IN THE MATTER OF THE PETITION OF RIGHT OF

CHARLES EVERETT GRAHAM.....SUPPLIANT; 1902

AND Nov 17.

HIS MAJESTY THE KING.....RESPONDENT.

Injurious affection of land — Erosion — Acceleration by public work— Damages — Jurisdiction of official arbitrators — Transference to Exchequer Court.

Such jurisdiction as the official arbitrators were empowered to exercise in respect of any claim for alleged direct or consequent damages to property arising out of anything done by the Government of Canada, under section 1 of 33 Vict., c. 23, and also in respect of any claim for alleged direct or consequent damage to property arising from the construction or connected with the execution of any public work under sec. 34 of 31 Vict., c. 12, was, in substance, transferred to the Exchequer Court by the provisions of sections 16, 58 and 59 of 50-51 Vict., c. 16.

2. Where the erosion of land arising from the natural action of the waters of a river was accelerated and increased by certain works erected in the river, and some dredging done therein, by the Crown,—

Held, that a Petition of Right would lie for damages for the acceleration and increase of such erosion.

PETITION OF RIGHT for damages to land arising out of the construction of certain works in the Gatineau river, and certain dredging done therein, by the Crown.

The facts are stated in the reasons for judgment.

October 10th, 1902.

The case was heard at Ottawa.

H. Aylen, K.C., for the suppliant, contended that the gravamen of the action did not constitute a tort. It was rather an incident of the principle of eminent domain that where property of another was injured

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Argument of Counsel.

such injury was to be made good by the owner of the property for whose benefit the works injuriously affecting the other property were constructed. This doctrine was part of the law of expropriation under the Quebec Civil Code. He cited *Lefebvre* v. *The Queen* (1); *Tremblay* v. *Quebec North Shore Turnpike Trustees* (2); *Brown* v. *Holland* (3). Art. 407 C. C. L. C. (4).

There is no difference between the digging of a hole and the erection of a wharf in the conception of a public work. (*Nordheimer* v. *Alexander* (5).

The Crown cannot rely upon the defence of *force majeure* when they have made an accident possible. (C. C. L. C. Art. 17, sec. 24; *McLean* v. *Crossen* (6); *Currie* v. *Adams* (7); *Marcotte* v. *Henault* (8); *St. Jean* v. *Peters* (9); *Grenier* v. *City of Montreal* (10).

J. L. Dowlin, for the respondent, cited *City of Quebec* v. *The Queen* (11); *Hamburg & American Packet Co.* v. *The Queen* (12); *Martin* v. *The Queen* (13); and contended that there was nothing here to bring the case under sec. 19 (*c*) of 50-51 Vict.

F. H. Gisborne, followed for the respondent, and argued that the order in council waiving prescription did not waive any other defence, such as lack of jurisdiction. This was a matter in which there was no negligence of a servant of the Crown upon which to found jurisdiction under 50-51 Vict., c. 16. If there was negligence, it was not negligence by any officer or servant of the Dominion Government.

H. Aylen, K.C., in reply, cited C. S. C. c. 28. As to prescription, the statute 50-51 Vict. c. 16, is retro-

(1) 1 Ex. C. R. 121.
(2) 13 Q. R. S. C. 329.
(3) 11 L. N. 378.
(4) Sharp's C. C. p. 158, *et seq.*
(5) 19 S. C. R. 248.
(6) 33 U. C. Q. B. 448.
(7) 14 Q. L. R. 169.
(8) 13 Q. R. S. C. 453.
(9) 17 Q. L. R. 252.
(10) 3 L. N. 51.
(11) 24 S. C. R. 420.
(12) 7 Ex. C. R. 150.
(13) 2 Ex. C. R. 328.

active, being a matter of procedure. (*Hardcastle on Statutes* (1). Arts. 2227, 2265, C. C. L. C.)

The whole evidence shows that the pier built in 1874 facilitated the erosion by creating a cross-current, and the dredging undermined the support of the bank. There is negligence of a servant or servants of the Crown clearly demonstrated in this case.

THE JUDGE OF THE EXCHEQUER COURT now (Nov. 17th 1902) delivered judgment.

The suppliant is seized of certain lands known as lots Nos. 1 A and 2 A in the 5th Range of the Township of Hull in the County of Wright and Province of Quebec. These lands are situate upon the easterly shore of the Gatineau River, and a considerable portion of them adjacent to the river has been wasted by action of the waters of the river. The lands were from their situation liable to be washed away to some extent; but it is alleged, and I find, that the erosion to which they were exposed has been accelerated and increased by certain works erected in the river, and dredging done therein, by authority of the Crown. The original works, consisting of piers and booms for holding timber, were constructed many years before the union of the provinces; and since then have been maintained by the Government of the Dominion. The dredging was done in the year 1874 and since. In that year also a new pier was built and part of the booms enlarged. Prior to that time the erosion by the river of the suppliant's lands had not been considerable. He testified that up to that time the bank of the river had never, to his knowledge, been affected. Since then the erosion has been marked and a large part of the property has been washed away. Now, where a number of causes, some natural

(1) 3rd ed. p. 359, quoting Lord Blackburn.

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and others created by the act of man, concur to occasion damage, it is at times difficult to determine how far the damage is attributable to any one of such causes. In the present case it seems to be certain, and I find, that the works constructed, and more particularly and principally the dredging done in the Gatineau River, by authority of the Government of Canada in the year 1874, and since, have contributed in a large measure and degree to the injury and damage of which the suppliant complains. And I do not think it is a good answer to his claim to say that the damage has in part been occasioned by natural causes to the action of which the property was exposed. That is a matter to be taken into account in determining the value of the land that has been wasted away, and the damages that should be awarded. It must of course be conceded that land on the banks of a river, liable and exposed in its natural state to erosion, such as has taken place here, cannot be so valuable acre for acre as land that is not so exposed. The fact that apart altogether from the work done and works constructed, some portion of the suppliant's property might have been washed away, may well be taken into account in determining the amount of damages; but that consideration is not a good answer to the claim if the erosion was, as I think it was, due in a large measure to, and greatly increased by, the dredging done and the works constructed.

We come now to consider the question as to whether the petition of right will lie for the injury complained of. At the time when such injury was occasioned the official arbitrators had authority, among other things, to hear, and award upon any claim for alleged direct or consequent damages to property arising out of anything done by the Government of Canada (1).

(1) 33 Vict. c. 23, s. 1.

And it was also provided that no such claim should be submitted to arbitration or entertained unless it was made within six months after the occurrence of the accident, or the doing or not doing of the act upon which the claim was founded (1). They had also jurisdiction with respect to any claim for alleged direct or consequent damage to property arising from the construction or connected with the execution of any public work (2); but such a claim was not to be entertained unless the claim and the particulars thereof were filed with the proper officer within twelve calendar months next after the loss or injury complained of (3). In 1879 an appeal was given from the official arbitrators to this court (4), and in 1887 their jurisdicton in respect to claims against the Crown was transferred to this court (5). That was in substance the effect of the Exchequer Court Act of that year; though the terms in which the jurisdiction of the court was expressed were, I think, in some matters not as general as those that had been used to define the jurisdiction of the official arbitrators (6).

The present claim was not brought before the official arbitrators. If it had been they would, I think, have had jurisdiction in respect of it, subject always to the statute of limitations that was applicable to it. But if that defence had been waived the arbitrators would, I think, have had jurisdiction in the matter. And the jurisdiction which they had, has, it seems to me, devolved upon this court, subject to the claim being defeated if the Crown should rely upon the defence of prescription. In this case the Crown has undertaken and agreed to waive the benefit of any statute of limi-

(1) 33 Vict. c. 23, s. 2.
(2) 31 Vict. c. 12, s. 34.
(3) 31 Vict. c. 12, s. 37. See also R. S. C. c. 40, ss. 6 and 8.
(4) 42 Vict. c. 8.
(5) The Exchequer Court Act, 50-51 Vict. c. 16.
(6) 50-51 Vict. c. 16 ss. 16, 58 and 59.

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tations, or any defence by way of prescription, which might or could be pleaded in answer to the suppliant's claim. The court has, I think, apart from any question of prescription, jurisdiction to hear and determine the matter. That question having been waived and abandoned the jurisdiction remains.

There will be judgment for the suppliant, and a reference to the Registrar of the court to inquire and report in respect to the amount of damages the suppliant has sustained in this matter.

Judgment accordingly.

Solicitors for suppliant : *O'Meara & Graham.*

Solicitor for respondent : *J. L. Dowlin.*