judgment is, that if the lands in dispute are the lands intended to be expropriated they have never been legally expropriated, and no title thereto ever passed to the Crown.

Where a statute provides for certain formalities to be followed, if it is desired to exercise the right of eminent domain, the statute must be strictly complied with, and a court cannot say that compliance with such conditions precedent can be dispensed with. *The Queen v. Sigsworth*;[1] *The King v. Justices of Surrey*;[2] *Lewis on Eminent Domain*;[3] *Nichols on Eminent Domain*;[4] *Mills on Eminent Domain*[5] and *Lamontagne v. The King*[6] a decision of Mr. Justice Audette.

In the year 1881 a statute was enacted which has been carried into the various revisions and now is sec. 82 of ch. 36, R.S.C. 1906. The original of this section was, as I

[1] 2 Can. Ex. 194. [2] [1908] 1 K.B. 374. [3] 3rd Ed. (1909) sec. 387. [4] (1909) sec. 295. [5] 2nd ed. (1888) sec. 115. [6] Ante . 203.

have stated, enacted in 1881–44 Vic. cap. 25, sec. 10. This statute is only a curative statute where the lands are in *possession* of His Majesty. The possession evidently means occupation. The tenth section of the original statute of Nova Scotia, 1854, provides that the Commissioners are authorized to enter upon and take *possession* of any lands required.

In the 2nd series of Judicial and Statutory Definitions of Words and Phrases, at pages 1,098, 1,099 will be found a collection of decisions on the meaning of this word "possesssion." It never could have been in contemplation that parliament would have passed such an enactment in reference to lands which had never been taken possession of by the railway. It is argued by Mr. McIlreith that this statute was *ultra vires* of the Dominion parliament as an encroachment on provincial rights. It is unnecessary to discuss this question, but I would refer to the case of the *Grand Trunk Railway Co. v. Attorney General of Canada*[1] in reference to the Railway Amendment Act of 1904.

It may well be that parliament which has power to authorize a railway to expropriate provincial lands for a Dominion railway, has also power to enact a curative statute relieving *nunc pro tunc*, for failure to comply with the strict provision of the statute under which the expropriation was intended to be made. It must also be borne in mind that the curative statute was enacted in 1881. The road in question became vested in the Crown of Nova Scotia in 1902. I do not think this statute covers the case before me. The railway never was in possession of the lands in dispute.

The plaintiff relies upon the conveyance made by one Wier. This deed was executed on November 1, 1893. At this time Wier had no title to the lands in question. He had previously on July 9, 1888, conveyed the lands to James Adams. It is argued by Mr. Sangster that this conveyance cannot be referred to on the alleged ground that the defendant is not at liberty to set up what he calls the *jus tertii*. There is no question of *jus tertii*. It is put in to show that no title passed from Wier to the Crown

[1] 36 Can. S.C.R. 136; [1907] A.C. 65.

1917

THE KING v. LEE.

Reasons for Judgment.

by reason of the fact that Wier had already conveyed whatever interest he had in the lands.

I am of opinion that if the lands in dispute ever were a portion of the lands intended to be expropriated for the railway, the title thereto had never been legally acquired by the Crown and the action should be dismissed with costs.

Action dismissed.

Solicitor for plaintiff: *H. W. Sangster.*

Solicitors for defendant: *McIlreith & Tremaine.*