BETWEEN:

THE CORPORATION OF THE TOWN OF DARTMOUTH, a body corporate..... SUPPLIANT;

AND

HIS MAJESTY THE KING..... RESPONDENT.

1939
Jun. 12
1940
Jun, 17
1943
Jun. 14 & 29
1945
Dec. 15

Expropriation—Crown—Petition of Right—Fee of streets vested in town—City or town not entitled to compensation for streets expropriated—Town holds streets as trustee for public.

In 1919 the Crown expropriated certain streets and water lots in the town of Dartmouth, Nova Scotia, to provide for the extension of the Canadian National Railways and its facilities. The action is to determine the value of the property expropriated. At the trial a claim was also made by the suppliant for possible future damage to sewers laid by the town under the portions of streets expropriated.

Respondent denied the suppliant's ownership of certain of the streets expropriated since these streets had once formed part of a Common which had been vested in trustees prior to the incorporation of the town of Dartmouth. By various grants and statutes of the Province of Nova Scotia these streets had become vested in the suppliant.

The sewers were the subject of a lease entered into between the Crown and suppliant in 1914 and also of an undertaking given by counsel for the respondent at trial that it would bear any additional cost of maintaining them, in the event of a failure to agree on the cost such to be referred to arbitration or to this Court.

Held: That the fee of the streets is vested in the suppliant; the streets belonged to the suppliant in full ownership together with the adjoining land and were opened through the suppliant's own property for the purpose of passage and the benefit and advantage of the public.

2. That at the time of the expropriation the suppliant owned the soil as well as the surface of the streets; the owner of the land on either side of the streets did not own half the soil over which the street existed.

3. That the suppliant holds the fee of the streets as a trustee for the public having no private right or interest therein and is not entitled to compensation for the streets or parcels thereof expropriated.

4. That the suppliant is entitled to compensation for the water lots expropriated by the respondent.

5. That the suppliant has reserved to it the right to repair or reconstruct the sewers as need be and to charge to respondent the increased cost of such work due to the respondent's works or tracks.

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PETITION OF RIGHT by suppliant claiming compensation for lands expropriated by respondent and for damages arising from such expropriation.

The action was tried before the Honourable Mr. Justice Angers, at Halifax.

J. L. McKinnon, K.C. and *W. E. Moseley* for suppliant.

I. C. Rand, K.C. and *H. C. Friel* for respondent.

The facts and questions of law raised are stated in the reasons for judgment.

ANGERS J. now (December 15, 1945) delivered the following judgment:

The suppliant, by its petition of right, claims from the respondent the sum of $25,000, with interest from June 21, 1919, as compensation for the lands hereinafter described and for all damage or loss sustained or to be sustained by reason of the expropriation.

[The learned Judge here refers to the pleadings which describe the expropriated property in detail and continues.]

I think it is convenient to note that, at the time of the expropriation or thereafter, no information was exhibited on behalf of His Majesty as is usual in such cases and apparently no thought was given by either party to the matter of compensation allowable to the town of Dartmouth for the lands taken.

The matter first came before the Court by means of a petition of right instituted by the town, dated March 2, 1932, and filed on September 27, 1932, approximately thirteen years after completion of the expropriation proceeding. Indeed a plan of the lands expropriated and a description of portion thereof were registered in the office of the Registrar of Deeds for the county of Halifax, within the circumscription whereof the said lands are located, on June 21, 1919. No explanation was offered by either party for this delay.

This case, I may say, has been rather unfortunate. It opened before me at Halifax on June 12, 1939. I heard the evidence which the parties thought fit to adduce. After

the hearing of the witnesses, Mr. Rand (now Mr. Justice Rand), who was then acting as counsel for the respondent, stating that the petition merely sets out the value of the lands in the strict sense and makes no claim for stated damages or injurious affection and that, as a result, he is placed at a disadvantage in considering a question of sewers or interference therewith raised by the suppliant, asked for an adjournment so that the engineers of Canadian National Railway Company might consult with the town engineers with a view to finding out what the facts were and endeavour to come to some agreement. There being no objection to this request on the part of suppliant, the case was adjourned *sine die.*

The case came up for argument at the session of the Court in Halifax on June 17, 1940, before the late President. He suggested that the argument should be adjourned to the next term of the Court in June 1941, as I had heard the evidence and he would be in an unfavourable condition to hear the argument in a case in which the evidence had not been taken before him. Counsel however insisted on proceeding and the late President agreed to hear the argument. Following this, judgment was reserved.

The late President became ill in the spring of 1942. In spite of this he worked strenuously and assiduously until the second or third day before his decease. He had, in the meantime, delivered a number of judgments and had commenced writing notes in connection with the present case when he departed from life.

The case again came up before me in July 1943. Mr. Friel, who had replaced Mr. Rand as counsel for respondent, begged leave to adduce further evidence and file a lease entered into between His Majesty the King and the town of Dartmouth. He declared that very likely his predecessor was unaware of the existence of this lease and that that was the reason why it had not been produced before. Notwithstanding the objection on the part of counsel for the suppliant to the production of this lease, I thought advisable that it should be put in evidence, considering that it might have some bearing on the question of damages allegedly arising from the interference by the

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respondent with the sewers constructed under two of the streets of the town of Dartmouth, the right of the town to the sewers not having been reserved in the expropriation proceeding.

The parcels of land involved in this expropriation proceeding lie to the southwesterly side of the line of railway along the harbour front in Dartmouth, which was originally built in 1883-1884. The railway line was enlarged and certain facilities were constructed in 1895-1896 and the operations continued with the increase of certain facilities, which affected some of the streets with which we are concerned, until 1918 when elaborate extensions were made. It is in respect of the expropriation of 1919 that the present proceeding is brought.

Counsel for respondent intimated that he could probably facilitate the presentation of the facts by putting in certain plans and deeds before witnesses were called. I thought the suggestion appropriate and consequently allowed Mr. Rand to file his exhibits.

The first plan produced and marked as exhibit A is a copy of the expropriation plan of 1918; it shows certain of the parcels of land involved in the present action, together with others with which we are not concerned. This plan indicates that the railway line runs in a northwesterly to southeasterly direction and that the most northwesterly of the parcels of land expropriated is Mott street, that thence southeasterly one reaches a street indicated by the words "Unnamed street", which is approximately of the same size as Mott street, that a short distance below one comes to Water street and from there to Stairs street and Church street. In virtue of this plan, a copy whereof was filed in the office of the Registry of Deeds of the county of Halifax on January 5, 1918, the lands of the unnamed street, Water street and Stairs street were expropriated.

This plan, which appears to have been prepared by an engineer of the Department of Railways and Canals, does not set forth all of the railway facilities in Dartmouth, but it indicates not only the land expropriated from the town but also that taken from a concern designated as Electric Boat Company.

The next plan deposited by counsel for respondent is the expropriation plan of 1919, which took in (*inter alia*) Church and Mott streets. This plan, a copy whereof was marked as exhibit B, appears to have been filed in the office of the Registry of Deeds of the county of Halifax on June 21, 1919.

Counsel for respondent pointed out that the plan exhibit B is based upon the existing yard rail at Dartmouth and shows all the tracks then in existence as well as the projected improvements. He stated that the section of Dartmouth in which the crossings north of the southern boundary of Stairs street are embraced is what was originally known as Dartmouth common and that the southern boundary of the common was the southern boundary of Stairs street. He declared that this land was originally granted to trustees for public purposes, as hereinafter more fully set forth, and that the reason why this was done is that the town of Dartmouth, at the time of the grant, had not yet been incorporated. In fact it was incorporated in 1873 and by conveyances, to which reference will be made later, the properties held by the trustees were conveyed to the town.

Counsel for respondent intimated that he made these statements with the concurrence of counsel for suppliant, it being agreed that the admission of facts would facilitate the hearing.

He said that, seeing that the streets with which we are concerned were originally within the area of the common and that some question may arise as to the underlying fee therein, his position is going to be that, when these streets were laid out and lots fronting thereon sold on both sides, the common law rule followed, so that the underlying fee of the streets resided in the abutting owners, but that the position taken by counsel for suppliant will be that the underlying fee remained in the town.

Counsel for respondent observed that with regard to the land located south of the southerly limit of Stairs street, which takes in the parcel of Church street, one is faced with the ordinary case of a grant of land to private individuals. He concluded in stating that we have Church street, i.e. the land adjoining it and the soil thereof, origin-

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ally granted to private individuals and everything to the north, including Stairs street, originally granted to the Trustees of the Common.

Certain admissions agreed upon by counsel were read into the record, which I deem advisable to reproduce herein *in extenso:*

1. That the Town of Dartmouth, through its Council, thereto authorized, entered into an agreement dated the 12th day of June, 1883, with the Department of Railways of the Government of Canada referring to the construction of a branch railway to and through the Town of Dartmouth.

2. That the railway was in part built on a portion of the southwesterly side of Water street by consent of the Town and that the street was widened by the railway on its northeast side and a stone wall was built from near Best street to Geary street and grading done with the consent of the Town and that this wall partially shut off access to and use of a portion of the southwesterly end of Mott street referred to as Parcel "D" in the Petition of Right.

3. That most of the 300 ft in length of the westerly end of the area described in Parcel "C" in the Petition of Right, and 50 ft. in width, was land covered by the waters of Halifax Harbour and designated in the Crown Grant to the Town of Dartmouth of June 27, 1850, in Grant Book 17, Page 60, as Public Dock 5

4. That on occupying that portion of Water street, a part of and adjoining its Railway station the Railway constructed on the Easterly side of its freight shed a roadway approximately 30 ft. in width suitable for public traffic giving passage between Geary street and Stairs street. The railway has not made any grant or transfer of said roadway to the Town and the suppliant claims that the roadway is still a private roadway belonging to the railway. The said roadway is not as wide as Lower Water street and was built, the suppliant claims, for the purpose of giving access to the doors of the freight shed.

5. That a portion of the southwesterly end of Stairs street together with the land covered with water designated in Crown Grant to the Town of Dartmouth, dated June 27, 1850, registered in Grant Book 17, Page 60, was conveyed by the Town of Dartmouth under statutory authority to the sole beneficial use of W S. Symonds by deed in Book 248, Page 539 of the records of the Registry of Deeds of the County of Halifax, prior to Railway construction, subject, however, to the reservations contained in said Deed to the Town in reference to its sewers and sewerage.

6. Referring to the southwesterly end of Mott street, Geory street (Unnamed street) Stairs street and Church street (between the Railway as originally constructed and the harbour front), the suppliant says that the use of the ends of said streets as streets may have been restricted by the original construction of the said Railway but the suppliant claims that said streets were used at the time of the expropriation as streets by the general public and also by the Town in respect to its sewers.

7. That all the land adjoining each side of those portions of Church street, Stairs street, Water street, Geary street (Unnamed street) and Mott street expropriated was land conveyed in fee by reference to the streets as boundaries and to the sole beneficial use of respective private land owners prior to June 12, 1883.

8. That no part of Ochterloney street was expropriated.

[The learned Judge here considers the evidence and continues.]

The claim of the suppliant is based on three heads:

(1) portions of streets;

(2) water lots;

(3) sewers.

Dealing with the ownership of the streets, counsel for suppliant submitted that with respect to Church street he was not in a position to show very much about the title thereto except the statutory title in virtue whereof the street is vested in the town.

He claimed that the other streets, namely Mott street, the foot of Geary street, Water street and Stairs street, are a part of the common and that the title to the common derives from the grant hereinabove referred to, a copy whereof was filed as exhibit 5.

A brief history of the title of the town of Dartmouth seems appropriate. The first document available is a grant from His Majesty "George the Third, by the Grace of God, of Great Britain, *France* and Ireland King, Defender of the Faith, and so forth", unto Thomas Cochran, Timothy Folgier and Samuel Starbuck in trust for the use and purpose hereinafter mentioned of "all that certain tract and parcel of land commonly called the Dartmouth Common as the same hath been lately surveyed and laid out by the Surveyor General of Lands for the Province of Nova Scotia situate, lying and being in Dartmouth aforesaid within the County of Halifax and Province aforesaid." There follows a detailed description by measurements and bounds, which I do not deem it necessary to reproduce here.

The grant, dated September 4, 1788, registered the same day, a copy whereof was filed as exhibit 5, stipulates (*inter alia*) as follows:

TO HAVE AND TO HOLD the said parcel or tract of one hundred and fifty acres of land, and all and singular other premises hereby granted unto the said Thomas Cochran, Timothy Folgier and Samuel Starbuck, their Heirs, Executors and Administrators in special trust to and for the use and benefit of the Inhabitants settled and resident and which may hereafter settle and actually reside within the Town Plat of Dartmouth aforesaid during such residence only as a Common for the General and equal Benefit of such resident settlers in said town and not otherwise they the said inhabitants or the said Trustees, their Heirs or Assigns, yielding and paying therefor unto us, our heirs and successors, or to our Receiver-General for the time being, or to his

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Deputy or Deputies for the time being, yearly—that is to say, at the Feast of St. Michael in every year, at the rate of two shillings for every hundred acres, and so in proportion according to the quantities of acres hereby granted; the same to commence and be payable from the said Feast of St. Michael, which shall first happen after the expiration of years from the date hereof.

The deed then provides for the clearing, and draining if required, within three years after the date thereof, of three acres for every fifty acres of plantable land. It further provides for the voidance of the grant and the reversion to the grantor of the lands granted, in the event of the rent being in arrear for the space of one year from the time it shall become due. It finally provides that if the land granted to the trustees shall at any time or times come into the possession and tenure of any person or persons whatever, inhabitants of the Province of Nova Scotia, such person or persons, being inhabitants as aforesaid, shall within twelve months after his, her or their entry and possession of the same, take the oaths prescribed by law and make and subscribe a declaration to the effect that the declarant promises that he will maintain and defend the authority of the King in his Parliament as the supreme Legislature of the Province; and it stipulates that in case of default on the part of such person or persons in taking the oaths and making and subscribing the declaration within twelve months the present grant and every part thereof shall be null and void to all intents and purposes and the lands granted and every part thereof shall revert to and become vested in the grantor, his heirs and successors.

These provisoes have no materiality herein and spending more time on them would be idle.

The next document, in order of date, put in evidence is a grant from Her Majesty Queen Victoria, in consideration of the sum of ten pounds, eighteen shillings and nine pence paid to her, unto John Tempest, Walter Robb and Charles W. Fairbanks, trustees of the Dartmouth water lots, in trust for the inhabitants of the Township of Dartmouth, of "the public docks situate, lying and being at Dartmouth aforesaid and known and described as follows viz., the dock marked No. 1 on the plan annexed hereto and adjoining the Southern side of water lots belonging to Thomas Boggs, Esq. near the Point, being of the same

width as the street opposite to it and measuring three hundred feet into the harbour—The dock marked No. 2 on the said plan and situate on the Northern side of Mr. Bogg's water lots aforesaid, being bounded on the Northern side by a water lot belonging to E. H. Lowe, Esq., and measuring three hundred feet into the harbour—The dock marked No. 3 on the said plan and lying opposite to the Western end of Boggs street, being of the same width as the street and measuring three hundred feet into the Harbour—The dock marked No. 4 at the end of North street, being thirty feet in width and three hundred feet in length—The dock marked No. 5 at the end of Church street, being of the same width as the street and thre hundred feet in length—The dock marked No. 6 at the end of Stairs street, being of the same width as the street and three hundred feet in length—The dock marked No. 7 on the said plan and bounded Northerly by a water lot of Thomas and Michael Tobin and Southerly by a water lot of William Foster, and measuring three hundred feet in length—The dock marked No. 8 at the end of Mott street, being of the same width as the street and three hundred feet in length—The docks marked Nos. 9, 10 and 12 being of the same width as the streets to which they are severally opposite and each three hundred feet in length—which said Lots are particularly marked and described in the annexed Plan, as also in a Plan of Survey of the said Lots made by Charles W. Fairbanks, Deputy Surveyor; together with all Hereditaments and Appurtenances whatever thereunto belonging, or in any wise appertaining; to have and to hold the said Lots of Land, and all and singular the premises hereby granted, with their appurtenances, unto the said John Tempest, Walter Robb and Charles W. Fairbanks In Trust as aforesaid, and to their Successors in Office."

Dealing further with the consideration, the grant stipulates as follows:

forever, yielding and paying for the same to Us, our Heirs, and Successors, one Peppercorn of yearly rent on the 25th day of March in each year, or so soon thereafter as the same shall be lawfully demanded;

There follows a clause reserving to the grantor, her heirs and successors a large number of mines, which it would not be useful to enumerate here, with the right to enter

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upon the land to search and dig for the same and carry them away and to open any road or roads that may be found necessary.

The grant is dated June 27, 1850, and appears to have been registered. A copy was filed as exhibit C.

The title to the Common vested in the trustees by the grant exhibit 5 was later vested in the town of Dartmouth, in virtue of section 35 of chapter 17 of the Statutes of Nova Scotia (36 Victoria), entitled "An Act to incorporate the Town of Dartmouth", passed on April 30, 1873, to which further reference will be made later.

An Act of the Legislature of Nova Scotia passed on April 10, 1841, 4 Vic., chapter 52, for regulating the Dartmouth Common, after referring to the grant of September 4, 1788 (exhibit 5), to an Act passed in 1789, 29 Geo. III, chap. VII, entitled "An Act to enable the Inhabitants of the Town Plot of Dartmouth to use and occupy the Common Field, granted them by his Excellency the Lieutenant-Governor, in such way as they may think most beneficial to them" and to an Act passed in 1797, 37 Geo. III, chap. II, entitled "An Act to enable the Governor, Lieutenant-Governor, or Commander in Chief for the time being, to appoint Trustees for the Common of the Town of Dartmouth, on the death or removal of the Trustees holding the same, and to vacate that part of the grant of the Common aforesaid, which vests the trust in the heirs, executors or administrators, of the Trustees named in the said grant, on the death of such Trustees", and relating that on April 13, 1798, under the last mentioned Act, Michael Wallace, Lawrence Hartshorne and Jonathan Tremain were appointed trustees of the said Common in place of the trustees named in said grant, that the trustees so last named and appointed are all deceased and that there has for several years last past been no proper authority to take charge of the said Common, to prevent trespasses or to effect improvement thereon, recites (*inter alia*):

And whereas, the said Common fronts on the Harbour of Halifax, and some of the Water Lots in front thereof have been granted to certain individuals, and it would be advantageous if a certain portion of said Common, fronting on the Harbour, were demised in Lots to persons who would be willing to pay rents for the same;

And whereas, it is requisite, for the purposes aforesaid, to appoint new Trustees for said Common:

. . . . . .

And whereas, it is requisite, for the purposes aforesaid, to appoint new Trustees for said Common:

I. *Be it therefore enacted,* by the Lieutenant-Governor, Council and Assembly, That it shall and may be lawful for the Governor, Lieutenant-Governor, or Commander in Chief for the time being, to nominate and appoint three fit and proper persons to be Trustees of the said Common, at Dartmouth; and in case of any vacancy among such Trustees, by death, resignation, removal from office, or permanent absence, from time to time, to supply such vacancy.

II. *And be it enacted,* That in the said Trustees, for the time being, the legal estate and title of and in the said Common shall be and be deemd at all times hereafter absolutely vested for the benefit of the said Inhabitants of Dartmouth

III. *And be it enacted,* That the said Trustees shall, when appointed as aforesaid, make and execute to any persons who may be named and selected for that purpose, by the officiating Roman Catholic Clergyman, at Dartmouth, a Deed or Conveyance, in fee simple, of so much and such portion of the said Common as is now enclosed and used as a Burial Ground for the Roman Catholic Congregation, at Dartmouth, to be held by such persons, and their heirs, for the purpose of being so used and employed as a Burial Ground, as aforesaid.

IV. *And be it enacted,* That the said Trustees shall, immediately after they shall be so appointed as aforesaid, proceed to lay off and divide into proper, convenient, and suitable lots and parcels, all that portion of the said Common, which is bounded in front, westerly, on the Harbour of Halifax, and in rear, eastwardly, by the road leading from Water street, in Dartmouth, to the Windmill: *Provided,* that there shall be reserved and laid off, through the said Lots so directed to be laid out as aforesaid, a Public Road, sixty feet wide, along the line of high water mark, or as near thereto as may conveniently be.

V. *And be it enacted,* That after the said several lots or parcels of Land shall have been laid off as aforesaid, the said Trustees shall fix and apportion for each lot or parcel of Land some small annual rent; and, after due notice of such sale, publicly given by advertisement, shall proceed to offer such respective lot or parcel of Land for sale, at Public Auction, for the highest price to be obtained for the same, subject to the annual rent as aforesaid, for the term of nine hundred and ninety-nine years.

On September 21, 1868, an Act was passed by the Legislature of Nova Scotia entitled "An Act to amend the several Acts relating to the Dartmouth Common", being 31 Victoria, chapter 31. Section 1 thereof reads as follows:

1. The Trustees of the Dartmouth Common shall be a Body politic and corporate, and shall have power to give releases under seal in fee simple, of such parts of the Common as are held under lease, upon receiving from the lessees at the rate of sixteen dollars and sixty-seven cents for every dollar of rent payable by such lessees, respectively, and shall keep the moneys so arising continually invested in securities on real estate or in the public funds.

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Section 3 reads thus:

3. The streets already made in and around the Common shall be under the control and management of the Commissioners of Streets for the Town of Dartmouth.

Counsel for suppliant referred to section 68 of chapter 86 of the Statute of 1886 (49 Vic.) entitled "An Act to amend the Acts relating to the Town of Dartmouth"; section 68 is thus worded:

68. All the public streets, roads, highways, lanes, sidewalks, bridges, squares and thoroughfares, all public sewers, drains and ditches, and all public wells in the town are hereby vested absolutely in the town, and the council shall have full control over the same.

Counsel also referred to section 149 of chapter 56 of the Statute of 1902 (2 Ed. VII), entitled "An Act to consolidate the Acts relating to the Town of Dartmouth", which enacts:

149. The common of Dartmouth, excepting such parts thereof as have been alienated and such parts as are vested in the commissioners of Dartmouth park, is the property of the town.

Dealing first with the title to the streets, counsel for suppliant declared that with regard to Church street he was unable to show very much about the title except the statutory title in virtue of which the street vested in the town. In regard to Mott, Water, Geary and Stairs streets, counsel stated that they are all a part of the Dartmouth Common, the title to which derives from the aforesaid grant by His Majesty the King to trustees in trust and for the use of the inhabitants resident and who might in the future reside within the town plat of Dartmouth, a copy whereof was filed as exhibit 5. He submitted that the title to the Common includes the streets. He said that later the streets were laid out on plans by the Commissioners and eventually opened for the convenience of the residents of Dartmouth.

As previously noted, the Common became vested in the Town of Dartmouth, when the town was incorporated by 36 Vic., chap. 17, passed on April 30, 1873. Section 35 of this Act provides as follows:

35. The Common of Dartmouth, the School House and all property, real and personal, which at the passing of this Act of Incorporation shall be public property or shall have been held in trust for the Town of Dartmouth, shall on the passing of this Act vest in and become the property of the Town.

As we have seen, section 3 of the statute 31 Vic., chap. 31, puts the streets already made in and around the Common under the control and management of the Commissioners of streets for the town.

Then section 68 of chapter 86 of the statute 49 Victoria declares that all the public streets, roads, highways, lanes, sidewalks, bridges, squares and thoroughfares and all public sewers, drains and ditches are vested absolutely in the Town and that the Council shall have full control over the same.

It seems to me unquestionable that, in virtue of the grants and statutes hereinabove referred to, all the real property which at the time of the passing of the statute 36 Vic., chapter 17, was vested in the trustees, including the Common and the neighbouring land held as public property in trust for the town, became vested in the Town of Dartmouth.

It was argued on behalf of respondent that the town of Dartmouth had only a title to the surface of the streets and that the subsoil thereof was the property of the abutting owners, each *usque ad medium filum viae.*

Counsel for suppliant on the other hand urged that the doctrine that a municipality is only vested with the surface of its streets and that the ownership of half of the soil over which the way exists rests in the owners of the land on either side of the way is not applicable herein, particularly in view of the categorical wording of section 68 of chapter 86 of the Statute of 1886 hereinabove reproduced, which says, *inter alia,* that "all the public streets ...are hereby vested *absolutely* in the town..."

Precedents were cited in support of each of these contentions.

A brief review of the authorities is not only expedient but needful.

Cripps on *Compensation,* 8th edition, dealing with the subsoil under a public street, says (p. 76):

> In the event of the promoters requiring to take land under a public street or highway, it is necessary in the absence of any special provision in the private Act to serve a notice to treat on the owners of the subsoil. It is now settled that the interest of a public authority in the surface of a street extends only to so much thereof whether above or below the surface as is necessary for the control, protection and maintenance

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of the street as a highway for public use, and does not extend to the sub-soil or *usque ad coelum*. It has not been usual in practice for owners to insist on a notice to treat in respect to their interest in the sub-soil under streets or highways, since in the majority of cases no substantial claim could be maintained, but the fact that a claim may only be nominal in amount does not affect the legal rights of the parties, and the owner of the sub-soil is entitled to the same protection as a surface owner. The presumption that half the soil of the road is intended to pass to a purchaser under a conveyance of land described as bounded by a public thoroughfare, is equally applicable to streets in a town as to highways in the country; but this presumption may be rebutted by evidence of surrounding circumstances which lead to the inference that no part of the soil of the highway was intended to pass or did pass.

Cripps refers to the case of *Finchley Electric Light Company* v. *Finchley Urban District Council* (1).

The plaintiffs, a limited company, had for one of their objects the supply of electricity. They had not obtained any statutory authority for such supply. The defendants, the urban district council for the district of Finchley, had obtained a provisional order from the Board of Trade empowering them to undertake the supply of electricity within their district, but they had done nothing under the order except acquiring a site for a generating station.

The plaintiffs carried two wires across a road in defendants' district called Regent's Park Road, at a height of 34 feet in order to supply electricity to a customer. The defendants cut the wires and threatened to cut any other which plaintiffs could carry over any street within their district. Plaintiffs sued for an injunction and damages. Defendants in their defence alleged that the site of Regent's Park Road was vested in fee simple and by a rejoinder they disclaimed any intention to prevent the plaintiffs carrying wires over any roads the fee simple whereof was not vested in defendants.

Regent's Park Road was originally built by turnpike trustees appointed under a local Act of Parliament (7 Geo. 4, chap. XC.). The site or part of the site of the road where plaintiffs' wires crossed it was originally glebe land and was later conveyed to the trustees in fee simple by the rector of the parish under the Turnpike Roads Act (3 Geo. 4, chap. 126). The turnpike-gates were subsequently removed and the road became a highway repairable by the inhabitants at large.

(1) (1903) 1 Ch. 437.

The defendant's title rested upon section 149 of the Public Health Act, 1875, 38 & 39 Vict., chap. 55, which enacts *inter alia:*

All streets, being or which at any time become highways repairable by the inhabitants at large within any urban district, and the pavements, stones, and other materials thereof, and all buildings, implements, and other things provided for the purposes thereof, shall vest in and be under the control of the urban authority.

Farwell J. was of opinion that under that section what was vested in the urban authority under the word "street" was so much of the soil of the street as was required for the purposes of the street under the particular circumstances of the case, and, having regard to the fact that the site of the road was conveyed to turnpike trustees in fee simple under the Turnpike Roads Act, 1822, for the purposes of the road, he held that the whole estate of the trustees vested in the urban authority, which was entitled to prevent the electric wires being carried over the road at any height whatever and dismissed the action.

Plaintiffs appealed and the judgment of Farwell J. was reversed.

Collins M.R. expressed the following opinion (p. 440):

Then the local authority come in under s 149 of the Public Health Act, 1875. There is no doubt that this street had become a highway repairable by the inhabitants at large, and therefore the right conferred by s. 149 upon the local authority existed. That right is that the street and the pavement, stones, and other materials thereof, etc., shall vest in and be under the control of the urban authority. It has been decided by a long series of cases that the word "vest" means that the local authority do actually become the owners of the street to this extent: they become the owners of so much of the air above and of the soil below as is necessary to the ordinary user of the street as a street, and of no more. For example, they do not take that part of the subsoil which has to be used for the purpose of laying sewers. That point was clearly decided by the House of Lords in the case of the *Tunbridge Wells Corporation* v. *Baird* (1896, A.C. 434), where the question was whether, by virtue of the vesting of the street, the local authority were entitled to make underground lavatories and conveniences. It was contended that this was a sort of use which a public authority might properly make of a street, but it was held that that was going beyond the ordinary use of a street qua street.

Romer L.J. concurred and made the following observations (p. 443):

The defendants can only claim that the road in question here became vested in them in the full sense in which they seek to maintain that it has been vested in them by relying on s. 149 of the Public Health Act, 1875. Now that section has received by this time an authoritative interpretation by a long series of cases. It was not by that section in-

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tended to vest in the urban authority what I may call the full rights in fee over the street, as if that street was owned by an ordinary owner in fee having the fullest rights both as to the soil below and as to the air above. It is settled that the section in question was only intended to vest in the urban authority so much of the actual soil of the street as might be necessary for the control, protection, and maintenance of the street as a highway for public use. For that proposition it is sufficient to refer to what was said by Lord Halsbury L.C. and by Lord Herschell in *Tunbridge Wells Corporation* v. *Baird* (1896, A.C. 434).

In re *White's Charities. Charity Commissioners* v. *The Mayor of London* (1), it was held by Romer J. as follows (headnote):

The presumption that half the soil of the road is intended to pass to a purchaser under a conveyance of land described as bounded by a public thoroughfare is equally applicable to streets in a town as to highways in the country; and this presumption is not rebutted by the fact that the vendor is the owner of the soil beyond the medium filum viae; in such a case the presumption is that the conveyance passes the soil of the highway so far as it is vested in the vendor.

In the case of *The Mayor, etc., of Tunbridge Wells* v. *Baird* (2), it was held by the House of Lords that The Public Health Act, 1875, which by section 149 vests certain streets in the urban authority, does not vest the subsoil and that, in the present case, the urban authority had no power to excavate the soil and erect lavatories below the surface of the street for the use of the public.

Lord Halsbury, L.C. expressed the following opinion (p. 437):

My Lords, I really am hardly able to follow the reasoning which suggests that a right of property in the subsoil, to the extent and degree to which it has here been taken possession of, has passed under any Act of Parliament whatever. Whatever may be the true construction of the word "street"—and many observations might be made about the mode in which the word "street" is defined—it appears to me that in no sense have these structures been placed in the "street". The word certainly would be very inappropriate in ordinary parlance to describe a subterranean excavation made with the conveniences described. My Lords, for my own part, I am disposed to adopt every word of what James L.J. said in the passage that has been quoted as to the true effect and meaning of the vesting of a "street" in a local body. That the street should be vested in them as well as under their control may be, I suppose, explained by the idea that, as James L.J. points out, it was necessary to give, in a certain sense, a right of property in order to give efficient control over the street. It was thought convenient, I presume, that there should be something more than a mere easement conferred upon the local authority, so that the complete vindication of the rights of the public should be preserved by the local authority; and, therefore, there was given to them an actual property in the street and in the materials thereof. . . . . It is intelligible enough that Parliament should have vested the street

(1) (1898) 1 Ch. 659. (2) (1896) A.C. 434.

quâ street, and, indeed, so much of the actual soil of the street as might be necessary for the purpose of preserving and maintaining and using it as a street.

But the provisions with respect to the subsoil are totally different. In the first place, it lies plainly before one that if the complete vesting of the whole of the property in the land over which the public had rights or duties of repair were intended to be given, there would be no reason in the world why the Legislature should not have said so, whereas it has carefully guarded apparently, in the various Acts of Parliament to which reference has been made, against any suggestion that it ever was intended to convey the land over which the public right existed in the sense in which it would be conveyed to an ordinary private proprietor if you were conveying a piece of land.

See also the reasons of Lord Herschell on pages 440 and 441.

In the case of *Municipal Council of Sydney and Young* (1), it was held by the Judicial Committee of the Privy Council that the Sydney Corporation Act of 1879, which vests public streets in the municipal council, does not so vest them in proprietary right but only for purposes incidental to the exercise of municipal authority.

Lord Morris, who delivered the judgment of the Court, expressed the following opinion (p. 459):

Now it has been settled by repeated authorities, which were referred to by the learned Chief Justice, that the vesting of a street or public way vests no property in the municipal authority beyond the surface of the street, and such portion as may be absolutely necessarily incidental to the repairing and proper management of the street, but that it does not vest the soil or the land in them as the owners. If that be so, the only claim that they could make would be for the surface of the street as being merely property vested in them quâ street, and not as general property. Their Lordships are of opinion that that is not the subject-matter of compensation, but the street being diverted into a tramway is in no way a taking of property within the meaning of the compensation to be assessed under the Public Works Act of Sydney. In point of fact, it is rather the opposite, because the municipal authority, by getting rid of the street, pro tanto have less expense, and it is in that respect a relief to the ratepayers.

The law in England regarding the ownership of the soil of the streets is substantially summed up in *Halsbury's Laws of England*, second edition, pp. 240 and 241, Nos. 290 and 291. I believe it expedient to quote the two paragraphs:

290. The public right in a highway being a right of passage only, an owner who expressly dedicates, or is presumed to have dedicated, land as a public highway retains at common law his property in the soil, and can transfer it by conveyance or lease to others.

(1) (1898) A.C. 457.

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291. There is a general presumption that the owner of land of whatever tenure adjoining a highway is owner also of the soil of one-half of the highway, i.e., *usque ad medium filum viae;* and a similar presumption arises in the case of a private or occupation road. Such a presumption is, however, *praesumptio juris* and not *juris et de jure:* it may be rebutted by evidence, e.g., by proof of title deduced to another from some person shown to have been the original owner of the highway, or by proof of acts of ownership on the part of another; and, indeed, acts of ownership, such as the letting of the roadside herbage, if continued for a sufficiently long period, may confer a statutory title, or justify the presumption of a lost grant.

Further on, dealing with the statutory vesting of country roads and of streets, Lord Halsbury (loc. cit. pp. 248 and 249, Nos. 299 and 300) says:

299. Every "county road" and the materials thereof, and all drains belonging thereto, vest in the county council (or county borough council, as the case may be), except where an urban authority has retained the power and duty of maintaining and repairing such road, in which case it vests in the urban authority as an ordinary road.

Subject as above mentioned in all urban districts, all "streets" which are for the time being highways repairable by the inhabitants at large, and the pavement, stones, and other materials thereof, and all buildings, implements, and other things provided for the purposes thereof, vest in and are under the control of the local authority.

300. The effect of these provisions is not to transfer the freehold to the authority, even where it had originally been vested in turnpike trustees, but merely to vest in the authority the property in the surface of the street or road, and in so much of the actual soil below, and air above, as may reasonably be required for its control, protection, and maintenance as a highway for the use of the public, and to this extent the former owner is divested of his property.

In re *Land Titles Act—Ex parte Jackson et al* (1), Beck J.A., after quoting the part of section 300 (numbered 81 in the first edition of Halsbury's Laws of England), makes these observations (p. 345):

This statement is well supported by such cases as *Finchley Elec. Light Co.* v. *Finchley Urban Council* (1903, 1 Ch. 437; 72 L.J. Ch. 297; 88 L.T. 215; 19 T.L.R. 238) following the principle laid down by the House of Lords in *Tunbridge Wells Corpn.* v. *Baird* (1896, A.C. 434; 65 L.J.Q.B. 451; 74 L.T. 385) and see *Land Tax Commissioners* v. *Central London Ry.* (1913, A.C. 364; 82 L.J. Ch. 274; 108 L.T. 690; 29 T.L.R. 395). The general proposition is quite well settled, but the particular applications of it may well vary, not only by reason of the different statutory powers of the local authorities and the different systems and methods of municipal government generally, but also by reason of the constantly developing views on more or less divergent lines here in this new country of the needs and requirements of the public. But in the application of the principle we are not in this case interested. It is quite clear therefore that the vesting of a highway

(1) (1925) 1 W.W.R. 337.

in a municipality does not vest in it the title to the mines and minerals below so much of the soil as may be reasonably necessary for the ownership of the highway as such.

Reference may also be had with benefit to the remarks of Cotton, L.J. in the case of *Micklethwait* v. *Newlay Bridge Company* (1), where at page 145 he said:

But the question is whether this conveyance of a piece of land described by quantity of yards, and described as being bounded on the north by the river, carries with it as part of that which was conveyed the right to the soil *ad medium filum aquae*. In my opinion the rule of construction is now well settled, that where there is a conveyance of land, even although it is described by reference to a plan, and by colour, and by quantity, if it is said to be bounded on one side either by a river or by a public thoroughfare, then on the true construction of the instrument half the bed of the river or half of the road passes, unless there is enough in the circumstances or enough in the expressions of the instrument to show that that is not the intention of the parties. It is a presumption that not only the land described by metes and bounds, but also half the soil of the road or of the bed of the river by which it is bounded, is intended to pass, but that presumption may be rebutted. In my opinion, you may look at the surrounding circumstances, but only to see whether there were facts existing at the time of the conveyance and known to both parties, which showed that it was the intention of the vendor to do something which made it necessary for him to retain the soil in the half of the road or the half of the bed of the river, which would otherwise pass to the purchaser of the piece of land abutting on the road or river.

Further on, in order to support his view, Cotton, L.J. commented on certain cases as follows (p. 146):

In *Lord* v. *Commissioners of Sydney* (12 Moo P.C. 473), where there was a grant by the Crown of a piece of land described as bounded on one side by a creek, it was held that even as against the Crown the grant must be taken to pass the soil of the creek up to the middle. The case of *Berridge* v. *Ward* (10 C.B. (N.S.) 400) is very important, because there, although the map annexed to the conveyance coloured the land only to the edge of the highway, one half of the highway was held to pass by the conveyance. The rule as to the presumption is there laid down, and the case is a very strong instance of its application. The case of *Leigh* v. *Jack* (5 Ex. D. 264) was referred to, where the Court of Appeal held that the rule did not apply. That case is a good illustration of the circumstances which may show that the presumption is not intended to apply to the particular conveyance. The property there was laid out for building, and there was an intended road which adjoined and bounded the plot which was conveyed to one of the parties. It was obviously necessary that the vendor should retain the soil of that intended road in order that he might construct and make it into a road and then dedicate it to the public. This object was shown by the conveyance, for the road was described in it as an intended road, and the purchaser must have known that the half of it was not to pass to him.

(1) (1886) 33 Ch. D. 133.

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Counsel for respondent stressed the point that, if the fee in the streets vested in the town, there is no value for which the town should be compensated. He submitted that these stub ends of streets, if used as such, would be a burden to the town, as they were held in trust and would have to be kept up for the benefit and use of the public. He stated that the same remark applies to the water lots. In connection with these lots he added that before the town could make any construction thereon it would have to have the plans approved by the Governor in Council. He relied on section 7 of chapter 115 of the Revised Statutes of Canada, 1906, which reads:

7. The local authority, company or person proposing to construct any work in navigable waters, for which no sufficient sanction otherwise exists, may deposit the plans thereof and a description of the proposed site with the Minister of Public Works, and a duplicate of each in the office of the registrar of deeds for the district, county or province in which such work is proposed to be constructed, and may apply to the Governor in Council for approval thereof.

This section must be read in conjunction with sections 4 and 5, which are thus worded:

4. No bridge, boom, dam or aboiteau shall be constructed so as to interfere with navigation, unless the site thereof has been approved by the Governor in Council, nor unless such bridge, boom, dam or aboiteau is built and maintained in accordance with plans approved by the Governor in Council.

5. Any bridge to which this Part applies, which is built upon a site not approved by the Governor in Council, or which is not built in accordance with plans so approved, or which, having been so built, is not maintained in accordance with such plans, may, in so far as the same interferes with navigation, be lawfully removed and destroyed under the authority of the Governor in Council.

Sections 4 and 5 were repealed by 9-10 Edward VII, chapter 44, section 1, and others submitted therefor, which have no materiality herein. The sections 4 and 5 enacted by the aforesaid statute were repealed by 8-9 George V, chapter 33, section 2 and replaced by the following:

4. (1) No work shall be built or placed in, upon, over, under, through or across any navigable water unless the site thereof has been approved by the Governor in Council, nor unless such work is built, placed and maintained in accordance with plans and regulations approved or made by the Governor in Council.

(2) The provisions of this section shall not apply to small wharves or groynes or other bank or beach protection works, or boat-houses, provided that, in the opinion of the Minister of Public Works (*a*) they do not interfere with navigation, and (*b*) do not cost more than one thousand dollars.

5. (1) Any work to which this part applies which is built or placed upon a site not approved by the Governor in Council, or which is not built or placed in accordance with plans so approved, or which, having been so built or placed, is not maintained in accordance with such plans and regulations, may be removed and destroyed under the authority of the Governor in Council by the Minister of Public Works, and the materials contained in the said work may be sold, given away or otherwise disposed of, and the costs of and incidental to the removal, destruction or disposition of such work, deducting therefrom any sum which may be realized by sale or otherwise, shall be recoverable with costs in the name of His Majesty from the owner; Provided, however, that the Governor in Council may approve of works constructed, or in process of construction, on the first day of June, one thousand nine hundred and eighteen, subject to the provisions of section seven hereof, and such approval shall have the same effect as approval of works to be constructed.

Paragraph (2) of section 5 contains a definition of the word "owner" and need not be reproduced.

Sections 4 and 5 hereinabove immediately preceding were those in force at the time of the expropriation.

The same provisions are reproduced almost literally in chapter 140 of the Revised Statutes of Canada, 1927.

I see no reason for assuming that the Governor in Council would refuse to the town the permission to construct a wharf or some other work on its water lots, provided it did not interfere with navigation. I would rather think that the government would welcome improvements in a harbour. One must not overlook however the fact that in order to get to the wharf erected on the water lot one would have to go over the tracks and that the right to cross over the tracks depends on the approval of the government. This approval would likely be obtained but the crossing of several sets of tracks would be difficult. Useless to say, those impediments are not liable to enhance the value of the lot.

Counsel for respondent cited a case dealing with this feature, to wit *The King* v. *Wilson* (1). It will suffice to quote the headnote:

In assessing compensation for lands compulsorily taken under expropriation proceedings any "special adaptability" which the property may have for some use or purpose is to be treated as an element of market value. *The King* v. *McPherson*, 15 Ex. C.R., 215 followed. *Sidney* v. *North Eastern Railway Co.* (1914) 3 K.B.D. 629.

2. In such cases the Court should apply itself to a consideration of the value as if the scheme in respect of which the compulsory powers are exercised had no existence. *Cunard* v. *The King*, 45 S.C.R. 99; *Lucas* v. *Chesterfield Gas & Water Board* (1909) 1 K.B.D. 16; *Cedar Rapids Mfg. Co.* v. *Lacoste* (1914) A.C. 569, referred to.

(1) (1914) 15 Ex. C.R. 283.

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3. The owner of a water-lot in a public harbour under a patent from the Crown granted before Confederation cannot place erections thereon without the approval of the Governor in Council as required by Cap. 115, part 1 of R.S. 1906.

Held, that the market value of the water-lot is the proper basis for assessment of compensation, but while that value may be enhanced by the hope or expectation of obtaining authority to erect structures on the lot where there is no evidence of market value to guide it the Court will not assess compensation on a hope or expectation which cannot be regarded as a right of property in the defendant. *Lynch* v. *City of Glasgow* (1903) 5 C. of Sess. Cas. 1174; *May* v. *Boston,* 156 Mass. 21; *Corrie* v. *McDermott* (1914) A.C. 1056 referred to.

See the comments of Cassels, J. at pages 287 and 288.

Counsel suggested that this case is useful for the consideration which it gives to hopes and expectations. He said that, assuming that the town owned the fee in the street, its only hope of using it would be in the event that, due to some unexpected circumstance, the street would be closed up and the fee would revert to the town.

Counsel pointed out that Minshull, who was one of the valuators acting for the Intercolonial Railway Company in connection with the properties expropriated, declared that, supposing there was a possibility of reversion to the town of the fee in the street, the latter, so long as it remained a street, would not have any commercial value. Minshull added that the possibility of the street being removed was so remote that he would not offer anything for that possibility. In counsel's opinion Minshull had a precedent for making this statement in the case of *Municipal Council of Sydney and Young.* I do not think that the decision in that case upholds the last point submitted by counsel.

In addition to the case of *Municipal Council of Sydney and Young* counsel for respondent relied on the decision of the Supreme Court of the State of New York in *The People of the State of New York et al* v. *Kerr et al* (1). I deem it apposite to quote an excerpt from the headnote:

The act of the legislature, passed April 17, 1860, to authorize the construction of a railroad in the seventh avenue, and in certain other streets and avenues in the city of New York, is not to be construed as granting the use of the streets, etc. only after compensation made to, or agreed upon with, all owners of any interest in the lands forming the streets, and as not establishing such right absolutely and unconditionally.

(1) (1862) 37 Barbour's S.C. Rep. 357.

It is apparent from the whole scope and tenor of the act that the legislature, in passing it, assumed the right to grant the franchise absolutely and unconditionally, so far as the occupation of the streets and avenues mentioned, for the purposes of the railroad was involved.

The act is not void as being repugnant to the constitutional prohibition against the taking of private property for public use, without compensation, for the reason that it omits making any provision for compensation to the corporation of the city of New York, or to property owners, for the franchise granted.

The fee of the streets and avenues resides in the corporation of the city of New York, in trust, to keep them open forever as streets for the use of the public. Leonard, J. dissented.

Reference may be had to Lewis on Eminent Domain, 3rd ed., p. 321, no. 175 (119), where the author says:

As we have already had occasion to observe a municipal corporation, though holding the fee of its streets, holds them simply as a trustee for the public. It has no such private right or interest therein, as entitles it to compensation when a railroad is laid thereon by legislative authority, though without its consent.

Mr. Friel submitted that, if a statute gives a right and does not provide compensation,, the people from whom land is taken cannot get compensation, as long as the work is done without negligence. He urged particularly that the Intercolonial Railway had the right to cross the streets of the town without paying any compensation. He cited in support of his contention the case of *The City of Ottawa* v. *Canada Atlantic Railway Co.* (1). I may note that this question is not in dispute in the present case. The petition claims compensation for parcels of streets expropriated; it does not ask for damages arising out of the crossing of the streets by the railway. The case cited has no relevance.

The following cases may also be consulted: *Marquis of Salisbury* v. *Great Northern Railway Co.* (2); *Berridge et al.* v. *Ward* (3); *Holmes* v. *Bellingham* (4); *O'Connor* v. *Nova Scotia Telephone Company* (5).

Let us now examine the doctrine that the presumption that a conveyance of land abutting on a street convoys the soil of the street *usque ad medium filum viae* may be rebutted by the surrounding circumstances (proof of title, acts of ownership, etc.). It will be convenient to review a few decisions bearing on this point.

(1) (1903) 33 S.C.R. 376.
(2) (1858) 5 C.B.N.S., 174.
(3) (1861) 10 C.B.N.S., 400.
(4) (1859) 7 C.B.N.S, 329.
(5) (1893) 22 S.C.R. 276.

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In the case of *Roche* v. *Ryan* (1), a Divisional Court of the Common Pleas Division composed of Galt, C.J. and MacMahon, J. reversing the judgment of the trial judge, held that under the Municipal and Surveyors' Acts by the filing of a plan and the sale of lots according to it abutting on a street, the property of the street becomes vested in the municipality, although they may have done no corporate act by which they became liable to repair.

At page 115 we find the following comments of Galt, C.J.:

By section 62, of 50 Vic. ch. 25 (O.), to which I have already referred, "All allowances for streets surveyed in villages, or any part thereof, which have been, or may be, surveyed or laid down on the plan thereof, and upon which lots of land fronting on or adjoining such allowances for streets have been or may be sold to purchasers shall be public highways, streets and commons".

I refer to this in reference to the argument of Mr. McCarthy that the law in England as respects public highways does not extend to streets laid down in towns, as shown by the case of *Leigh* v. *Jack*, 5 Ex. D. 264, in which Cockburn, C.J., says, at p. 270: "I think that the legal presumption as to the ownership of the soil of a highway does not apply to intended streets." This opinion was also expressed by the other learned Judges.

It is, however, manifest that whatever may have been the right of adjoining owners, or of the original proprietor, under the common law, they are settled by the positive provision already referred to in the Municipal Act, sec. 527, viz.: "Every public road, street, bridge or other highway, in a city, township, town, or incorporated village, shall be vested in the municipality, subject to any rights in the soil which may have been reserved." In the present case no rights had been reserved, consequently the streets vested absolutely in the municipality.

In the case of *Cotton et al.* v. *The Corporation of the City of Vancouver* (2), the headnote reads thus:

Section 218 of the Vancouver Incorporation Act, 1900, provides, in part, that every public street . . . in the City shall be vested in the City (subject to any right in the soil which the individuals who laid out such road, street, bridge or highway may have reserved).

In an action for an injunction to restrain the Corporation from digging and blasting for the construction of a drain on a street within the corporate limits, plaintiffs submitted that a proper construction of the word "vest" as used in section 218, did not authorize the Corporation to dig to an excessive depth:—

Held, adopting the ruling in *Roche* v. *Ryan* (1891), 22 Ont. 107, that the word "vest" was not a vesting of the surface merely, but is wide enough to include the freehold as well.

(1) (1892) 22 O.R. 107. (2) (1906) 12 B.C.R. 497.

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The judgment of the Supreme Court of British Columbia rendered by Irving, J. contains the following comments (p. 499):

Then turning to the other ground upon which the injunction is sought, *viz.*: that danger is reasonably to be apprehended: the plaintiffs rely chiefly on section 218 of the Vancouver Incorporation Act, 1900, Cap. 54. By that section it is enacted as follows:

"218. Every public street, road, square, lane, bridge or other highway in the City shall be vested in the City (subject to any right in the soil which the individuals who laid out such road, street, bridge or highway may have reserved), and such public street, road, square, lane or highway shall not be interfered with in any way or manner whatsoever, by excavation or otherwise, by any street railway, gas or waterworks company, or any companies or by any company or companies that may hereafter be incorporated, or any other person or persons whomsoever, except having first made application and received the permission of the City Engineer in writing."

There was much discussion as to what this section meant The plaintiffs' contention is that it only gives or vests in the Corporation the surface of the street as street, with a depth sufficient to enable the Corporation to do that which is done in every street, that is to say, to raise the street, lay down sewers and water pipes; and that the sinking to an excessive depth is not authorized by this construction of the word "vest".

A number of English cases were cited in support of that contention, but I have arrived at the conclusion that this limitation is not at all applicable to the section in question. There is a marked difference between our Act and the English Acts referred to by Mr Wilson By our Act, everything is vested in the Corporation, unless expressly reserved; nothing, therefore, will be reserved by implication. In *Roche* v. *Ryan* (1891), 22 Ont. 107, Street, J., came to the conclusion that the word "vest" was not a vesting of the surface merely; that the word was wide enough to include the freehold as well as the surface; that where the individual who had laid out the lane had reserved no right in the soil, the soil and freehold were vested in the municipality. I think that the argument is applicable to section 218. The defendants, then, own the street.

In *Mappin Brothers* v. *Liberty and Co. and Attorney-General* (1), it was held by Joyce, J. that the presumption that a conveyance of land abutting on a highway passes the soil of the road *usque ad medium filum* is rebutted by the surrounding circumstances where a new street is made by Commissioners under an Act of Parliament which imposes on them obligations inconsistent with the presumption and where the parcels and plan show no intention to pass any part of the street.

In the case of *Leigh* v. *Jack* (2), it was held by the Court of Appeal, affirming the decision of the Exchequer Division, that the presumption that the soil to the middle of a highway belongs to the owner of the adjoining land

(1) (1903) 72 L.J. Ch. D. 63. (2) (1880) L.J. 49 Q.B.D. 220.

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does not apply where such land abuts on an intended highway which, at the time of the conveyance, has not been dedicated to the public.

I deem it convenient to quote a passage from the reasons of Cotton, L.J., which seems to me relevant (p. 223):

> Neither of the two conveyances purports in terms to convey the land in question to the defendant, so that he is obliged to rely on the old presumption of law which obtains in the case of roads the dedication of which is of ancient date. It is a presumption which is well known, clearly defined, and founded on reason; it is a presumption which applies, moreover, to existing roads; and no case has been cited in which a conveyance of land adjoining something which it is intended to make into a road at some future time has been held to pass the right to half the soil of that road when it shall be made. In such a case the grantor still retains the ownership of that land, and still retains over it his rights, which have not been diminished by any public rights such as result from the dedication of land to the public. The presumption of law on which reliance has been placed is easily rebutted; and in such a case as the present I think that many circumstances would require to co-exist to establish the presumption. I am of opinion that it does not arise where there was only an intention to dedicate a street hereafter.

Another case offering some interest although not so directly in point is *Ernst* v. *Waterman* (1). This was an action of ejectment. Plaintiff had laid off a tract of land into lots and streets, according to a plan, and sold to defendant lots on both sides of one of the streets. The action was brought to eject the defendant from the part of the street lying between the lots purchased by him, he having fenced it in and ploughed and occupied it for several years. It was held by the Supreme Court of Nova Scotia, in appeal, setting aside the verdict, that the presumption that the defendant held the street *usque ad medium filum viae* was rebuttable by proof of the title being in the plaintiff and that under the description in defendant's deed designating the land, as indicated on the plan, and specifying the dimensions, which were such as not to include the street, the title to the street did not pass to the defendant.

Thompson, J., who delivered the judgment of the Court, expressed the following opinion (p. 275):

> It was urged that the law presumes the ownership of half the soil over which the way exists, to be in the owners of the land on either side of the way, and that consequently the defendant was entitled to one-half the locus, being the half adjoining his lot of land; also, that although the defendant's conveyance should bound his lot on the way or street, the ownership *ad medium filum viae* would also pass. 7 C.B., N.S., 329, and 10 C.B., N.S., 400, were cited to sustain this double proposition. As

(1) (1883-84) 4 Russell & Geldert, 272.

regards the first branch of this contention, we have to observe that the presumption is by no means conclusive, and may be rebutted, as was done here, by proof of title being in another than the owner of the contiguous land. As regards the second branch, it will be found that the application of the doctrine depends in every case on the language of the conveyance, and it cannot be contended that all deeds, no matter what the description may be, will pass the title to half the adjoining ways. The description in this deed, we think, excluded the soil of the way, because it not only designated the land conveyed as a certain lot indicated on an annexed plan, but specified the dimensions which the conveyed parcel was to contain, and these dimensions do not admit of any part of the way being included. The cases above mentioned sustain these views and also the case of *Pugh* v. *Peters*, 2 R & C., 143.

The theory that the owner of land adjoining a street is also owner of the soil of one half of the street on which his land abuts is very likely based on the presumption that the adjoining owners each contributed half the land required for the street: *Doe dem. Pring et al.* v. *Pearsey* (1); *Holmes* v. *Bellingham* (2).

Cockburn, C.J., in the last case, said (p. 336):

The direction complained of is, that the learned judge told the jury that there was a presumption, in the case of a private way or occupation road between two properties, that the soil of the road belongs *usque ad medium filum viae* to the owners of the adjoining property on either side. That proposition, subject to the qualification which I shall presently mention, and which I take it was necessarily involved in what afterwards fell from the learned judge, is in my opinion a correct one. The same principle which applies in the case of a public road, and which is the foundation of the doctrine, seems to me to apply with equal force to the case of a private road. That presumption is allowed to prevail upon grounds of public convenience, and to prevent disputes as to the precise boundaries of property; and it is based upon this supposition,—which may be more or less founded in fact, but which at all events has been adopted,—that, when the road was originally formed, the proprietors on either side each contributed a portion of his land for the purpose.

See *Nichols* on *Eminent Domain*, 2nd ed., vol. 1, p. 394, para. 132; *Gebhardt* v. *Reeves* (3).

The streets with which we are concerned were not dedicated to the town by the adjoining owners; they belonged to the town in full ownership together with the adjoining land and were opened through its own property for the purposes of passage and the benefit and advantage of the public.

After a careful perusal of the grants and statutes abovementioned and a minute study of the doctrine and precedents, I have reached the conclusion that the Town of

(1) (1827) 7 B. & C, 304; 26 English and Empire Digest, 323, No. 566.
(2) (1859) 7 C.B. n.s. 329.
(3) (1874) 75 Ill. 301.

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Dartmouth, at the time of the expropriation, owned the soil as well as the surface of its streets and that the rule that the ownership of half the soil over which a street exists is vested in the owners of the land on either side thereof does not obtain in the present case. There was no dedication of the streets by owners of land adjoining them. The land on which the streets were opened and the land on each side abutting thereon was wholly vested in a single owner, namely the Town of Dartmouth, and, prior to the latter's incorporation, in the trustees. In my opinion the suppliant held the fee of its streets.

The question arises as to whether the suppliant is entitled to compensation for the parcels of streets expropriated. The doctrine and jurisprudence are unanimous in disallowing compensation for streets expropriated on the ground that the municipality holds them in trust for the public: Nichols on Eminent Domain, 2nd ed., vol. 1, p. 394, para. 132; Lewis, Eminent Domain, 3rd ed., vol. 1, p. 321, para. 175 (119); *City of Vancouver* v. *Burchill* (1); *Zanesville* v. *Telegraph and Telephone Co.* (2); *City of International Falls v. Minnesota, Dakota & Western Railway* (3); *Worcester* v. *Worcester etc. Street Railway Co.* (4); *People* v. *Walsh* (5); *State* v. *Shawnee County Commissioners* (6); *Prince* v. *Crocker* (7); *Browne* v. *Turner* (8); *Springfield* v. *Springfield Street Railway* (9); *Arbenz* v. *Wheeling & H.R. Co.* (10); *Tyler County Court* v. *Grafton* (11); *State* v. *Hilbert* (12); *Gebhardt* v. *Reeves* (13); *Chicago* v. *Carpenter* (14); *Paul* v. *Detroit* (15).

Lewis says (*loc. cit.*):

> As we have already had occasion to observe a municipal corporation, though holding the fee of its streets, holds them simply as a trustee for the public. It has no such private right or interest therein, as entitles it to compensation when a railroad is laid thereon by legislative authority, though without its consent.

(1) (1932) S.C.R. 620 at 625.
(2) 64 Ohio State Rep. 67.
(3) (1912) 117 Minn. Rep. 14.
(4) 196 U.S. 539.
(5) 96 Ill. 232.
(6) (1910) 83 Kan. 199, 110 Pac. 92.
(7) (1896) 166 Mass. 347, 44 N.E. 446.
(8) (1900) 176 Mass. 9, 56 N.E. 969.
(9) (1902) 182 Mass. 41, 64 N.E. 577.
(10) (1889) 33 W. Va. 1, 10 S.E. 14.
(11) 86 S.E. 924.
(12) 72 Wis. 184, 39 N.W. 326.
(13) 75 Ill. 301.
(14) 201 Ill. 402, 66 N.E. 362.
(15) 32 Mich. 108.

Nichols, though less explicit, expresses a similar opinion (*loc. cit.*):

> Whatever doubts may arise regarding other property, it is well settled that streets and highways are held in trust for the public, and whatever estate or interest in them belongs to the city or town in which they lie is owned by the municipality in its governmental capacity and as an agency of the state.

Further on the matter adds:

> A city or town is not however wholly without rights even in a public way. The public easement in a bridge, forming part of a highway, is completely under legislative control, but the timbers or other materials in the bridge may be said to be the property of the town in a stricter sense, so that there is some authority for holding that the town must be compensated for them when they are destroyed by the construction of some other public work. If the highway over the bridge is discontinued, the materials in the bridge would become the absolute property of the town, and the same is probably true of the curbstones, lamp posts and other materials put into a roadway by a city or town.

This statement is unquestionably restrictive.

At page 499 Nichols makes the following observations:

> It has been suggested that while it is conceivable that a municipality might have an absolute fee in a street, and so would have the same rights as a private owner to use its land in any reasonable way that it found desirable, yet it ordinarily holds the fee of a highway in trust to be used for highway purposes. This may be true, but it is in trust for the public that it is held, and not for the abutting owners.

Nichols then comments on the remedy at the disposal of the *cestui que trust* in case the trust is abused. These remarks have no relevance to the question at issue.

I may say with deference that I hesitated before adopting the doctrine expounded by the authors and the judgments aforesaid because depriving a municipality of its right to compensation for streets or parcels of streets expropriated is liable to cause great prejudice. Municipalities have duties towards their residents; they are bound to open streets and keep them in good condition. I believe that a municipality might be compelled to open new streets to replace those which have been expropriated and accordingly prohibited to traffic. I think it would only be fair and equitable in these circumstances to compensate the municipality for its loss.

If I had reached the conclusion that the suppliant ought to receive compensation, I must say that the task of placing a value on these parcels of streets is extremely difficult.

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There is no evidence of recent sales in the vicinity. The only sale put in evidence is one by the Town of Dartmouth to William S. Symonds, on January 29, 1873, for the price of $280, of "a certain lot of land, land covered with water and water lot situate in the Town of Dartmouth," at the foot of Stairs street, described in the deed, a copy whereof was filed as exhibit 3, as being bounded on the north and south by property of said Symonds, on the east by Stairs street, extending westerly into the harbour of Halifax four hundred feet more or less, with the reserve to the town of the right at any time to enter upon the said land and land covered with water and open and dig the same and build and lay sewers or drains through it for the purpose of public drainage and at any time to re-enter thereupon for the purpose of repairing or rebuilding the said sewers or drains or building or laying down new ones. The price represented approximately 10 cents per square foot.

Another sale was mentioned, to wit that made by the Town of Dartmouth to Electric Boat Company, of a lot of land and land covered with water, bounded by Stairs street, Commercial street, Church street and the harbour as shown on plan exhibit 2, about which we have no information, as well as the expropriation thereof by the Crown in 1919. Minshull, valuator for the Intercolonial Railway at the time of the expropriation in 1918-1919, who said he had the original estimates before him, declared that the property consisted of lots 3, 8 and 9 having an area of 83,910 square feet and of lots 4, 5, 6 and 7, all waterlots, having an area of 138,675 square feet; he appraised this property at $40,000. The matter was settled and taken out of his hands. He said he had nothing to do with the actual settlement; he thought that it was made on a basis of .30c. per square foot for land and land covered with water.

I must say that the sale by the Town of Dartmouth to Electric Boat Company and the expropriation of the same property by the Crown, with the scanty and most indefinite information about them, are of very little assistance in determining the value of the land and land covered with water taken by the respondent.

As far as the sale from the Town of Dartmouth to Symonds is concerned, it is far too remote to be of any help in determining the value of land at the time of the expropriation. We have the declaration by Evans that he did not understand that there had been an improvement in value from 1873 to 1918 and that, if there was any change, it was a depreciation in value. Evans said he valued this land at 2 1/3 cents per square foot, being the price paid by Symonds to the town. He stated that this price was for the land above high water and that the price for the whole worked out to about 1.16 cents per square foot.

The ends of streets expropriated, in view of the construction of the railway in 1883 and the retaining wall from near Best street to Geary street and the various additions to the railway facilities since 1883, have a considerably restricted use and their value as land is accordingly rather small. The sum of .35c. per square foot claimed by the suppliant is, in my opinion, grossly exaggerated.

At Mott street the parcel expropriated contains, according to Minshull, 1,529 square feet and, according to Evans, about 1,973 square feet. Geary street, according to Minshull, has an area of 2,239 square feet and according to Evans, of about 2,375 square feet. Lot No. 4, made up of portions of Water street and Stairs street, contains, according to Minshull's figures, 7,600 square feet; Evans did not mention the area. The parcel consisting of the foot of Stairs street, below the tracks, has, according to Minshull's calculation, an area of 13,720 square feet; Evans gave no information with reference to this piece of land. As to Church street, mentioned in the description as parcel C, it has according to Minshull an area of 9,727 square feet and according to Evans of 27,590 square feet. I have never seen such a wide discrepancy between estimates of the superficies of parcels of land comparatively small. The Court is usually asked to determine the value of land, not its area. Had I concluded that suppliant is entitled to compensation for its parcels of streets I would have allowed $1,150.

After carefully perusing the evidence in relation to the water lots and considering the growth of the Halifax har-

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bour, which, in all likelihood, is destined to become one of the principal Canadian ports on the Atlantic coast, but not overlooking the difficulties of access to these lots due to the railway tracks which existed on June 21, 1919, I am convinced that a compensation of $3,250 will be fair and reasonable.

I shall now examine the question of the sewers. The sewer on Stairs street, 18 inches in diameter and 500 feet in length, was constructed in 1914. It has been used ever since and the evidence shows that it is in good condition. No trouble has ever been experienced in its functioning; no repairs have ever been required. It is made of vitrified sewer pipe and, in the opinion of the town engineer Allan, it may last indefinitely. The station and its platform are built across Stairs street. There are six railway lines crossing the street. In view of these obstacles any repairs to the sewer would cost much more than if the street were vacant. The Geary street sewer is 9 inches in diameter. Nobody could say where it empties. The plan exhibit 2 shows that it ends between Water street and the harbour. The same plan shows a proposed extension of the sewer from the point where it presently ends to the harbour, a distance of 100 feet.

Of the Stairs street sewer approximately 200 feet in length were affected by the expropriation. No estimate of the cost of replacing or repairing this sewer was supplied. Allan however placed a value of $2,800 on it on the basis of 500 feet of an 18-inch sewer as shown on the plan exhibit 2, as it exists to-day. In his estimate that is what it would cost to reproduce that sewer to-day. Allan suggested that a new 18-inch sewer from point A, at the intersection of Turner and Stairs streets, to point B, which is the harbour, shown on the plan exhibit 2, being 325 feet in length, would cost $2,700. He declared that a 30-inch sewer from point A to point B would cost $2,900.

Allan computed the cost of the 9-inch sewer on Geary street, extending out as far as it goes, to $430; he estimated the cost of the extension of this sewer from the old outlet to the water at $1,400, this portion being more expensive than the one presently existing due to the fact that there is a fill containing large boulders through which it would be difficult to dig a trench.

In view of the conclusion which I have reached with regard to the sewers and which I propose to submit forthwith, I do not think that these figures have any materiality.

As already stated a lease was entered into by His Majesty the King and the Town of Dartmouth on December 9, 1914, a copy whereof was filed as exhibit L.

This lease stipulates (*inter alia*) as follows:

This indenture . . . between His Majesty the King, represented herein by the Minister of Railways and Canals, acting under the provisions of Chapter 35 of the Revised Statutes of Canada, 1906, and of the 34th section of "The Expropriation Act," and under the authority of an Order in Council dated the Fifth day of December, A.D., 1914, hereinafter called the Lessor, of the First Part; and The Town of Dartmouth in the County of Halifax and Province of Nova Scotia, hereinafter called the Lessee, of the Second Part.

Witnesseth, that the Lessor, in consideration of the rents, covenants, provisoes and conditions hereinafter reserved and contained, hath demised and leased, and, by these presents, doth demise and lease unto the Lessee

The right and privilege to lay and maintain across the right of way and under the tracks of the Intercolonial Railway at Dartmouth aforesaid, one Standard Heavy one and one-half inch (1½") galvanized iron water pipe at the south end of Prince street, near the so called Marine Railway, and one eighteen-inch (18") sewer pipe on Stairs street, both as indicated in red ink on the plans dated October 5, 1914, hereto annexed.

TO HAVE and TO HOLD the said right and privilege unto the Lessee, from and after the First day of December, one thousand nine hundred and fourteen, during the pleasure of the Lessor.

YIELDING and PAYING therefor, invariably in advance, on the First day of December in each year, during the existence of this Lease, unto the Lessor, through the Honourable the Receiver General of Canada for the time being, the yearly rent or sum of One Dollar ($1), of lawful money of Canada, the first payment of which rent, being for the year commencing on the First day of December, 1914, having been made at or immediately before the delivery of these Presents, the receipt whereof is hereby acknowledged.

It is . . . further agreed by and between the said parties hereto that these Presents are made and executed upon and subject to the covenants, provisoes, conditions and reservations hereinafter set forth and contained, and that the same and every of them, representing and expressing the exact intention of the parties are to be strictly observed, performed and complied with, namely:

. . . . . .

8. Should it become necessary or expedient for the purposes of repairs or improvements on the said Intercolonial Railway that the said pipes be temporarily removed, the said "The General Manager of Government Railways" may notify the Lessee, either verbally or in writing, to remove the same, and on failure forthwith thereafter to comply with such notice, the said "The General Manager of Government Railways" may remove or destroy the said pipes without the

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Lessor becoming thereby liable for damages of any nature and may collect from the Lessee, as rent due hereunder, all expenses occasioned by reason thereof. The Lessee upon complying with such notice may, if the said "The General Manager of Government Railways" deems it expedient, and the progress of the work is not thereby interfered with, temporarily maintain the said pipes in such manner or at such point as the said "The General Manager of Government Railways" may direct; the Lessee bearing all expenses and assuming all risk or damage. At the conclusion of the work the said pipes may, if deemed expedient by the said "The General Manager of Government Railways" be replaced by the Lessee at own cost and expense and in exact accordance with instructions and directions of the said "The General Manager of Government Railways" with respect thereto.

. . . . . .

10. That the Lessor may at any time terminate this Lease by giving to the Lessee notice in writing signed by the Minister or the Secretary for the time being of the Department of Railways and Canals, and either delivered to the Lessee or any officer of the Lessee, or mailed addressed to the last known residence or office of the Lessee, at any of His Majesty's Post Offices, and thereupon after the delivery or mailing of such written notification these Presents shall be void, and the Lessee shall thereupon, and also in the event of the determination of this Lease in any other manner, forthwith remove the said pipes and all materials, effects and things at any time brought or placed thereon by the Lessee, and shall also to the satisfaction of the said "General Manager" repair all and every damage and injury occasioned to the lands and premises of the Lessor by reason of such removal or in the performance thereof, but the Lessee shall not, by reason of any action taken or things performed or required under this clause, be entitled to any compensation whatever.

It was argued on behalf of respondent that the suppliant had no right to ask for damages in connection with the sewers because the petition of right only claims compensation for the lands taken. The petition is perhaps not very cleverly drafted; it certainly might be more explicit. I believe however that the conclusions of the petition are broad enough to include the claim regarding the sewers. The allegation relating thereto, would naturally have been more in place in the body of the proceeding than in its conclusion, but this is only a matter of form of little, if any, importance. The late president, before whom the case was argued in June 1940, told counsel for suppliant that, if he wanted to amend the petition and if he made a motion to that effect he would feel inclined to grant it, although he did not consider that an amendment was necessary. I may say that I share this opinion and believe that the petition, although not in a particularly happy form, is sufficient to embrace the claim respecting

the sewers. If I were to accept the interpretation of Mr. Rand, I would have to take for granted that the respondent expropriated the sewers as well as the land in which they lie, which legally he did seeing that there was, in the notice of expropriation, no reserve about the sewers as there was in the sale by the Town of Dartmouth to William S. Symonds, and consequently allow to the suppliant the full value thereof at the time of the expropriation. This means that I would add to the value of the water lots, to wit $3,250, the value of the sewers fixed at $3,230. I feel loath to adopt this conclusion, as apparently there was an oversight on the part of respondent's representative with regard to the sewers at the time of the expropriation. On the other hand the fact that the respondent saw fit to give a lease to the suppliant covering the sewer on Stairs street seems to indicate that the respondent took for granted that it owned the sewer in question. It may be that respondent did not fully apprehend the logical consequence of his act.

Mr. Rand in his written argument dated July 11, 1940, filed on the 13th of the same month, made the following statement:

> As respects the sewers, the Respondent is willing to give an undertaking in the following terms:
>
> The expropriation will be abandoned in relation to the existing sewers on Stairs and Geary (unnamed) streets. These sewers will be reserved to the Town in a deed to the Crown from the Town of the interest of the Town in the lands taken. The Crown will at all times in the future bear the additional expense of maintaining the sewers caused by the expropriation and the improvements which have in the past and may in the future be placed on the lands taken. The amount of that shall be ascertained by the Engineers of the Railways and of the Town and if they cannot agree it may be referred either to arbitration or to this Court.

In his oral argument before me on July 2, 1943, Mr. Friel, speaking on behalf of respondent, said that an undertaking had been given by his predecessor, Mr. Rand, in reference to the sewers, that it still stands and that it reads as follows:

> The expropriation will be abandoned in relation to the existing sewers on Stairs street and Geary street, when the sewers will be reserved to the Town in a deed to the Crown from the Town of the interest of the Town in the lands taken. The Crown will at all times in the future bear the additional cost of maintaining the sewers covered by this expropriation and the improvements which have since the expropriation and may in the future be placed on the lands taken. The amount of that

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shall be ascertained by the engineers of the Railways and of the Town and if they cannot agree it may be referred either to arbitration or to this Court.

I do not know if this proposed understanding was ever signed, but no copy of it was produced. In the circumstances I must consider it as inexistent. The declaration by counsel in his brief dated July 11, 1940, or in his argument on July 2, 1943, cannot bind the respondent. It has been decided several times that a minister has no authority to bind the Crown, unless authorized by statute or order in council: *The Jacques-Cartier Bank* v. *The Queen* (1); *Quebec Skating Club* v. *The Queen* (2); *The King* v. *Vancouver Lumber Co.* (3); *The King* v. *McCarthy* (4); *Livingston* v. *The King* (5). The same doctrine applies in the case of any representative of the Crown: *De Galindez* v. *The King* (6); *Burroughs et al.* v. *The Queen* (7); *The Queen* v. *St. John Water Commissioners* (8); *Attorney-General of the Province of Quebec* v. *Fraser et al.* (9); *The Queen* v. *Lavery* (10); *Wood* v. *The Queen* (11).

The texts of the aforesaid undertakings are substantially identical; the few slight differences in the wording are absolutely immaterial.

The compensation for the water lots or land covered with water expropriated, as previously stated, is fixed at $3,250. The suppliant will be entitled to recover the said sum from the respondent, with interest thereon at 5 per cent per annum from the 21st day of June, 1919, date of the expropriation, to the date hereof, upon giving to the respondent a good and valid title to the said property, free from all mortgages and incumbrances whatsoever.

After giving the matter my best consideration I have decided that, whether the undertaking aforesaid in relation to the sewers be duly executed or not, the proper course to follow is to reserve the right of the suppliant to make use of the two sewers abovementioned and in the event of

(1) (1895) 25 S.C.R. 84.
(2) (1893) 3 Ex. C.R. 387.
(3) (1914) 17 Ex. C.R. 329.
(4) (1919) 18 Ex. C.R. 410.
(5) (1919) 19 Ex. C.R. 321.
(6) Q.R. 15 K.B. 320; (1907) 39 S.C.R. 682.
(7) (1891) 2 Ex. C.R. 293; (1892) 20 S.C.R. 420.
(8) (1889) 2 Ex. C.R. 78; (1889) 19 S.C.R. 125.
(9) Q.R. 25 S.C.R. 104; Q.R. 14 K.B. 115; (1906) 37 S.C.R. 577.
(10) Q.R. 5 Q.B. 310.
(11) (1877) 7 S.C.R. 634.

their collapsing or becoming obstructed or of the lease coming to an end the suppliant shall have the right, with the assent of the respondent, to proceed to their repair or reconstruction as need be and to charge to respondent the increased cost of such work due to the existence of the constructions or tracks lying over the sewers so repaired or reconstructed.

In the event of the respondent failing to allow the suppliant to do the necessary work, the claim of the suppliant for compensation for the value of the sewers is reserved and the suppliant shall be at liberty to come before the Court for directions, if necessary, after notice duly served upon respondent.

In examining the record I found that counsel for respondent at the trial had only filed a plan of the property expropriated (exhibit B) and had overlooked the filing of a description. I instructed the registrar to communicate with him and to draw his attention to this omission, which he did on June 1, 1945. Counsel sent copies of descriptions of, among others, parcels C and D, with a certificate of the registrar of deeds for the county of Halifax stating that they had been deposited of record in his office on June 21, 1919. He failed however to forward copies of descriptions of lots 3 and 4. On my request the registrar again wrote to counsel asking him for these copies. The reply was that descriptions of lots 3 and 4 had not been registered. In compliance with my direction the registrar wrote to counsel pointing out that if, in 1919, the solicitor, who had charge of the expropriation, had not complied with the exigencies of the law, the situation could be remedied. I advised the registrar to call counsel's attention to sections 9 and 10 of the Expropriation Act and quote the material portions thereof.

The first paragraph of section 9 reads as follows:

Land taken for the use of His Majesty shall be laid off by metes and bounds; and when no proper deed or conveyance thereof to His Majesty is made and executed by the person having the power to make such deed or conveyance, or when a person interested in such land is incapable of making such deed or conveyance, or when, for any other reason, the minister deems it advisable so to do, a plan and description of such land signed by the minister, the deputy of the minister or the secretary of the department, or by the superintendent of the public work, or by an engineer of the department, or by a land surveyor duly licensed

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and sworn in and for the province in which the land is situate, shall be deposited of record in the office of the registrar of deeds for the county or registration division in which the land is situate, and such land, by such deposit, shall thereupon become and remain vested in His Majesty.

Section 10, which is particularly pertinent to the point involved, is thus worded:

In case of any omission, misstatement or erroneous description in such plan or description, a corrected plan and description may be deposited with like effect.

As a result counsel for respondent caused to be deposited of record with the registrar of deeds aforesaid on November 9, 1945, descriptions of lots 3 and 4 and on November 15, 1945, he forwarded to the registrar of the Court certified copies thereof together with a copy of a plan of these lots and a certificate of the registrar of deeds.

Needless to say, I had to keep the matter in abeyance until all the formalities of the expropriation had been completed. Failing this I could not have held that lots 3 and 4 had become vested in His Majesty the King. My conclusion in this respect would have been limited to parcels C and D. This unfortunate incident delayed the judgment; had the proceedings in expropriation been duly fulfilled, I would have been in a position to deliver judgment early in June.

The suppliant will be entitled to its costs against the respondent.

Judgment accordingly.