THE SISTERS OF CHARITY, OF ROCKINGHAM, IN THE COUNTY OF HALIFAX, A BODY CORPORATE, SUPPLIANT.

1919
March 7.

AND

HIS MAJESTY THE KING, RESPONDENT.

Expropriation—Crown railways—Shunting-yard—School—Compensation—Harbour—Riparian rights—Consequential injuries.

The Dominion Government, in the operation of its railways, constructed a shunting-yard on lands reclaimed by it from the waters of Bedford Basin, partly in front of the school buildings of the suppliant corporation. The latter owning water lots thereon, which had been improved as a bathing pavilion and wharf in connection with the school, claimed compensation for injurious affection by reason of the construction and operation of said yard.

Held, Bedford Basin being a public harbour at the time of Confederation, was the property of the Dominion by virtue of the *B. N. A. Act,* and no title to water lots thereon could pass under a provincial grant. *Maxwell v. The King,* (1917), 17 Can. Ex. 97, 40 D.L.R. 715, followed.

2. The fact that the suppliant had been allowed a crossing across the railway tracks to reach the beach where such lots were situated, it did not thereby acquire an irrevocable license as against the Crown, nor could it under the circumstances claim such as a riparian right, so as to be considered as an element of compensation.

3. The injury having been caused by the operation of works on lands other than those taken from the suppliant, the latter was not entitled to compensation therefor.

PETITION OF RIGHT claiming compensation and damages against the Crown.

Tried before the Honourable Mr. Justice Cassels, at Halifax, N.S., September 25, 26, 1918.

T. F. Tobin, K.C., and *L. A. Lovett,* K.C., for suppliant.

T. S. Rogers, K.C., and *J. A. McDonald,* K.C., for respondent.

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CASSELS, J. (March 7, 1919), delivered judgment.

A petition of right filed on behalf of the suppliant, claiming compensation and damages against the Crown, for certain lands belonging to it expropriated for the purpose of the government railways in Halifax and damages to other lands said to be held therewith.

The suppliants claim the sum of $500,000. The respondent denies that the suppliants are entitled to any compensation but have offered a certain sum in full of any alleged claim.

The case was tried before me in Halifax, commencing on the 25th September last. At the conclusion of the case counsel requested an opportunity of putting in written arguments. The last of these arguments was received about the first of February last. Owing to other engagements I have been unable to consider the case at an earlier date.

The case is one in some respects of considerable importance. I have occupied considerable time in considering the evidence and authorities.

The supplicants are a corporate body (the charter granted by Statute of Nova Scotia in 1864). The amending Acts were consolidated by ch. 81 of the Statutes of Nova Scotia for the year 1907. The purpose of the organization is educational and charitable, extensively educational.

I had the pleasure, accompanied by counsel for the plaintiffs, and for the Crown, of paying a visit to the academy, and was most courteously received and shown over the establishment from top to bottom. I may say that I have never seen more complete buildings for the purposes of an educational establishment, and it is lamentable the effect upon

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the academy of what has taken place. I will describe subsequently how the works tend to injure an establishment of this character.

The main grievance, as appears from the evidence, is the creation and operation of a shunting yard partly in front of the academy, and between them and the waters of Bedford Basin. The shunting yard is almost entirely on land reclaimed from Bedford Basin vested in the Crown. There are 14 tracks in this shunting yard, and all the freight cars in and out of the City of Halifax by the Intercolonial Railway, now a part of the Government railways, are made up in this yard. Ordinary knowledge without the aid of the evidence in the case would indicate the effect of such a yard partly in front of an institution of this character. There are about 140 pupils ranging from five years old up to the time when they graduate, and it may be said that all of these pupils are practically resident pupils. There are in addition about 140 novitiates who reside at the academy.

My thanks are due to the railway company for their kind consideration during the two hours occupied in going over the institution, in refraining from making the slightest noise in their yards. All operations apparently ceased while I was inspecting the institution, and I am glad to believe that the railway authorities must have been aware of my visit.

In order to understand the case, it is necessary to consider the situation on the ground. Exhibit No. 1 in the case is a plan showing the location and layout of the property. The buildings are erected on lands purchased from time to time by the corporate body to the west of a public road which has been in existence from time immemorial.

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Some time between the years 1850 and 1854 what was called the Nova Scotia Railway was constructed. This railway subsequently formed part of the Intercolonial Railway. All the papers in connection with this old railway apparently have been lost. At all events none of them have been procured. This railway was constructed immediately to the east of the public road, and extended nearly to high water mark along the harbour. At this time there were no riparian rights as far as can be ascertained between high water mark and the eastern side of the railway right of way except as to a small strip of land to the east of the railway, and between the railway and high water mark apparently of no value to anyone. The railway was not obliged to give any rights of crossing over their tracks whereby anyone from the road could reach the waters and no crossings existed in fact until about 20 years later when two crossings, which I will refer to, apparently were allowed to be used. As I have stated the land between the railway and high water mark had apparently no value to anyone. The properties owned by the corporation were purchased at different periods and from different persons. The first purchase was made in September, 1872. It is what is marked "cottage" on plan near the public road. On the 14th September, 1872, one water lot was purchased. The water lot in question was a post-Confederation grant, and was a grant from the Provincial Government.

I had occasion in the case of *Maxwell v. The King*,[1] to consider the question whether or not Bedford Basin was a public harbour at the time of Confederation. I came to the conclusion for the reasons

[1] 17 Can. Ex. 97, 40 D.L.R. 715.

set out in the report of that case that Bedford Basin at the time of Confederation formed part of the Harbour of Halifax, and became the property of the Dominion by virtue of *The British North America Act*. That case was not appealed.

In the present case counsel for the suppliant admitted that they could not claim title to the water lots, acquiesing in my decision in the *Maxwell* case.

There are two knobs of land to the east of the railway, one is said to contain about 220 square feet, and is between the railway and the high water mark at the place marked "the bath house." The other is a knob of land between the railway and the high water mark at the place marked "esplanade," which is said to contain about 1220 square feet.

At the time of the expropriation in this case, which was on the 9th March, 1913, it is admitted that the suppliant had title to these two knobs of land by prescription. They did not get title to either of these knobs of land except a title under the *Statute of Limitations*. These two parcels of land were not included in any of the various conveyances granting the lands to the suppliant.

It may be important also to notice that between the two knobs of land there is also a small piece of land to the east of the railway and between the railway and the high water mark, as to which no claim has been made on the part of the suppliant, their proof being confined to the two knobs of land that I have referred to.

In 1873, the suppliants having obtained title to the cottage in question, erected an enclosure at the place where the bath house is for the purpose of enabling the young ladies to bathe in the waters

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of Bedford Basin, and the railway permitted them to cross their tracks to reach this bathing enclosure, and subsequently erected a gate to the way leading across their track. The sisters and the pupils from that time forward were accustomed to cross the track during the bathing season to reach this bathing enclosure.

According to the evidence given before me, in the fall of 1872 what is called the main building was erected. This is said to have been completed by September, 1873, the cost being $8,750. The erection of the north wing was commenced in 1882, and was completed in the year 1885, at a cost of $27,256.33. The south wing was built in the year 1888, at a cost of $42,440.38. In 1891, farm buildings were erected at a cost of $2,953.40. In 1901 a laundry building was erected at a cost of $17,359.35. An additional wing was erected in 1903, at a cost of $36,660, and in 1904 the chapel and annex were erected at a cost of $208,635.87.

I may mention in passing that the chapel in question is a beautiful church and very imposing.

In addition to these various items there was the cost of the lands acquired and the improvements to the property. The cost of the land is placed at $16,060 and the improvements to the land at $125,120. The cost of the bathing house subsequently erected and also of the small wharf which I will refer to later are not included in these items.

I am mentioning these figures to show the great outlay that the suppliants have made on their premises.

According to Mr. Roper, at the prices in force at the time of the expropriation, the premises could not be erected for less than $900,000 to one million dollars.

The suppliant, subsequent to the making of the enclosure erected a bathing house on the spot marked "bathing house," taking the place of the former enclosure. The only evidence of anyone qualified to pass on the question of value is that of Mr. Roper, who placed the value of the crib-work and the bathing house at the sum of $5,500, at the date of expropriation, March, 1913.

The suppliant apparently being of opinion that their title to the water lot was valid, commenced to fill in the waters of the harbour, and created what is marked on the plan "the esplanade." It was admitted at the trial by counsel for the suppliant that the esplanade was entirely on land filled in and below high water mark. Jutting from the eastern portion of the esplanade a small wharf was erected in the year 1904, and rebuilt in 1907. Mr. Mosher, an expert in regard to wharves, placed what would be the cost of construction in 1913 at the sum of $1,350.

The cost of the filling in of the esplanade between March, 1899, and June, 1912, is stated to be about the sum of $12,829.16. There is no evidence of the exact time when this filling was made.

The cost of the crib-work is not included in the cost of the filling in of the esplanade.

According to the witness Harris, who acted as one of the government appraisers, the Crown tendered for the bathing house the sum of $1,610.

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He makes it up as follows:

9,600 feet of land at 5 cents a foot	$480.00
Bathing house	300.00
Crib-work	530.00
Fence	170.00
	$1,480.00
To this he adds 10 per cent.	148.00
	$1,628.00

If the suppliants are to be allowed for the cost of the bathing house and the wharf, I would accept the valuations of Mr. Roper and Mr. Mosher; and as the Crown are willing to reimburse the suppliants for these amounts, I think they should receive these two amounts of $5,500 and $1,628 with interest from the date of the expropriation.

It is clear that the suppliant acquired no title to the land filled in and called "the esplanade." When they commenced the fill they had not acquired any title to the land above high water mark and furthermore they have never acquired title as against the Crown.

The Crown apparently never raised any objection and the railway allowed the two crossings, one for the bathing house, the other to the wharf. I would refer in this connection to the case of the *Attorney-General of Southern Nigeria v. Holt & Co.*[1] The facts in the case before me are not similar to those in the *Nigeria* case. See also *Wood v. Esson,*[2] and *Rattè v. Booth.*[3] It may also be well to refer to the

[1] [1915] A.C. 599.
[2] (1884), 9 Can. S.C.R. 239.
[3] (1886), 11 O.R. 491, 494; 15 App. Cas. 188, 193.

Statutes for the Protection of Navigable Waters.[1]

I am of opinion that while at the date of the expropriation the suppliants were the owners in fee of the two parcels of land, the one containing 220 feet, and the other containing about 1,220 feet, and should be assumed to be riparian proprietors of these two parcels, it cannot be held that there was an irrevocable license on the part of the Crown to have the crossings to the bathing house and the esplanade and wharf for all time as against the Crown. These erections are on Crown property, and no title passed to the suppliants for work done on a public harbour. The value of the riparian right in respect of these two small pieces of land between the railway and high water mark is very small, if of any value detached from the right to the esplanade and the bathing house. It must not be lost sight of that no riparian right existed in favour of the properties of the suppliant bounded by the highway and the right to the two parcels of land of 220 and 1,220 square feet was acquired under the *Statute of Limitations* and became perfect years after. See *Giles v. Campbell*,[2] *Cockburn v. Eager*,[3] as to riparian right (if authority be necessary), and *Holditch v. Canadian Northern R. Co.*[4] as to the properties not being held together.

A serious question and one of importance is whether or not any legal claim can be made on the part of the suppliants in respect of the grave injury caused to the institution by the use of the property in front of their buildings and between the eastern

[1] R.S.C. (1906), ch. 115. Amended, 9 & 10 Ed. VII. (1910), ch. 44, 8 & 9 Geo. V., ch. 33 (24 May, 1918).
[2] 1872), 19 Gr. 226.
[3] (1876), 24 Gr. 409.
[4] 27 D.L.R. 14, [1916] 1 A.C. 536.

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boundary and the railway land reclaimed by the Crown from the bed of the harbour as part of the shunting yard. Had no portion of the suppliants' property been taken, the damage would be the same, but no legal claim for damages could be allowed. So far as the railway right of way is concerned, it has been in existence since the year 1854. At first but one track was laid on this right of way. At the time of the expropriation I gathered that there were two extra tracks, but I fail to see how any claim can be raised in regard to any user of their right of way for the purposes of their railway. The 14 tracks used as a shunting yard are mainly on lands the property of the Crown. It is possible that one track may be over what is called these two knobs of land which I have described; but the injury which has been occasioned to the suppliants by reason of the placing and use of the shunting yards at the present location, is an injury caused by the operation of the works on lands other than lands taken from the suppliants.

Our courts have followed the decisions in the English courts under the *Land Clauses Acts,* and I think that I am bound by the English decisions. Authorities in the United States can be found where the law is decided in a manner different from the law as enunciated in the English courts. I have pointed out I am bound as I think by the English authorities approved of in our own courts. See *Paradis v. Queen,*[1] *Queen v. Barry,*[2] *Brown v. The King,*[3] *The King v. Macpherson,*[4] *The King v. Wilson.*[5]

[1] (1887), 1 Can. Ex. 191.
[2] (1891), 2 Can. Ex. 333.
[3] (1909), 12 Can. Ex. 463, 471.
[4] (1914), 15 Can. Ex. 215; 20 D.L.R. 988.
[5] (1914), 15 Can. Ex. 283, 288, 22 D.L.R. 585, affirmed by Supreme Court (unreported).

In the case of *Cowper Essex v. Local Board of Acton,*[1] Lord Halsbury states, as follows:

"My Lords, with reference to the main question "I have had less difficulty, since I take it that two "propositions have now been conclusively estab- "lished. One is, that land taken under the powers "of the Lands Clauses Act, and applied to any use "authorized by the statute, cannot by its mere use, "as distinguished from the construction of works "upon it, give rise to a claim for compensation. But "a second proposition is, it appears to me, not less "conclusively established, and that is, that where "part of a proprietor's land is taken from him, and "the future use *of the part so taken may damage* "*the remainder of the* proprietor's land, then such "damage may be an injurious affecting of the pro- "prietor's other lands, though it would not be an "injurious affecting of the land of neighbouring "proprietors from whom nothing had been taken "for the purpose of the intended works."

In this *Cowper Essex* case the Lord Chancellor uses these words, p. 161: "That where part of a "proprietor's land is taken from him, and the "future use of the part so taken may damage the "remainder."

In the *City of Glasgow Union R. Co. v. Hunter,*[2] the land taken was a portion of the land in the rear. The damage claimed was for the injury to the land by the construction of a bridge on the front of the property. It was held that a claim for damage caused by the operation of the railway was not within the statute. The reasoning of this case put by Lord Chelmsford, that the land being in the

[1] (1889), 14 App. Cas. 153 at 161.
[2] (1870), L.R. 2 Sc. & Div. 78.

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rear of the property, it must be treated as if no land had been taken and the damage therefore was caused by something authorized by the statute.

The *Stockport* case[1] has been confirmed in the *Cowper Essex* case. In that particular case there is strong language to the effect that the mischief must be caused by what *is done on the land taken.*

In the case of the *Duke of Buccleuch v. Metropolitan Board of Works,*[2] the property was fronting on the Thames. There was a valuable riparian right. There was a causeway which gave access from the property at low water to the river. The authorities expropriated the causeway and built a road in front of the property and between the property and the river. There was a large amount of damage to the property by reason of dust and noise, etc. The owner, however, was held entitled to compensation for this damage by reason of his riparian right having been taken away, and not by reason of the causeway being expropriated. Had the taking of the causeway let in the other damage there would have been no necessity to allow the damage to him as a riparian owner.

In *Halsbury*[3] will be found a statement of the law, and a reference is given to a case in the Court of Appeal in England, *Horton v. Colwyn Bay and Colwyn Urban District Council.*[4] In that particular case the respondents constructed an intercepting sewer. The sewers were in part constructed on land the property of the claimant; the pumping station and the reservoir were constructed on land the property of other persons. The head-note states that

[1] (1864), 33 L. J. Q. B. 251.
[2] (1871), 5 E. & I. App. 418.
[3] Vol. 6, p. 42.
[4] [1908] 1 K.B. 327.

the present value of certain portions of the claimant's land which were in proximity to the pumping station and reservoir was depreciated by reason of the contemplated user of that station and reservoir for sewage purposes. Held, that as the acts of user, the contemplation of which caused the depreciation, could be done on land not the property of the claimant, the damage was not sustained "by reason of the exercise of the powers," of the *Public Health Act* within the meaning of s. 308 of that Act, and consequently that the claimant was not entitled to any compensation under that Act in respect of that depreciation.

Lord Alverstone, C. J., at page 333, states as follows: "It was contended by Sir Robert Finlay "in his most interesting and able argument that, in "addition to the compensation that was included in "the £871 for the damage done by the actual con- "struction of the sewer in his land, the claimant was "entitled to compensation for the general damage "which he alleged was occasioned to his property by "the construction of the whole of the sewage works, "according to the principle recognized by the House "of Lords in *Cowper Essex v. Acton Local Board.*"

The Chief Justice, at page 336, states as follows: "Sir Robert Finlay next contended that, although "the pumping station was not on the claimant's "land, it was of no use to the respondents unless the "sewage could be brought to it; that the pumping "station, when regarded simply as a building, did "not injure the claimant's land, but that what did "cause injury was the erection of a pumping station "which was intended to be used in connection with "a scheme for the disposal of sewage, and that as

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"it was necessary for that purpose to pass the "sewage through the claimant's land, the claimant "was in a position to veto, not merely the construc- "tion of sewers on his land, but the carrying out of "the whole system of sewage works. If that con- "tention is sound, the claimant would be entitled to "receive this further sum of money as compensa- "tion; but I desire to point out that the argument "goes a great deal further than anything that was "suggested in the *Cowper Essex* case, and it seems "to me that it is directly opposed to the principle "that was recognized in *City of Glasgow Union R. Co. v. Hunter.*"[1]

He then proceeds: "But Lord Watson in the "*Cowper Essex* case, when referring to *Ogilvy's* "case,[2] and to *City of Glasgow Union R. Co. v.* "*Hunter,* said that in both these cases 'land had " 'been taken from the claimants for railway pur- " 'poses; but the use complained of as injurious " 'was not of that part of the railway constructed " 'on the land so taken, and was held in both cases " 'to afford no ground for statutory compensation. " 'It appears to me to be the result of those authori- " 'ties which are binding upon this House, that a " 'proprietor is entitled to compensation for depre- " 'ciation of the value of his other lands, in so far " 'as such depreciation is due to the anticipated " 'legal use of works to be constructed upon the " 'land which has been taken from him under com- " 'pulsory powers.' "

And then proceeds to deal, at page 337, with the case of *Rex v. Mountford.*[3]

[1] L.R. 2 Sc. & Div. 78.
[2] (1855), Macq. 260.
[3] [1906] 2 K.B. 814.

Again at page 339, the Chief Justice emphasizes it, quoting from the *Tilbury* case,[1] and the *Metropolitan Board of Works* case. Referring to a judgment of Bigham, J.: "I think it is clear that the "exercise of the statutory powers referred to and "contemplated by the learned judges in the *Tilbury* "case consists of something done on the land taken "from the claimant by the public body, or on land "held by him. Such an exercise of the statutory "powers alone concerns him. The statutory powers "exercised elsewhere, though they may depreciate "the value of his property, cannot in my opinion be "relied upon for the purpose of increasing the com- "pensation recoverable. In my opinion that is a "perfectly accurate statement of the result of the "authorities as they now stand, and if the principle "of the *Cowper Essex* case is to be extended so as "to give a claimant the right to compensation for "injury resulting from the user of land other than "his own, it can only be done by a decision of the "House of Lords."

Lord Justice Buckley's opinion was to the same effect.

Having regard to these authorities I have reluctantly come to the conclusion that the suppliants are not entitled to claim the damages which will necessarily be occasioned by the use of the property partly in front of their building as a shunting yard.

I would allow the two amounts of $5,500 and $1,628.

These sums are ample to include 10 per cent for compulsory taking.

The suppliant is entitled to an additional sum for the loss of any riparian rights by reason of the ex-

[1] 24 Q.B.D. 326.

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propriation. If $500 be allowed I think, having regard to my findings, it would be ample. In all judgment will be entered for $7,628 and interest from March, 1913, to date of judgment and costs to the suppliant.

Judgment accordingly.

Solicitor for suppliant: *T. F. Tobin.*

Solicitors for respondent: *Silver & McDonald.*