

LOUIS ACHILLE BERTRAND... SUPPLIANT ;

1891

AND

Jan. 19.

HER MAJESTY THE QUEEN.....RESPONDENT.

*Damages to property from Government railway—The Government Railways Act, 1881, s. 27—Claimant's acquiescence in construction of culverts, effect of—Negligence of Crown's servants—Estoppel.*

The suppliant sought to recover damages for the flooding of a portion of his farm at Isle Verté, P.Q., resulting from the construction of certain works connected with the Intercolonial Railway. The Crown produced a release under the hand of the suppliant, given subsequent to the time of the expropriation of a portion of his farm for the right of way of a section of the Intercolonial Railway, whereby he accepted a certain sum "in full compensation and final settlement for deprivation of water, fence-rails taken, damage by water and all damages past, present and prospective arising out of the construction of the Intercolonial Railway," and released the Crown "from all claims and demands whatever in connection therewith." It was also proved that, although the works were executed subsequent to the date of this release, they were undertaken at the request of the suppliant and for his benefit, and not for the benefit of the railway, and that, with respect to part of them, he was present when it was being constructed and actively interfered in such construction.

*Held:*—That he was not entitled to compensation.

2. The Crown is not under an obligation to maintain drains or back-ditches constructed under 52 Vic. c. 13, s. 4.

**PETITION OF RIGHT** to recover a sum of \$7,937 as compensation for injury done to a farm belonging to the suppliant at Isle Verte, County of Temiscouata, P. Q.,—such injury having been occasioned by the construction and maintenance of the Intercolonial Railway.

The facts of the case are sufficiently stated in the judgment.

August 19th, 1890.

*Pouliot* for suppliant :

There should be damages in respect of the land on the

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 BERTRAND given by the suppliant.

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 THE As to the north side, Bertrand's land carries a great  
 QUEBEC. deal more water than before the railway was put there.  
 ———— This has resulted from the construction of the second  
 Argument culvert. I admit that this was done at Bertrand's  
 of Counsel. request, but having undertaken the work the Govern-  
 ———— ment should have made it sufficient to carry away all  
 the water.

The suppliant is entitled to at least \$1,000.

*Taché*, Q.C. for the respondent :

The claim is \$7,937, while claimant's brother says the whole property is worth only \$5,000. The culvert last constructed has benefited the property south of the railway, and such enhancement of value is a complete compensation for the inconvenience caused to the northern part. Again, suppliant accepted \$20 in full when he had no culvert. The second culvert was made at Bertrand's wish and we built all that he asked, and he should not now complain.

*Pouliot*, in reply :

The railway authorities saw that the suppliant's land was flooded, and upon his complaint they built the culvert. He wanted his land drained and they consented to do it. They should have done the work efficiently when they set about to do it.

BURBIDGE, J. now (January 19th, 1891) delivered judgment.

This petition is brought to recover compensation for injury to a farm belonging to the suppliant, situated in the Parish of Isle Verte, County of Temiscouata and Province of Quebec, occasioned by the construction and maintenance of the Intercolonial Railway. The suppliant's house and other buildings are situated at the north end of the farm, in the Village of Isle

Verte, and not far from the River St. Lawrence. At the east side of the farm and near to the barn and out-buildings is a deep gully or water-course through which the water coming from the south is discharged, the natural drainage of the land being from south to north. By the construction of the railway the natural flow of the water from the south of the railway was interfered with, and the railway ditches collected a considerable quantity of water which was discharged upon the suppliant's farm, as its level was lower than that of the farms adjoining.

The exact date of the construction of the railway is not disclosed by the evidence, but I take it that it was constructed in or about the year 1871, for in July of that year the suppliant was paid eighty-nine dollars and ten cents as compensation for the right of way of the railway through his farm.

The question of the compensation to which he was entitled because the railway injuriously affected his property was not determined until 1877. On the 22nd of January of that year an award was made by three of the Official Arbitrators, by which they determined that the Government of Canada should pay to the suppliant the sum of twenty dollars in full payment and settlement of his claim, the payment being for all damages past, present, and future, which the construction of the said railway might theretofore have occasioned or might thereafter occasion to the said farm.

The claims which the Arbitrators considered had been put forward by the suppliant in the years 1874 and 1875, by which he, in addition to the value of some fence rails, sought compensation for damage to his property because the construction of the railway had caused one portion of it to be flooded and another portion to be deprived of water by the diversion of a stream. I understand the injury by the flooding to

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have related principally, if not entirely to the portion south of the railway, and that if any portion of the farm was at the time deprived of water it was the portion to the north of the railway.

In June following such award, the suppliant, by a release under his hand, and in consideration of twenty dollars theretofore awarded to him by the Official Arbitrators "in full compensation and final settlement for deprivation of water, fence rails taken, damage by water, and all damages past, present and prospective arising out of the construction of the Intercolonial Railway," to the property in question, released Her Majesty "from all claims and demands whatsoever in connection therewith."

In his evidence taken before Mr. Cowan, which, by consent has been used in this case, the suppliant, the facts having for the time, it is probable, gone from his memory, denied knowledge of this award, or that he signed the release or receipt mentioned. The original papers have since been produced and are in evidence, and there is no doubt the facts are as stated.

Since such award and release the Minister of Railways and Canals has caused two additional culverts to be constructed, and ditches to be opened and repaired for the purpose of carrying off the water that, as we have seen, collected upon and drowned a portion of the farm south of the railway. It does not appear that he was under any obligation to execute these works, or that they were constructed for any purpose except to drain the land of the suppliant. Why they were undertaken is, so far as can be gathered from anything before the court, a mere matter of conjecture. It may have been because the officers of the railway, like the suppliant himself, lost sight of the fact that the matter had been concluded by the award and release, or they may have thought the compensation awarded was

incommensurate with the damage done, and that there was some moral, if not legal, obligation to attempt to remove or mitigate it, or it may be that the suppliant succeeded in securing the execution of the works by reason of his much asking. That they were undertaken at his request is admitted, and it appears that when, in 1885, the second and deeper of the two culverts was constructed and a ditch leading therefrom through the suppliant's land was repaired, he was present while the work was going on, and, so far at least as respects the ditch, actively interfered in the execution of the works. When completed he appears to have expressed his satisfaction with the works executed, and for the purposes they have no doubt proved sufficient. But it happens that during the winter the culverts fill up with snow and ice, forming, with the railway embankment, a dam that in the spring holds the water which collects south of the railway. Then when the culverts are opened by the section-men, or by a sudden thaw, the water so held back is discharged with great force and in such quantities that it overflows the lands adjacent to the gully or natural water-course, of which mention has been made, and occasions damage by flooding the portion of the farm where the suppliant's buildings and gardens are.

The suppliant by his particulars claims compensation to the extent of \$7,937, while according to the testimony of his brother, which there is no occasion to question, the farm with the buildings thereon is worth about \$5,000. Part of this claim is for damage caused by the flooding of the land south of the railway which we have seen has already been disposed of.

The injury occasioned by the flooding of the lands on which are his buildings and gardens, is, however, substantial and considerable, and in respect of this he is, I think, entitled to compensation unless—1st. such

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injury is part of the damage of which he acquitted the Crown in 1877; or—2ndly. his request for the construction of the works that cause the injury, and his acquiescence and interference in their execution, constitute a good defence to his petition.

It seems to be clear that if the injury complained of results wholly from the original construction of the railway the suppliant cannot succeed (1). That certainly is the case in respect of everything that might in 1876 or 1877 have been foreseen, and it is, it appears to me, conclusive in respect of the flooding of the land south of the railway, and of the collection of water by the railway ditches, and of its discharge upon the suppliant's land. These causes of damage must have been well known and observed at the time of the arbitration. What probably was not foreseen was that if means were taken to drain the flooded land, the injury in question might occur. The absence, for so many years, of any such injury shows, I think, that it was occasioned by the subsequent opening of the culverts and ditches to which reference has been made. At the time when such subsequent works were executed *The Government Railways Act*, 1881, (44 Vic. c. 25) was in force, by the twenty-seventh section of which was recognized the Crown's liability to make compensation for any properly established claim for property taken, or for direct or consequent damage to property arising from or

(1) *The King v. Leeds and Selby Ry. Co.*, 3 A. & E. 683; *Lee v. Milner*, 2 M. & W. 824; *Lawrence v. G. N. Railway Company*, 16 Q. B., 643; *In re Ware*, 9 Ex. 395.; *Broadbent v. The Imperial Gas Company*, 7 DeG. M. & G., 436, 7 H. L. C., 600; *The Caledonian Railway Company v. Lockhart*, 6 Jur. N. S., 1311; *Bagnall v. L. & N. W. Railway Company*, 7 H. & N., 423, 1 H. & C. 544; *Reg. v. Aire & Calder Navigation Company*, 30 L. J.Q.B. 337; *Croft v. L. & N. W. Railway Company*, 3 B. & S. 436; *Whitehouse v. The Wolverhampton & Walsall Railway Company*, L.R. 5 Ex. 6; *Stone v. Corporation of Yeovil*, L. R. 2 C. P. D. 111, 113; *Reg. v. Hubert*, 14 Can. S.C.R. 737.

connected with the construction, repair, maintenance or working of any Government railway. The Minister had, it is clear, the right, under the statute to which I have referred, to construct the works mentioned; and if he had done so of his own motion, or for the protection or in the interest of the railway, or because he was under some obligation to do so, it would, I think, be tolerably clear that the suppliant would have been entitled under the Act to compensation. If the suppliant had simply stood by and not objected to the Minister undertaking such works he would not, I think, have deprived himself of his remedy, for he would have had the right to assume that, as the Minister was acting under the statute, the compensation thereby provided for would be given for any injury done, and his acquiescence would not be such as could be invoked against him. In *The Conservators of the River Thames v. The Victoria Station and Pimlico Railway Company* (1) it was held that the consent given by the plaintiffs under the defendant's Special Act to the latter's plans for a bridge, the foundations of which rested upon land belonging to the plaintiffs, did not constitute a license to build the bridge upon such land without compensation (2).

Here, however, there is more than mere acquiescence or consent. The suppliant for his own benefit asks the Minister to execute works, which the latter is under no obligation to undertake, and which are constructed to the satisfaction of the former. It happens, however, that while by reason of what has been done, the suppliant has secured the benefit of having one portion of his farm drained, it has become necessary for him to incur very considerable expense to prevent another portion thereof from being flooded for a short time in the spring. If similar acts had been done by a neighboring pro-

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(1) L. R. 4 C. P., 59.

*Board of Works v. The Metropolitan*

(2) See also *The Metropolitan Ry. Co.*, L. R. 3 C. P. at p. 629.

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prietor, under like circumstances, I do not see how the suppliant could have maintained an action therefor against the former; and that, it is well established, is one test by which the right of the matter is to be tried. It was not suggested that there is any difference, and I take it on this point there is no difference, between the law of Quebec, by which the case is to be determined, and the law in force in the other Provinces. (1). I am of opinion, therefore, that the suppliant is not entitled to compensation under the statute.

It is contended, however, that part of the inconvenience and damage results from the failure of the Minister of Railways to keep open a cross-ditch on a neighbor's land, which, if properly maintained, would carry a portion of the water to another gully or water-course on the farm of one Napoléon Côté. It was also suggested that the injuries complained of have in part resulted from the negligence of the Minister's servants in opening the culverts in the spring. But as to the first contention, I know of no obligation resting upon the Minister to keep this ditch open, and counsel did not point me to any law under which such a duty might arise. Speaking generally, that duty seems to be thrown on the proprietor through whose lands the ditches are constructed by the Crown (2).

As to the second contention, there is, I think, no evidence which would justify me in concluding that the officers or servants of the Crown have been guilty of negligence in opening the culverts in question.

There will be judgment for the respondent with costs.

*Judgment for respondent with costs.*

Solicitors for suppliant: *Pouliot, D'Amour & Pouliot.*

Solicitors for respondent: *O'Connor & Hogg.*

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(1) *Paradis v. The Queen*, 1 Ex. the repealed statutes 31 Vic. c. C. R. 191. 12, s. 30; 44 Vic. c. 25 s. 5 (9);

(2) See 52 Vic. c. 13 s. 4; and and R. S. C. c. 39 s. 4.