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 Mar. 18. HER MAJESTY THE QUEEN (DE- } APPELLANT;
 FENDANT)

AND

THE COMMISSIONERS OF SEW- }
 ERAGE AND WATER SUPPLY }
 FOR THE CITY OF ST. JOHN, } RESPONDENTS.
 AND PART OF THE CITY OF }
 PORTLAND (CLAIMANTS)..... }

Appeal from report of Official Referee—Damages to property from works executed on Government railway—Parol undertaking to indemnify owners for cost of repairs by officer of the Crown—Crown's liability thereunder.

The claimants' property having been injuriously affected in the carrying out by the Crown of certain improvements in the yards and tracks of the Intercolonial Railway at and near its station in the City of St. John, N.B., A., the Chief Engineer of the railway, verbally agreed with the claimants that the works which it was necessary to execute in order to restore their property to its former safe and serviceable condition, should be executed under the direction of M., the claimants' engineer, and that the Crown would pay to the claimants the cost thereof. The exact extent and character of the works to be so executed were never definitely settled.

The works executed under M.'s direction exceeded what were necessary to remove the injury done, and to a certain extent added to the permanent value of the claimants' property. M. did not act in bad faith, but erred in judgment. The work, however, was done upon and adjacent to the railway property, where it was open at all times to the inspection of the officers and engineers of the railway, and the necessary excavations were made for M. by men employed and paid on behalf of the Crown.

The case was referred to an Official Referee to ascertain the amount of damages, if any, and he reported in favor of claimants for \$2,655.62, less certain deductions.

On appeal from this report,

Held (affirming the report), that while the claimants were entitled to take such steps and to execute such works as were necessary to make their property as good, safe and serviceable as it was before the interference therewith, and to recover from the Crown the expenses thereby incurred, they were not entitled to improve

their water system and service at the Crown's expense. They were entitled to be fully indemnified for any injury done, but to nothing more.

2. The question of A.'s authority, under the circumstances, to make a contract whereby the Crown's liability would be extended, not being raised,—

Held, that the claimants were entitled, under the contract made with A., to recover the cost of the works executed under M.'s direction.

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APPEAL from a report of one of the Official Referees of the court, recommending that respondents (claimants) be paid the sum of \$2,655.62, less certain deductions, as due by the Crown upon an undertaking by one of its officers to indemnify respondents for the cost of executing certain works in connection with their property, rendered necessary by the interference of the tracks of the Intercolonial Railway therewith.

The facts of the case are sufficiently stated in the head-note.

January 18th and 19th, 1889.

McLeod, Q.C., and *Pugsley* for appellants;

Barker, Q.C., for respondents.

BURBIDGE, J. now (March 18th, 1889,) delivered judgment.

This is a motion, made on behalf of the defendant, by way of appeal from the report of Mr. Compton, one of the Official Referees of the court, "recommending "that the claimants be paid the amount of their claim, "viz.: two thousand six hundred and fifty-five dollars "and sixty-two cents," less certain deductions therein indicated.

The facts of the case are fully stated in the report and need not be repeated here.

There is no question but the claimants' property was injuriously affected by the alterations and improvements made in 1884, by the Minister of Railways and Canals, in the yard and tracks of the Intercolonial Rail-

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way at and near the station in St. John, N.B., and that claimants were entitled to take such steps, and to execute such works, as were necessary to make their property as good, safe, and serviceable as it was before the interference therewith, and to recover from the defendant the expense thereby incurred. They were not entitled, however, to improve the water system and service of the city of Portland at the Crown's expense. They were entitled to be fully indemnified for any injury done, but to nothing more.

Now it appears clear to me that the claimants, in the extent and character of the works which they executed and the expense which they incurred, exceeded the limit which I have indicated, and that a very considerable portion of the claim made is for works and materials which added to the permanent value and utility of the claimants' property, but which cannot be fairly said to have been rendered necessary by any thing done by the Minister of Railways, or the officers of his Department.

It is, therefore, with hesitation that I have come to the conclusion to dismiss this motion and confirm the report. In coming to this conclusion I am influenced not so much by what passed between the Chief Engineer of the Intercolonial Railway and the Chairman and Engineer of the St. John and Portland Sewerage and Water Commission, as by what thereafter was done and not done. It is clear, I think, that Mr. Gilbert Murdoch, the Engineer of the Commission, was, as well for the Minister of Railways as for the Commission, to have the direction of whatever works were to be executed. I find, too, that Mr. Archibald, the Chief Engineer of the railway, consented to, or at least did not dissent from, the laying of a new main. The work was done upon and adjacent to the railway property. It was open at all times to the inspection of the officers

and engineers of the railway. The excavations were made by men employed, supervised, and paid on behalf of the Minister of Railways, and Mr. Murdoch was allowed to proceed to the completion of the work without even a suggestion from any one acting in the interest of the railway authorities, who must, I think, be taken to have acquiesced in and assented to what he did. I think it is unfortunate that Mr. Murdoch when, on his return from Halifax, he disapproved of the suggestions as to what works were necessary, made by his assistant in his absence and approved of by Mr. Archibald, did not, in the absence of the latter in British Columbia, communicate with the Chief Superintendent or some other responsible officer of the Intercolonial Railway before going on with the work. But there is, in my opinion, no good ground for concluding, as was suggested upon the argument of this motion, that Mr Murdoch acted in bad faith. That he erred in judgment as to the character and extent of the works which an engineer, occupying the dual position of trust that he occupied, ought to have executed at the Crown's expense, may be, and I think is, true; but that he deliberately and dishonestly used his position to improve the claimants' property at the defendant's cost, I cannot believe.

I am, therefore, of opinion to dismiss the motion, and to confirm the report with costs to the claimants.*

Appeal dismissed with costs.

Solicitor for appellant: *E. McLeod.*

Solicitor for respondent: *G. W. Allen.*

*On appeal to the Supreme Court of Canada (PRESENT: Ritchie, C. J., Strong, Taschereau, Gwynne and Patterson, JJ.), the judgment of the Exchequer Court was affirmed; Strong and Gwynne, JJ. dissenting on the ground that A., the Chief Engineer of the Intercolonial Railway, had no authority to bind the Crown by any such undertaking as that put forward by the claimants herein.

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