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*Nov. 18.
*Dec. 29.

JAMES GIBB AND FRANK ROSS (SUPPLIANTS) ..... } APPELLANTS;

AND

HIS MAJESTY THE KING (RESPONDENT) ..... } RESPONDENT.

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA.

Expropriation—Eminent domain—Public work—Abandonment—Revesting land taken—Compensation—Estimating damages—Construction of statute—Jurisdiction of Exchequer Court—"National Transcontinental Railway Act," 3 Edw. VII., c. 71—"Railway Act," R.S.C., 1906, c. 37, s. 207—"Exchequer Court Act," R.S.C., 1906, c. 140, s. 20—"Expropriation Act," R.S.C., 1906, c. 143—"Railways and Canals Act," R.S.C., 1906, c. 35, s. 7.

Per Curiam.—The jurisdiction of the Exchequer Court of Canada is not, by the effect of the provisions of section 23 of the "Expropriation Act," limited to adjudication upon claims for compensation in consequence of expropriation proceedings in regard to which there has been only partial abandonment of the property taken, but extends as well to claims made in cases where the whole of the property has been abandoned. Decision appealed from (15 Ex. C.R. 157) affirmed.

Under the provisions of section 23 of the "Expropriation Act," the person from whom re-vested land has been taken is entitled to compensation for damages sustained in consequence of the expropriation proceedings in the event of abandonment of the whole parcel of land as well as in the case of the abandonment of a portion thereof only. Idington J. *dubitante.*

Per Fitzpatrick C.J. and Davies, Idington and Brodeur JJ.—Section 23 of the "Expropriation Act" applies in matters of expropriation for the purposes of the National Transcontinental Railway under the provisions of the "National Transcontinental Railway Act";—*Per* Anglin J. It was so held in *The King* v. *Jones* (44 Can. S.C.R. 495); Duff J. *contra.*

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*PRESENT:—Sir Charles Fitzpatrick C.J. and Davies, Idington, Duff, Anglin and Brodeur JJ.

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Per Duff J.—The Minister of Railways and Canals has not, by virtue of the 23rd section of the "Expropriation Act," authority to abandon lands compulsorily taken for the Eastern Division of the National Transcontinental Railway which have become vested in the Crown by force of the 13th section of the "National Transcontinental Railway Act." Section 207 of the "Railway Act" is not incorporated in the "National Transcontinental Railway Act" by force of the 15th section of that statute.

On the merits of the appeal, Davies, Idington and Brodeur JJ. considered that, in the circumstances, the amount of the award for damages made by the judgment appealed from (15 Ex. C.R. 157) was sufficient, and that the appeal should be dismissed. The Chief Justice and Anglin J held that the appeal should be allowed and the case remitted to the Exchequer Court for the purpose of estimating damages on the basis of allowing suppliants the value of the land at the date of expropriation less its value at the time of the abandonment. Duff J. was of opinion that the suppliants were entitled to the full compensation tendered by the Crown for the land taken, but, having accepted the property as returned and agreed to credit its diminished value in part satisfaction of their claim, the appeal should be allowed and damages awarded estimated according to the difference between the admitted value of the land to them when taken and its value at the date of the abandonment. Consequently, on equal division of opinion among the judges of the Supreme Court of Canada, the judgment appealed from (15 Ex. C.R. 157) stood affirmed, no costs being allowed.

APPEAL from the judgment of the Exchequer Court of Canada(1), declaring that the suppliants were entitled to recover only $3,000 on their petition of right.

In 1911, land belonging to the suppliants was taken by the Crown for the purposes of the National Transcontinental Railway and an information was filed in the Exchequer Court of Canada by the Attorney-General for Canada in which the circumstances of the expropriation were set out, offering to pay $61,447.75 as full compensation and asking for a de-

(1) 15 Ex. C.R. 157.

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claration that the land had vested in the Crown and that the amount tendered was sufficient compensation. This offer was accepted by the suppliants. Before the case came before the court for decision and about fifteen months after the land had been taken, the Minister of Railways and Canals and the Commissioners of the National Transcontinental Railway served notice on the suppliants, stated to be given pursuant to section 23 of the "Expropriation Act," section 207 of the "Railway Act" and section 15 of the "National Transcontinental Railway Act," as well as any other authority in that behalf, that the land was not required for the purposes of the railway and was abandoned by the Commissioners. Thereupon, the proceedings taken by the Attorney-General were discontinued and the suppliants brought the action, by petition of right in the Exchequer Court, claiming compensation in consequence of the expropriation proceedings and the effect of the abandonment. The claim made by the suppliants amounted to $31,747.75, being the balance of the sum which had been tendered by the Crown at the time of the expropriation plus $500 for special expenses incurred in the re-valuation of the property after deduction of $30,000 estimated as the value of the land, in its depreciated condition, at the time of the abandonment. By the judgment appealed from the suppliants were awarded $3,000 as full compensation for damages incidental to the prejudice caused by the expropriation proceedings and damages were refused to them on account of the alleged depreciation resulting from material alterations in the locus by the demolition of a public market-house and other buildings adjacent to the land of the suppliants.

The respondent, by a cross-appeal, contended that there had been no claim made by the suppliants for loss of rent and, consequently, the Exchequer Court had no right to grant damages in that respect; that the Exchequer Court had no jurisdiction to adjudicate in regard to the claim as made, and that the amount of $3,000 awarded included indirect damages, not resulting from the expropriation, which ought not to have been allowed.

G. G. Stuart K.C. for appellants, cross-respondents.

E. Belleau K.C. for respondent, cross-appellant.

THE CHIEF JUSTICE.—Assuming as both parties to this appeal appear to have assumed throughout that the "Expropriation Act" is applicable to these proceedings, I am of opinion that the assistant judge of the Exchequer Court has misapprehended the provision of the "Expropriation Act" governing this matter. The wording of the statute is simple and its meaning, I think, plain. Failure to regard the words of the statute has led to the confusion and difficulties which the learned judge discusses in his judgment occupying many pages of the printed case.

The lands in this case were taken under the powers vested in the Commissioners of the Transcontinental Railway by the "National Transcontinental Railway Act," 3 Edw. VII., ch. 71. These powers which are contained in section 13 are, so far as material, very similar to those in section 8 of the "Expropriation Act." This section 13 provides by sub-section 1:—

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The Commissioners may enter upon and take possession of any lands required for the purposes of the Eastern Division and they shall lay off such lands by metes and bounds, and deposit of record a description and plan thereof in the office for the registry of deeds, or the land titles office for the county or registration district in which such lands are respectively situate; and such deposit shall act as a dedication to the public of such lands, which shall thereupon be vested in the Crown, saving always the lawful claim to compensation of any person interested therein.

The provisions of section 23 of the "Expropriation Act" are, I think, applicable to expropriations under the "National Transcontinental Railway Act"; see the case in this court of *The King* v. *Jones*(1).

This section 23, so far as material, provides by sub-section 1 that

whenever, from time to time, or at any time before the compensation money has been actually paid, any parcel of land taken for a public work, is found to be unnecessary for the purposes of such public work, the Minister may, by writing under his hand, declare that the land is not required and is abandoned by the Crown.

And sub-section 2:—

Upon such writing being registered in the office of the registrar of deeds for the county or registration division in which the land is situate such land declared to be abandoned shall revest in the person from whom it was taken.

And sub-section 4:—

The fact of such abandonment or re-vesting shall be taken into account in connection with all the other circumstances of the case, in estimating or assessing the amount to be paid to any person claiming compensation for the land taken.

It will be observed that this section makes no new provision as to any compensation or damages to be paid as between the Crown and the person claiming compensation for the land taken, but only declares that the fact of the abandonment shall be taken into account in estimating the amount to be paid to any person claiming compensation for the land taken.

(1) 44 Can. S.C.R. 495.

The law casts the inheritance of land upon the heir and he is the only person in whom it vests lands without his consent.

The power conferred upon the Minister by this section is a very exceptional one since it enables him to vest the land in a person even against his will. We might expect that the rights of persons affected by this arbitrary power would be carefully safeguarded by the legislature and that is what in fact we do find, for I do not know that protection in a wider form could be afforded to their interests than it is by subsection 4 of section 23. This gives the court the most ample and general authority by simply providing that in estimating the compensation to be paid for the land taken the fact of the abandonment is to be taken into account.

By section 30 it is provided that if the injury to land injuriously affected by the construction of any public work may be removed wholly or in part, by (amongst other things) the abandonment of any portion of the land taken from the claimant, and the Crown undertakes to abandon such portion

the damages shall be assessed in view of such undertaking.

The intention of the legislature is, I think, the same in the rule, laid down in both sections 23 and 30, that the fact of the abandonment of the land is to be taken into account in assessing in one case the compensation for the land taken and in the other for the injury to land injuriously affected.

The values of the land at the date of the expropriation and at the date of the abandonment have to be ascertained in the ordinary way but otherwise, in my view, it is immaterial to inquire what were the causes of the value of the land at these dates.

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The value of the land at the time of the expropriation is ordinarily the compensation which the owner is entitled to claim. I refer to sec. 47 of the "Exchequer Court Act" and also to the decision of the Judicial Committee of the Privy Council in the *Cedar Rapids Manufacturing and Power Co.* v. *Lacoste*(1), to the effect that the compensation to be paid for land expropriated is the value to the owner as it existed at the date of the taking. If, by the inverse process to expropriation, the Minister forcibly vests the property in him again, the value of the land to the owner at the time of such revesting is an element to be considered in estimating the amount to be paid to him.

Suppose a business that has had to be removed when the property was expropriated; the property is abandoned by the Crown; the business cannot be moved back again; it may be years before the value can be realized, and meantime the owner is compelled to hold it for its speculative prospective value. In taking into account the fact of the abandonment it might in such case he that only the immediate value would be allowed by the court as a deduction from the compensation.

In a somewhat involved statement which, however, is baldly printed, the learned judge suggests that if the Crown is to bear decrease in the value of the land, it should benefit by any appreciation. He forgets, however, that this is an entirely one-sided power and that while the Crown is not obliged to exercise it and would presumably only do so when such exercise would be beneficial to its interests, it would obviously

(1) [1914] A.C. 569.

be impossible to force upon the former owner the property for which he may have no use and which he may not want and at the same time call on him to pay for getting it a sum in excess of the compensation to which he was entitled on the expropriation.

The form in which the proceedings were brought before the court, may have induced the error into which I think the assistant judge of the Exchequer Court has fallen. It is not, as he says, an action for damages resulting from the abandonment. Briefly, he has treated the matter as if it were an option which the Crown took on the property until the payment of the compensation with a liability if it did not exercise the option to pay any damages caused the owner. That, however, is not what the statute does. It provides that, on the expropriation, the lands

> shall be vested in the Crown saving always the lawful claim to compensation of any person interested therein.

The present case is remarkable from the fact that the Government had the property valued and filed an information in the Exchequer Court setting forth that His Majesty was willing to pay compensation to the amount of $61,747.75. This sum, the defendants by their statement of defence accepted. The parties were thus completely *ad idem,* the land was transferred to and vested in the Crown and the compensation agreed on. Then by the "Expropriation Act," as amended by 3 Edw. VII., ch. 22, there is added the power which may never be exercised, of abandoning and re-vesting the property in the original owner. It is more like the case between subjects of an agreement for sale at a valuation with an agreement superadded that the vendor will, at the option of the purchaser, within a

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given time re-purchase at the then valuation of the property. The cases are not, of course, identical, because the powers of the Crown both of taking and abandoning the land are compulsory, and as I have before said, I do not think the value at the time of re-vesting is necessarily the amount for which the owner of the land should be called on to give credit.

Although the appellants may not be free from blame for the form in which their claim was presented to the court, yet the basis of the judgment, being an erroneous construction of the statute, justice requires that the case should be sent back to the Exchequer Court to determine and award the amount to be paid to the appellants in respect of their claim for compensation for the lands taken, taking into account in assessing such amount, the fact of the abandonment in connection with all the other circumstances of the case.

I may add that I entertain no doubt as to the jurisdiction of the Exchequer Court, but if it were necessary to invoke it, I think the claim would be within paragraph (*d*) of section 20 of the "Exchequer Court Act."

DAVIES J.—This appeal is from a judgment of the Exchequer Court of Canada awarding the suppliant $3,000 for damages sustained by him by reason of the abandonment and re-vestment in the owners of a property in the City of Quebec, which had been expropriated by the Government of Canada for the National Transcontinental Railway.

The suppliant claimed that the lands and buildings had been expropriated in January, 1911, and had

not been revested in them until July, 1912, and that while they were admittedly worth $61,747.75 in 1911 (that being the sum the Government tendered and the suppliant agreed to accept as their value) they had shrunk in value when re-vested to the sum of $30,000, the difference being the damages the suppliant sought to recover, viz., $31,747.75.

The evidence established the fact that there was a "boom" in lands in that part of the City of Quebec, where the property in question was situate, at and about the time these lands were expropriated, brought about in large measure by the belief current amongst the citizens that the principal or terminal station of the National Transcontinental Railway was to be built on the site then occupied by the Champlain Market on or towards which the buildings on the lands in question fronted. That the value of these lands consisted largely in the fact that they so fronted on this market place on one side or end and on the river front on the other where the farmers came with their boats and produce to the market and that this fortunate conjunction enabled the owners to rent their buildings for shops, stalls and stores at very high rentals. That the general anticipation was that the removal of the market house would be followed by the building on its site and the adjoining lands of the principal station of the National Transcontinental Railway and that the subsequent change of plans, the demolition and removal of the market house to another site, and the construction of the principal station elsewhere caused a collapse of the boom and a great depreciation in nominal land values, and by reason of these facts, as stated in the suppliant's petition of right, his lot of land and buildings

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when returned by the Crown had depreciated in value to the extent of $31,747.75.

That these were reasons and causes of the high values placed upon the site and lands when expropriated and those placed upon them when returned were clearly proved by the suppliant's own witnesses Collier, Hearn and Colston and were indeed claimed as existing facts and their reasons in the suppliant's petition.

This claim was not allowed by the trial judge for obvious and clear reasons. The Crown had the right to expropriate the market site and buildings, to demolish the latter and build their principal terminal station on that site and the adjoining properties they expropriated or to change the terminal station site elsewhere without being responsible for the rise or diminution in value of any properties expropriated or otherwise which such changes might cause.

The statutory right to abandon and revest these expropriated properties in their owners could, no doubt, only be exercised subject to the payment of such damages or losses as might have been caused to the owner in consequence of the Crown's proceedings; but the sudden rise or fall in the value of the properties arising from such causes as I have mentioned could not possibly be held to be such a "circumstance in the case" as should be taken into account

in estimating or assessing the amount to be paid to any person claiming compensation for the land taken.

(See sub-section 4 of section 23 of the "Expropriation Act," R.S.C., 1906, ch. 143.)

They were not special damages suffered by this land alone, but such as were shared in common by the

land owners generally in the neighbourhood. They were not caused by the expropriation and the subsequent revestment of appellant's land, but by the change of market-site and transcontinental principal station-site and, in fact, had nothing to do directly with either of these acts of expropriation and revestment. This sudden rise and fall in the temporary speculative value of lands in that section of the city were, no doubt, as shewn by the evidence, caused by public belief that the market-house site would become the terminal site of the Transcontinental, and to the subsequent change in that respect made in the Government's plans.

Under the circumstances, therefore, and with the evidence before him the learned trial judge was right in my judgment in rejecting these fluctuating or speculative prices as the standard by which to estimate suppliant's damages. He allowed $3,000 as a fair and liberal allowance, I think, for the loss of rents the owners sustained during the period between expropriation and re-vestment of the property. The owner's possession had never been disturbed and he continued to draw the rents which were shewn to have been substantially reduced. The owner also escaped the payment of the taxes during the same period, which I should think must have been considerable.

If, however, the owner had lost or been deprived of his right to have sold his property at the high speculative values which may have been reached and had given any evidence to that effect I should certainly think such loss a legitimate damage which could be recovered because it would be special damage caused by direct interference with his right to sell his property. If his *jus disponendi* had been, not technically but

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actually, prevented by the expropriation and he had given any evidence to shew that he had actually lost a sale at the highest figures spoken of I see no reason why he should not be compensated for that loss. The rule laid down in the *Cedar Rapids Case*(1), by the Judicial Committee, at pages 596-7, is that the compensation to be paid for land expropriated is

> the value to the owner as it existed at the day of the taking.

It would seem to follow that in the case of lands expropriated by the Crown, with this statutory right of re-vestment subsequently exercised, the loss which the owner actually sustained by reason of his being deprived of the right to dispose of the property during the time the title was in the Crown would be the measure of his damages. In the absence of any evidence of an offer to purchase the suppliant's right in the land, the question would be: What would they have brought in the market if put up at auction subject to the exercise of the re-vestment power by the Crown? *Cedars Rapids Manufacturing and Power Co.* v. *Lacoste*(1), at page 579. See also *Pastoral Finance Association* v. *The Minister*(2).

The learned trial judge reviews the evidence given on this question and concludes most fairly, I think, that

> it is impossible to find from it that an offer for either $60,000 or $70,000 was ever made the suppliant for the property before the expropriation.

He might have added or for any other sum either before expropriation or afterwards before re-vestment, for no specific offer ever was shewn to have been made by any one. The best that could be said for the evi-

(1) [1914] A.C. 569. (2) [1914] A.C. 1083.

dence on this point was Ramsay's statement that inquiries were made by speculators, after expropriation, who were willing to consider these large sums. But nothing ever came of their consideration.

A syndicate of speculators was considering the matter, so Mr. Hearn said:—

> We had that in mind ($60,000). I don't know that I would have given that for it. We had in mind that it was worth $60,000.

But no offer ever was made to buy before or after expropriation nor, in my judgment, does the evidence shew that any chance of a sale at these figures was lost. Can it be doubted that if the existence of any such offer could have been proved it would have been, or if the reasonable chance of selling at the price of $60,000 could have been shewn that it would have been shewn ?

It has been suggested that the case might be referred back and the suppliant given another "day in court" to try and prove this loss, but I can see no reason or ground for such an unusual course and because of the absence of any such evidence as I have referred to and because I think the damages awarded ample I would dismiss the appeal with costs.

IDINGTON J.—The respondent on behalf of the National Transcontinental Railway, pursuant to the authority of 3 Edw. VII., ch. 71, on 24th January, 1911, deposited in the registry office in Quebec, a plan and description of certain lands to be expropriated to serve said enterprise, and amongst said lands was a parcel belonging to appellants.

The parties hereto being unable to agree as to the compensation to be given for appellants' lands, the

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respondent, on the 22nd October, 1911, filed an information in the Exchequer Court of Canada for the purpose of determining same and offered thereby the sum of $61,747.75 in payment thereof.

The appellants pleaded thereto accepting said price.

On the 19th March, 1912, respondent filed a discontinuance, and on the fifteenth day of July, 1912, the Honourable the Minister of Railways and Canals for Canada, gave notice to the appellants that the lands so taken were not required for the purposes of the National Transcontinental Railway and that the proceedings were abandoned by the Crown.

Thereupon the appellants, on the 22nd March, 1913, filed a petition of right in said Exchequer Court setting forth the foregoing facts and further alleging that respondent became thereby proprietor of said land and

that the land was abandoned in the month of July, 1912, subject to paying compensation to the suppliants (now appellants) for the value of the land so taken and the damages accruing by reason thereof.

The petition proceeded as follows:—

9. The said land was, on the 24th day of January, 1911, of the value of $61,747.75, and at the time that the said land was returned to your suppliants, in the month of July, 1912, it had a value of $30,000 only.

10. On the 24th of January, 1911, the said lot was situate on a street bounding the Champlain Market, a large and much frequented market place in the City of Quebec, and it was anticipated at that time that the said market if removed would be replaced by the principal station of the National Transcontinental Railway, and in fact His Majesty the King was under contract with the City of Quebec, to which the said market place belonged, to replace the said market by the principal station of the said National Transcontinental Railway in the City of Quebec.

11. In the month of July, 1912, when the said property was abandoned to your suppliants, the Champlain market had been

removed and destroyed, by and on behalf of His Majesty the King, and the proposal to erect the principal, or any, railway station for the National Transcontinental Railway had been abandoned, and by reason of the foregoing facts, the said lot of land when returned by His Majesty the King had depreciated in value to the extent of $31,747.75.

12. The suppliants were put to great expense by reason of the taking of their said land by the Crown, and of the information filed for the purpose of determining the value thereof, to wit: in the sum of $500.

I set forth in full the only claims set up in said petition so that there need be no misapprehension of what the claim herein is. There might, I suspect, have been other claims arising from the interference for a year and a half with the appellants' exercise of dominion over said lands or dealing with same. These, if any existed, are not presented by the pleading.

The appellants never were dispossessed. The proceeding, it is said now, though not so alleged in the pleading had injurious effect upon the appellants' profits derivable from the letting of parts thereof to tenants.

Some of the leases had expired pending the proceedings before the abandonment.

On account of the anticipated expropriation being likely to be completed it was quite natural such tenants should look elsewhere for places of business, or perhaps take advantage of the uncertainty of tenure to get better terms.

Although no case was made in regard thereto in the pleadings evidence was given relative to the subject of losses caused by reason of such disturbance of the tenants and prospective lettings.

Upon that evidence the learned trial judge allowed the sum of $3,000 in way of compensation for past

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and future probable losses occasioned thereby and costs to be taxed.

In his opinion judgment, the learned trial judge held the appellants not entitled to recover in respect of the claims set out in above recited pleading.

The claim for costs in and about the information seems to have been dropped owing, it is alleged, to counsel for the appellants properly declining to be a witness.

I presume the party and party costs were taxed against the Crown on the discontinuance.

And if the solicitor and client costs could not be agreed upon as chargeable to the Crown, it is to be regretted.

I think it is also to be regretted that no evidence was presented as to the amount of the usual assessment of the property, and taxes usually paid thereon. I understood it to be admitted that for two years pending the Crown's registration of title, no taxes were or could be imposed and, hence, appellants benefited to that extent as result of that registration.

The disturbing effect upon leaseholds of a proceeding such as taken and kept open so long may not be fully compensated for by what has been allowed, but that on the meagre evidence presented and no claim thereto having been made in pleading, seems to me all that can be claimed.

The claim made for the difference between alleged values on the date of registration of the plan and the date of abandonment is, in my view of the law, quite untenable even if these relative values had been established, which I think they were not.

It is quite true that the legal effect of the registration of the plans was to vest the title in the Crown,

but that, as Mr. Belleau well put it, was subject as it were to a resolutory condition which, becoming operative, divested the title and re-vested it in the appellants.

In the case of land held for an investment the injurious effect of such a proceeding as this in question, beyond creating an uncertainty of tenure on the part of the tenants and the disturbing effect so far as detrimental to the landlord, can be very little.

In the case of land held for purposes of speculation, or owned for any purpose, being put on the market for sale, the possible loss of a sale in a fluctuating market, by such proceedings as registration of an expropriation plan, might prove serious.

But if one has such a case he must plead it and prove it. Here it is neither pleaded nor proven.

Again, it is to be observed that in such a case the conduct of the party who keeps silent and makes no move to expedite the disposition of the claim to expropriate has to be considered. He certainly has not the right to let things drift as the appellants did here, and neither do nor say anything to expedite matters, and then claim his damages must be based on the result of the common neglect of himself and his opponent.

The non-registration of the notice of abandonment illustrates this.

It was quite competent for appellants to have got it registered and if the expenses attendant on that chargeable to the Crown, it would have come in as part of the compensation they would, in such case, have been entitled to.

I think the appeal should be dismissed with costs.

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There is a cross-appeal which questions the jurisdiction of the Exchequer Court to determine the damages suffered herein.

It is, I think, doubtful if, and arguable that, the Exchequer Court has not by virtue of section 23, subsection 4, of the "Expropriation Act," jurisdiction to determine the compensation to be awarded in case of an entire abandonment of all claims to expropriation. That points to a case of damages being settled on the hearing of the information.

But, independently of that, I think that court has jurisdiction to give relief in any case of the Crown taking, either permanently or temporarily, the lands of a subject.

It has taken for eighteen months or more the lands of the appellants and they should, I imagine, in a proper case be entitled to have indemnity therefor from the Crown at the suit of a suppliant in the Exchequer Court.

I think the cross-appeal should also be dismissed with costs.

DUFF J.—On the 24th of January, 1911, the lands in respect of the taking of which compensation is claimed by the appellants were taken for the purposes of the National Transcontinental Railway, under the authority of chapter 71, 3 Edw. VII., sec. 13, by the Commissioners appointed under that Act, who on that day deposited a description and a plan of the lands in the office of the registry of deeds for the City of Quebec. On the 21st of October of the same year, proceedings were taken by the Attorney-General of Canada, professedly under the authority of section 26 of the "Expropriation Act," ch. 143, R.S.C., 1906, by way of

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information in the Exchequer Court of Canada on behalf of His Majesty, by which information it was alleged that by the deposit of the plan and the description just mentioned the lands had become and were then vested in His Majesty and by which it was declared that His Majesty was willing to pay the sum of $61,747.75 in full compensation for the claims of all the persons interested, and a declaration was prayed that the lands were so vested and that the sum mentioned was sufficient and just compensation.

The appellants by their defence alleged that they were the sole owners of the property, accepted the sum offered and prayed for judgment declaring that they were entitled to be paid the same. The statement of defence was filed in October, 1911, but the Attorney-General did not proceed to trial; and on the 19th of March, 1912, a notice of discontinuance was filed, and on the 15th July, 1912, the following notice signed by the Minister of Railways and Canals and by Mr. Leonard for the Commissioners of the National Transcontinental Railway was served upon the appellants:—

Notice of Abandonment of lands taken for the National Transcontinental Railway.

In the Exchequer Court of Canada.

Between:

JAMES GIBB and FRANK ROSS,

Suppliants;

and

THE KING,

Respondent.

Registered in registry office, July 27th, 1912. Served personally on suppliants, July 27th, 1912, by Jean N. Fournier, bailiff.

To James Gibb and Frank Ross, of the City of Quebec, of the Province of Quebec, on plan Estate James Gibb, and to all to whom these presents shall come or to whom the same may in any wise concern.

Whereas the lands shewn upon and described in the annexed

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plan and description have under the provisions of the "National Transcontinental Railway Act," 3 Edward VII., ch. 71, sec. 13, been taken by His Majesty the King, acting through "The Commissioners of the Transcontinental Railway" for the purposes of a public work known as the National Transcontinental Railway, the construction of which public work is under the charge and control of the said "The Commissioners of the Trancontinental Railway" by the depositing of record in the office of the registrar of deeds for the City of Quebec, in the Province of Quebec, on the 24th day of January, 1911, of a duplicate of the said plan and description of the said lands.

And whereas no compensation money has yet been paid by or on behalf of His Majesty for the said lands.

And whereas the said lands have been found to be unnecessary for the purposes of the said public work and the undersigned have decided not to take the said lands for the purposes of the said railway.

Now, therefore, pursuant to and by virtue of the provisions of section 23 of the "Expropriation Act," R.S.C., 1906, ch. 143, and of section 207 of the "Railway Act," R.S.C., 1906, ch. 37, and section 15 of the "National Transcontinental Railway Act," 3 Edward VII., ch. 71, and in pursuance of any other authority in this behalf vested in the undersigned, the undersigned do hereby declare and notify you that the said lands are not required for the purposes of the said railway and that the said lands and the proceedings aforesaid are hereby abandoned by the Crown and by the said "The Commissioners of the Transcontinental Railway."

In witness whereof the Minister of Railways and Canals has hereunto set his hand and "The Commissioners of the Transcontinental Railway" have caused these presents to be executed and the corporate seal of the Commissioners to be affixed under the hand of the Commissioner and Secretary this fifteenth day of July, 1912.

F. COCHRANE,
Minister of Railways and Canals.

The Commissioners of the
Transcontinental Railway.
R. W. LEONARD,
Commissioner.
Per Secretary.

On the 19th of April, 1913, a petition of right was filed by the appellants claiming compensation and it is from the judgment given on the trial of that petition that the present appeal is brought.

The case presented by the petitioners was that upon the deposit of the plan and description in January, 1911, the title to the lands was transferred to the Crown and that in substitution for it a right to compensation became immediately vested in them and that the amount of compensation to which they then became entitled was that admitted to be due to them (the sum of $61,747.75) by the discontinued information. They admitted that on the return of the property the Crown became entitled to credit for a sum equal to the value of the property as of the date of its return and accepted it as payment *pro tanto;* but their contention was that they were entitled to the residue of the sum so admitted to be due to them after making deduction of that sum. The advisers of the petitioners apparently assumed that section 23 of the "Expropriation Act" applied and determined their rights.

The Crown, relying upon this same section, took the position that the Exchequer Court had no jurisdiction to entertain the petition. The learned assistant judge of the Exchequer Court did not accede to this view but rejected the claim of the petitioners for compensation for the value of the property taken—awarding the sum of $3,000 as reparation for loss which the learned judge held to be reasonably attributable to the action of the Crown in dispossessing the appellants.

I have come to the conclusion that both the advisers of the Crown and the advisers of the appellants have misapprehended the effect of the statutory provisions which must be looked to for the purpose of ascertaining the rights of the appellants. These enactments, I think, rightly construed confer no power

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upon the Minister of Railways or upon the Commissioners to revest compulsorily in the owners lands which have been taken under section 13 of the "National Transcontinental Railway Act," or to require the owners to accept, in discharge of the statutory obligation of the Crown to make compensation, anything but compensation in money; and the notice of the 15th July, 1912, was, consequently, without legal effect. That is the position the appellants were, I think, entitled to assume; but their advisers having proceeded on the assumption that the decision of this Court in *Jones* v. *The King* (1) was conclusive against this view of their rights, the petitioners by their petition presented their claim upon the footing that there was a re-transfer of the lands to them which must be treated as satisfaction in part of their right to compensation—to the extent, as I have already said, of the value of the lands at the time of re-transfer. While I think the petitioners were entitled to claim compensation without deduction; since, nevertheless, they have accepted the re-transfer and offered to submit to the deduction mentioned, that, I think, is the footing upon which their claim should be now dealt with.

It will be necessary to refer to several statutes and it will be more convenient, I think, to set out these enactments verbatim before discussing the effect of them.

The statutory provisions to be considered are:—

"National Transcontinental Railway Act," ch. 71, 3 Edw. VII.:—

Sec. 8.—The Eastern Division of the said Transcontinental Railway extending from the City of Moncton to the City of Winnipeg

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shall be constructed by or for the Government in the manner hereinafter provided and subject to the terms of the agreement.

Sec. 9.—The construction of the Eastern Division and the operation thereof until completed and leased to the company pursuant to the provisions of the agreement shall be under the charge and control of three commissioners to be appointed by the Governor-in-Council, who shall hold office during pleasure, and who, and whose successors in office, shall be a body corporate under the name of "The Commissioners of the Transcontinental Railway" and are hereinafter called "the Commissioners."

2. The Governor-in-Council may, from time to time, designate one of the Commissioners to be the chairman of the Commissioners.

Sec. 13.—The Commissioners may enter upon and take possession of any lands for the purposes of the Eastern Division, and they shall lay off such lands by metes and bounds, and deposit of record a description and plan thereof in the office for the registry of deeds, or the land titles office for the county or registration district in which such lands respectively are situate; and such deposit shall act as a dedication to the public of such lands, which shall thereupon be vested in the Crown, saving always the lawful claim to compensation of any person interested therein.

(2) If the lands so required are public lands under the control of the Government of the province in which they are situate, a description and plan thereof shall also be deposited in the department of the Provincial Government charged with the administration of such lands.

Sec. 14.—The Governor-in-Council may set apart for the purposes of the Eastern Division so much of any public lands of Canada as is shewn by the report of the chief engineer to be required for the roadbed thereof, or for convenient or necessary sidings, yards, stations and other purposes for use in connection therewith; and the registration in the office for the registry of deeds, or the land titles office for the county or registration district in which such lands respectively are situate, of a certified copy of the order-in-council setting the same apart shall operate as a dedication of the said lands for the purposes of the Eastern Division.

Sec. 15.—The Commissioners shall have in respect of the Eastern Division, in addition to all the rights and powers conferred by this Act, all the rights, powers, remedies and immunities conferred upon a railway company under the "Railway Act" and amendments thereto, or under any general railway Act for the time being in force, and said Act and amendments thereto, or such general railway Act, in so far as they are applicable to the said railway, and in so far as they are not inconsistent with or contrary to the provisions of this Act, shall be taken and held to be incorporated in this Act.

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R.S.C., 1906, ch. 37, "Railway Act":—

Sec. 207.—Where the notice given improperly describes the lands or materials intended to be taken, or where the company decides not to take the lands or materials mentioned in the notice it may abandon the notice and all proceedings thereunder but shall be liable to the person notified for all damages or costs incurred by him in consequence of such notice and abandonment, which costs shall be taxed in the same manner as costs after an award.

(2) The company may, notwithstanding the abandonment of any former notice, give to the same or any other person notice for other lands or materials, or for lands or materials otherwise described. 3 Edw. VII., ch. 58, sec. 166.

"Exchequer Court Act," R.S.C., 1906, ch 140:—

Sec. 20.—The Exchequer Court shall have exclusive original jurisdiction to hear and determine the following matters:—

(*a*) Every claim against the Crown for property taken for any public purpose;

(*b*) Every claim against the Crown for damages to property injuriously affected by the construction of any public works;

(*c*) Every claim against the Crown arising out of any death or injury to the person or to property or on any public work, resulting from the negligence of any officer or servant of the Crown, while acting within the scope of his duties or employment;

(*d*) Every claim against the Crown arising under any law of Canada or any regulation made by the Governor-in-Council;

(*e*) Every set-off, counterclaim, claim for damages whether liquidated or unliquidated, or other demand whatsoever, on the part of the Crown against any person making claim against the Crown. 50 & 51 Vict. ch. 16, sec. 16.

"Expropriation Act," R.S.C., 1906, ch. 143:—

Sec. 2.—In this Act unless the context otherwise requires—

(*a*) "Minister" means the head of the department charged with the construction and maintenance of the public work;

(*b*) "Department" means the department of the Government of Canada charged with the construction and maintenance of the public work;

Sec. 23.—Whenever from time to time, or at any time before the compensation money has been actually paid any parcel of land taken for a public work or any portion of any such parcel, is found to be unnecessary for the purposes of such public work, or if it is found that a more limited estate or interest therein only is required, the Minister may, by writing under his hand, declare that the land or such portion thereof is not required and is abandoned by the Crown,

or that it intended to retain only such limited estate or interest as is mentioned in such writing.

(2) Upon such writing being registered in the office of the registrar of deeds for the county or registration division in which the land is situate, such land declared to be abandoned shall re-vest in the person from whom it was taken or in those entitled to claim under him.

(3) In the event of a limited estate or interest therein being retained by the Crown, the land shall so re-vest subject to the estate or interest so retained.

(4) The fact of such abandonment or re-vesting shall be taken into account in connection with all other circumstances of the case, in estimating or assessing the amount to be paid to any person claiming compensation for the land taken. 52 Vict., ch. 13, sec. 23.

Sec. 26.—In any case in which land or property is acquired or taken for or injuriously affected by the construction of any public work, the Attorney-General of Canada may cause to be exhibited in the Exchequer Court an information in which shall be set forth—

(*a*) The date at which and the manner in which such land or property was so acquired, taken or injuriously affected;

(*b*) The persons who at such date, had any estate or interest in such land or property and the particulars of such estate or interest and of any charge, lien or encumbrance to which the same was subject, so far as the same can be ascertained;

(*c*) The sums of money which the Crown is ready to pay to such persons respectively, in respect of any such estate, interest, charge, lien or encumbrance; and,

(*d*) Any other facts material to the consideration and determination of the questions involved in such proceedings. 52 Vict., ch. 13, sec. 25.

"Railways and Canals Act," R.S.C., 1906, ch. 35:—

Sec. 7.—The Minister shall have the management, charge and direction of all Government railways and canals, and of all works and property appertaining or incident to such railways and canals, also of the collection of tolls, on the public canals and of matters incident thereto, and of the officers and persons employed in that service. R.S.C., ch. 37, sec. 6; 52 Vict., ch. 19, sec. 3.

Before giving my reasons for thinking that the notice of the 15th July, 1912, was inoperative I make one or two observations touching the positions respectively taken on behalf of the appellants and the Crown in the argument before us.

On the hypothesis that section 23 applies, the con-

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tention advanced on behalf of the Crown that the Exchequer Court is without jurisdiction to entertain the petition seems to be disposed of simply by reference to section 20 of the "Exchequer Court Act," and section 13 of the "National Transcontinental Railway Act." There is nothing in section 23 indicating an intention to take away the right to compensation recognized by section 13 and even assuming that sub-section 4 of section 23 ought to be construed, as the Crown contends it should be construed, as limited, namely, to cases in which the abandonment relates to part of the land taken only, it would still require very explicit language to take away all right of compensation for loss occasioned by the compulsory assumption of the legal title of the property. The general rule which enables the subject to proceed by petition of right for compensation for property which has found its way into the hands of the Crown (*Feather* v. *The Queen* (1), and *Windsor and Annapolis Railway Co.* v. *The Queen* (2), at page 614) would remain operative. I agree, however, with the appellants that this is not the necessary reading of sub-section 4, the construction of which I proceed to consider with special reference to the effect attributed to the statute by the learned trial judge.

The learned judge appears to have taken a view, the practical result of which is that, where section 23 applies and lands taken are returned under that section so that no part remains in the possession of the Crown, the right of compensation is limited to compensation for disturbance of possession. That, with great respect, I think, is not the point of view from

(1) 6 B. & S. 257, at p. 293. (2) 11 App. Cas. 607.

which the subject of compensation is envisaged by sections 22 and 23 of this statute. To prevent misapprehension, I note specially that I refer only to sections 22 and 23 and not to section 30, which deals only with the subject of injurious affection. It may be that section 30 approaches the subject from the same point of view, but that question does not arise and I express no opinion upon it at all. Sections 22 and 23 must be read together. It is perfectly true that, where section 23 applies, the declaration in section 22 that the lands become vested in the Crown and that in substitution for the title, the translation of which is thereby effected, there is vested in the owner a right of compensation—it is quite true that this declaration must be read with the provisions of section 23 empowering "the Minister" compulsorily to re-vest in the owner the lands taken; but on the other hand sub-section 4 of section 23 must be read with section 22 and, reading section 22 and sub-section 4 together, I apprehend it to be sufficiently clear that the governing consideration in determining the effect of the two provisions is the fact that the language of section 22 clearly imports that the compensation to which the owner becomes thereby entitled is normally to be determined as of the date when the lands vest in the Crown by the operation of section 22. In *Re Lucas and Chesterfield Gas and Water Board* (1), Lord Justice Moulton said that the general principle of compensation where land is taken under compulsory powers is that the property *is not diminished in amount but changed in form;* and section 22 seems to be only an explicit statement of this well-settled

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principle. That, as I have said, appears to be the governing consideration for determining the joint effect of these provisions. The result then is that, for the purpose of ascertaining the amount of compensation provided for in section 22, you must take into account the fact that the land taken has been compulsorily re-transferred together with the other circumstances of the case; but you are to take that fact together with the other circumstances into account for the purpose of determining how much money ought to be paid to the owner in order that he may receive in property and money the equivalent in value to him of the property taken as of the date when section 22 became operative; that is to say, the date of the filing of the plan.

One can easily conceive cases in which the question thus formulated might present considerable difficulty. In the case before us, which is a comparatively simple one, we have the formal offer of the Crown and it is not disputed that the amount offered fairly represented that to which the appellants were entitled, namely, the value of their property to them; and it is not suggested, indeed it could not be suggested, that in the circumstances this could be anything other than the market value of their property in the sense in which that phrase is used in the literature of compulsory purchase. The only question of fact, therefore, upon which the learned trial judge was called upon to pass was the question of the value of the property at the date upon which it was returned.

If I had taken the view that the case ought to be dealt with on this footing (that is to say, that section 23 is applicable) I should not have felt embarrassed by the course on which the case proceeded in the

court below. As applied to the circumstances before us, Mr. Stuart's method of working out the statute proposed at the trial and on the argument in appeal was, I think, substantially the right method; and the principle upon which the appellants' claim must rest (assuming always section 23 of the "Expropriation Act" to be applicable) was, I think, set forth with perfect clearness in the petition of right. The evidence given on behalf of the petitioners was explicitly directed to the precise point of fact just indicated; and, I think, the result of the evidence is that a deduction to the extent of $30,000 ought to be made from the amount of compensation originally offered.

I come then to the point upon which I think, as I stated above, the appeal should be decided, viz., that the notice of 15th July, 1912, was inoperative in law.

The first point for consideration is: Does section 23 of the "Expropriation Act" confer upon the Minister of Railways and Canals authority to re-vest compulsorily in the owner lands acquired by the National Transcontinental Railway Commissioners under the authority of section 13 of the "National Transcontinental Railway Act"? "Minister" in section 23 is to be read (in accordance with the direction of section 2 (*a*) and (*b*)) as meaning the

head of the department charged with the construction and maintenance of the public work.

It does not appear to require argument (when the terms of section 7 of the "Department of Railways and Canals Act" are compared with those of the sections extracted above from the "National Transcontinental Railway Act") to shew that the Eastern Division of the National Transcontinental Railway, although

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clearly enough a "public work" within the words of section 2, sub-section (*b*) of the "Expropriation Act" is not a "public work" with whose "construction and maintenance" the Department of Railways and Canals is "charged." The condition of the authority, therefore, of the Minister, under section 23, namely, that he shall be

> the head of the department charged with the construction and maintenance of the public work,

for which lands have been taken is in this case unfulfilled. The case is not a case to which the authority of the Minister of Railways and Canals extends under that section; the language of the section itself excludes it.

Moreover, comparing the provisions of the "Expropriation Act" with the provisions of the "National Transcontinental Railway Act," lands taken for the Eastern Division by the Commissioners seem to be clearly outside the contemplation of section 23. By section 13 of the former Act such lands not only become vested in the Crown, but become affected by a *"dedication to the public"* by the express words of the statute; that is to say, I presume, affected by a "dedication" to the public purposes for which they are taken—for the construction, maintenance and working of the Eastern Division of the National Transcontinental Railway. The "work" was under the charge and control of Commissioners brought into existence by this special statute, passed in pursuance of a contract with the Grand Trunk Railway Co. who were ultimately to be the lessees and operators of it, who, as the agreement between themselves and the Government shews, were narrowly concerned with the economical construction of the railway. Lands acquired for

the undertaking by these Commissioners cannot, I think, be fairly held to be subject to the power of the "Minister" under the provisions of section 23.

Again, section 13, the necessary conditions being satisfied, takes away the title from the owner substituting for it a right of compensation, which means, of course, compensation in money. In *The King* v. *Jones*(1) this court took the view that the claim for compensation means a claim against the Crown, not a claim against the Commissioners as a corporate body; and a claim, therefore, which was not intended to be made through the machinery provided by the "Railway Act," but must be prosecuted and determined in the ordinary way, by proceedings instituted by petition of right or an information filed on behalf of the Crown; this right to compensation, if one is to ascertain and define it by reference to the language of the "National Transcontinental Railway Act" alone (I suspend for a moment a necessary reference to section 15), is simply a right to be paid in money the value to the owner of what has been taken. And it is, of course, not disputed that the introduction of section 23, on any construction of it that has been suggested, must effect a sensible modification of the right so ascertained and defined. There is not a word in the "National Transcontinental Railway Act" referring to the "Expropriation Act"; which circumstance does not shew, of course, that the provisions of the "Expropriation Act" relating to procedure simply are not properly available for the purpose of enforcing rights conferred by the "National Transcontinental Railway Act" in respect of which no remedy is given speci-

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fically by the last mentioned statute. But it is one thing to say, as I have no difficulty in holding, that the provisions of the "Expropriation Act" relating to procedure simply may be made available for such purposes so long as they are applied consistently with the full recognition of the substantive rights given by the special Act dealing with the particular railway, the National Transcontinental Railway; and it is an entirely different thing to say that such substantive rights can properly be held to be modified by the provisions of another statute, general in its nature, to which not a single word of reference is to be found in the special Act.

It is to be observed, however, that the notice of the 15th July, 1912, is a notice given by the Commissioners of the National Transcontinental Railway as well as by the Minister of Railways and Canals; and it is a conceivable suggestion that the "National Transcontinental Railway Act" establishes a "department of the Government of Canada, charged with the construction and maintenance" of the Eastern Division of the National Transcontinental Railway; and that the Commissioners are the "head of the department" and, consequently, satisfy the description "minister" as defined by section 2, sub-sections (*a*) and (*b*) of the "Expropriation Act." There are two distinct objections severally fatal to this suggestion. "Department of the Government of Canada" is a phrase having a well understood significance and it clearly means one of the departments recognized by statute presided over by a Minister of the Crown, a member of the King's Privy Council for Canada. See R.S.C., 1906, ch. 4, sec. 4; ch. 48, sec. 3; ch. 23, sec. 2, etc. The second objection is that, assuming the lan-

guage used to be capable of a construction reconcilable with this suggestion, it is only by attributing to the words a forced and unusual meaning; and the considerations to which I have just referred are equally weighty to justify the rejection of this interpretation which would have the effect if adopted, of seriously prejudicing the right of compensation given by section 13 of the "National Transcontinental Railway Act."

The notice in question, moreover, professes to be given pursuant to section 207 of the "Railway Act": (see p. 426, *ante*), as well as to section 23 of the "Expropriation Act." The legislative provision now embodied in section 207 of the "Railway Act," which had its origin many years ago, frequently has been considered and it has uniformly, I think, been held that the power conferred by that provision is a power which ceases to be operative the moment the title to the land taken becomes vested in the railway company. *Mitchell* v. *Great Western Railway Co.*(1); *Canadian Pacific Railway Co.* v. *Little Seminary of Ste. Thérèse*(2); *Re Haskill and Grand Trunk Railway Co.*(3). Application, therefore, according to its true intent, it could not have to lands taken under section 13 of the "National Transcontinental Railway Act" the title to which, by the very act of taking, becomes vested in the Commissioners; and section 207, consequently, is not incorporated by force of section 15 of the last mentioned Act. These are the principal reasons which have satisfied me that the Crown is not entitled to invoke the provisions of section 23 of

(1) 35 U.C.Q.B. 148. (2) 16 Can. S.C.R. 606.
(3) 7 Ont. L.R. 429; 3 Can. Ry. Cas. 389.

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the "Expropriation Act," or the provision of the "Railway Act" just referred to.

I have now to consider *The King* v. *Jones*(1). In *The King* v. *Jones*(1) the learned judge of the Exchequer Court had dismissed an information filed by the Attorney-General of Canada praying for a declaration that certain lands taken by the Commissioners had become vested in the Crown and for a determination of the amount of compensation payable in respect of such taking on the ground that the effect of section 15 of the "National Transcontinental Railway Act" was to incorporate the sections of the "Railway Act" relating to compensation and that compensation must be determined in the way provided for by that Act. On appeal to this court it was held that the Exchequer Court had jurisdiction to entertain the information and to pass upon the question of compensation on two grounds, first, that the claim for compensation under section 13 is a claim against the Crown and that jurisdiction is given by section 20 of the "Exchequer Court Act," R.S.C., 1906, ch. 140, subsecs. (*a*) and (*b*), which invest that court with exclusive jurisdiction over every claim against the Crown for property taken for or injuriously affected by any public work; and secondly, on the ground that the Eastern Division of the National Transcontinental Railway is a "public work" within the meaning of sections 26 *et seq.* of the "Expropriation Act." That is the substance of the decision. The ratio is put very clearly in the judgment of Davies J., at page 499, in these words:—

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It is a public work vested in the Crown, constructed at the expense of Canada, or for the construction of which public moneys have been voted and appropriated by Parliament within the meaning of section 2, para. (*d*) of the "Expropriation Act," and the procedure taken by the Crown in fyling this information to determine the claim against the Crown for the lands taken falls within the language of the 26th section of that Act, and the claim itself is one coming in my judgment, within sub-section (*a*) of section 20, of the Act constituting the Exchequer Court and defining its jurisdiction over "every claim against the Crown for property taken for any public purpose."

Altogether I entertain no doubt that the jurisdiction of the Exchequer Court covers the claim made and think the appeal should be allowed and the jurisdiction of the Court affirmed.

With great respect, I am unable to understand why *The King* v. *Jones*(1) can be supposed in any way to decide the question which I have been discussing, touching the applicability of section 23. The effect of section 23 was not a subject of consideration in that case and I do not think anybody supposed that the court was deciding that each and every section of the "Expropriation Act" is applicable for the purpose of determining the substantive rights of the persons whose lands are taken under section 13 of the "National Transcontinental Railway Act." There is not the least difficulty, as I have already said, in holding that the Eastern Division of the National Transcontinental Railway is a "public work" under section 26 for the purpose of applying that section and the subsequent provisions in so far as they relate to procedure merely; and in holding at the same time that other provisions of that statute affecting the substantive rights of the parties are not capable of application because of the very fact that they deal with substantive rights and not with procedure and because

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they are not consonant with provisions of the special Act governing substantive rights. Section 13 provides for the right of compensation specifically but it says nothing about procedure. There seems no reason for holding that the provisions of a general statute enabling the Crown to take proceedings in the Exchequer Court for the purpose of determining the amount of compensation where compensation is payable in respect of the taking of lands for public works does not apply to the case of compensation payable under section 13 where the language of the statute is broad enough to comprehend, and does literally comprehend, that case; provided always, that the provisions of the general statute are not imported for the purpose or with the effect of modifying the substantive rights which are the legal result of a proper interpretation of the "National Transcontinental Railway Act" itself. That at all events is, I think, the proper interpretation of *The King* v. *Jones*(1).

The consequence would have been that the appellants, had they stood upon their rights, would have been entitled to claim the sum of $61,747.75, which the Crown had solemnly admitted to be the compensation to which they became entitled by the taking of the land. The appellants, however, in the petition of right had chosen to accept the property in part satisfaction and to that position they have consistently adhered throughout. I think this position results from a misapprehension of the "Expropriation Act," but they have asked for relief upon that footing, and upon that footing I think their claim must be

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dealt with. There is satisfactory evidence that the property when returned was not worth more than $30,000. It follows they are entitled to be paid the residue of compensation offered after deducting that sum.

ANGLIN J.—In *The King* v. *Jones*(1), a majority of the judges of this court held that the National Transcontinental Railway is a public work to which the "Expropriation Act" (R.S.C., 1906, ch. 143) applies.

Although sub-section 4 of section 23 of that Act is not as clearly expressed as might be desired, I agree with Mr. Stuart that it applies to cases of total, as well as to cases of partial, abandonment by the Crown, and that in it the words "land taken" mean not land taken and kept, but land taken under the provision for its acquisition, whether wholly or partially retained, or subsequently wholly abandoned. Otherwise there would be no provision in the "Expropriation Act" for compensation in cases of total abandonment, although in such cases the actual loss to the owner may have been very substantial. It cannot be assumed that it was intended to leave such a grievance without remedy, and if the statute is susceptible of an interpretation under which it will be provided for, that interpretation should prevail.

In the Exchequer Court this case has been dealt with on the footing that, upon the Crown exercising its right of abandonment under section 23, the owner became entitled to be indemnified for actual loss sustained as the direct result of his property having been

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taken out of his hands and held by the Crown from the date of deposit of the plan under section 13 of the "National Transcontinental Railway Act" (3 Edw. VII., ch. 71), until it was re-vested in him under section 23 of the "Expropriation Act." On that basis the learned assistant judge allowed him $3,000 for loss of revenue already suffered and likely to be sustained in the future. This allowance was intended to cover all loss attributable to interference with the suppliant's user of his property, including loss of opportunities to lease it to advantage. But the suppliant was also deprived during all that period of the right to sell or otherwise dispose of his property. Until notice of withdrawal had been given the property to all intents and purposes belonged to the Crown, and the suppliant had no reason or right to expect that he would again have any interest in it. That the deprivation of the right of disposition is in most cases a matter proper for compensation can scarcely admit of doubt. When the property has diminished in value during the time that right has been withheld some compensation should certainly be made. This element of damage was not taken into consideration in the Exchequer Court. No doubt the loss sustained as the result of deprivation of the *jus disponendi* involves elements of contingency. The possibility of profitable sale, as such, must be taken into account. *Cedars Rapids Manufacturing and Power Co.* v. *Lacoste*(1). Neither the difficulty of determining the loss proper to be allowed for, nor the fact that elements of contingency or uncertainty are involved in it is sufficient reason for refusing com-

(1) [1914] A.C. 569.

pensation. *Wood* v. *Grand Valley Railway Co.*(1); *Chaplin* v. *Hicks*(2). If the statute should receive the construction put upon it by the learned assistant judge of the Exchequer Court, it would, therefore, be necessary that this case should be referred back to him to consider what additional sum should be allowed as compensation to the appellant for deprivation of his *jus disponendi* while his property was vested in the Crown, the evidence in the record being scarcely sufficient to enable us to deal satisfactorily with that question.

I was, for a time, inclined to think that this appeal should be disposed of in the manner which I have just indicated, but further consideration has led me, though not without some hesitation, to accept the construction placed upon section 23 of the "Expropriation Act" by my Lord the Chief Justice.

Where land or property taken under sub-section 1 of section 13 of the "National Transcontinental Railway Act" is subsequently abandoned and re-vested in the former owner under section 23 of the "Expropriation Act," no provision of either statute expressly deprives him of "the lawful claim to compensation" reserved to him by section 13 of the "National Transcontinental Railway Act," If it has been intended that the right to compensation which accrued upon the taking of the land should cease upon the re-vesting of it, having regard to the extraordinary and exceptional exercise of eminent domain involved in such re-vesting, we should certainly expect to find the extinction of the owner's right to compensation declared in explicit terms. But, on the contrary, sub-section 4 of section

(1) 51 Can. S.C.R. 283. (2) [1911] 2 K.B. 786.

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23, though not as clear as could be desired, appears to be framed on the assumption that, notwithstanding the abandonment and the re-vesting, "the person claiming compensation for the land taken" is still entitled to have "the amount to be paid to" him estimated or assessed by the court, which is directed, in estimating or assessing it, to take into account the fact of such abandonment or re-vesting, *i.e.*, to make allowance, at its then present value to him, for any advantage or benefit which the owner will derive from such abandonment or re-vesting.

The suppliant would, therefore, be entitled to the amount of the compensation which he would have recovered had the Crown retained the property less what is found to be a proper deduction to be made on account of the re-vesting. The property being thus treated as having belonged to the Crown while held under expropriation the Crown is entitled to the *mesne* profits from it during that time, but would be liable to the suppliant for interest for the same period on the full amount of the compensation which he would have recovered had the property not been abandoned.

The case has been dealt with in the Exchequer Court on an entirely different view of the effect of sub-section 4 of section 23 of the "Expropriation Act." We are not in a position to determine satisfactorily what compensation should be allowed the appellant.

The appeal should be allowed with costs and the action should be remitted to the Exchequer Court in order that the amount to be paid to the appellant may be estimated or assessed on the basis indicated.

BRODEUR J.—Il s'agit dans cette cause d'une pétition de droit réclamant des dommages.

Le 24 janvier, 1911, le gouvernement donnait avis d'expropriation d'une propriété appartenant aux appelants et dont il avait besoin pour la construction du Transcontinental. Au mois d'octobre, 1911, des procédures étaient instituées par le procureur-général devant la Cour d'Echiquier pour établir l'indemnité qui devait être payée pour l'expropriation de cette propriété et il offrait une somme de $61,747.75. Il y eut contestation quant au montant de l'indemnité; mais en définitive les parties se sont entendues et les appelants se sont déclarés prêts à accepter le montant offert et les procédures en Cour d'Echiquier furent alors discontinuées.

Le 27 juillet, 1912, la couronne déclarait que l'immeuble en question n'était pas requis et cet avis était enregistré le 30 décembre, 1912.

Dans leur pétition de droit les appelants prétendent que l'immeuble en question valait lors de l'expropriation au-delà de $60,000, ainsi qu'il avait été admis par le gouvernement lui-même et que lors de la rétrocession elle ne valait plus que $30,000 et ils réclament la différence.

La Court d'Echiquier n'a maintenu l'action que pour une somme de $3,000 pour les dommages qu'ils avaient soufferts pour pertes de revenus.

Nous avons à considérer la portée de la sous-section 4 de la section 23 de "La Loi des expropriations" (ch. 143 des Statuts Refondus de 1906). En vertu de cette loi des expropriations, lorsque la Couronne dépose au bureau d'enregistrement un plan et une description des terrains que l'on veut exproprier, cet immeuble, par le fait même de ce dépôt, devient la propriété de Sa Majesté (sec. 8).

Dans la cas actuel, cependant, les appelants sont

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restés en possession de la propriété et en ont retiré tous les loyers.

Il n'y a jamais eu dépossession. La jouissance était nécessairement restreinte et il leur était impossible de pouvoir retirer de la propriété les mêmes revenus qu'elle donnait auparavant. Je considère donc que les dommages qui ont été accordés par le juge de la cour inférieure pour cette perte de loyer doivent être maintenus.

La somme de $3,000 qui a été accordée représente une somme plus élevée qui les loyers qui ont été perdus; mais il faut tenir compte, en même temps, du fait que les appelants se trouvent avec des locataires qui ne leur donneront pas des revenus aussi considérables que ceux qu'ils auraient perçus s'ils avaient pu louer sans restriction. Le montant n'est donc pas trop élevé, loin de là.

Mais le point principal soulevé par les appelants est de savoir si la propriété a diminué de valeur entre la prise de possession et la rétrocession et s'il y a lieu de condamner à la Couronne à payer cette différence.

Je comprends que si la Couronne avait pris possession de la propriété, s'il y avait eu un incendie, par exemple, ou si on avait fait des détériorations, la Couronne serait tenue de payer ces dommages.

Mais dans le cas actual la propriété du terrain en question appartenait à la Couronne en vertu de son avis d'expropriation; mais elle n'a jamais exercé son droit de propriété et a laissé les appelants en possession.

En vertu de la loi, les appellants avaient droit aux dommages qu'ils avaient soufferts comme résultat de cet avis d'expropriation et de la rétrocession.

Le demandeur a-t-il réellement souffert de dommages autres que ceux que je viens de mentionner plus haut ?

Avant que la construction du chemin de fer fût décidée, la propriété des appelants valait à peine $30,000. Elle rapportait environ $2,000 de revenus par année, soit un peu plus de 6%. Il est reconnu, en général, qu'une propriété de ville doit donner un revenu brut de 10%. Or, en évaluant à $30,000 cette propriété qui ne donnait que $2,000 de revenu je fais une évaluation bien libérale.

Il est reconnu par les appelants qu'elle vaut aujourd'hui environ $30,000. Elle a donc la même valeur qu'avant. Quand le gouvernement eût décidé de construire le chemin de fer, de suite cette propriété parut acquérir une plus valeur. Les avis d'expropriation ne furent pas donnés de suite et quand ils furent donnés la propriété avait doublé en valeur. Et comme le gouvernement était tenu de payer la valeur qu'elle avait à la date de l'avis d'expropriation, il a offert un peu plus de $60,000.

Il a considéré, je suppose, à un moment donné, que ce projet de construire une gare à cet endroit était trop dispendieux, à raison probablement de la valeur factice que les expropriés réclamaient pour leurs terrains et alors il a simplement résolu de ne pas donner suite à son projet et de placer sa gare à un autre endroit. Il a donné avis aux appelants qu'il leur rétrocédait leur propriété.

Ces derniers, je considère, ne peuvent pas, comme ils le font, réclamer des dommages pour cette valeur factice que le projet du chemin de fer a donnée à leur propriété. Le juge avait le droit d'examiner toutes les circonstances de la cause, comme le dit le statut,

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et notamment de considérer la valeur de cette propriété non-seulement ou moment de l'expropriation mais même avant le projet de la construction du chemin. Il est bien evident pour moi que les seuls dommages soufferts par les appelants sont ceux qui leur ont été accordés en cour inférieure. Ce jugement devrait être confirmé avec dépens.

The appeal stood dismissed, on equal division of opinion, no costs being allowed.

Solicitors for the appellants: *Pentland, Stuart, Gravel & Thomson.*

Solicitor for the respondent: *Eusèbe Belleau.*