BETWEEN:

HIS MAJESTY THE KING, on the Information of the Attorney-General of Canada,

PLAINTIFF;

AND

CORNELIUS HAWKINS O'HALLORAN (In Trust),

DEFENDANT.

1933
* Jun. 9, 10, 12.
1934
* Jan. 18.

Crown — Expropriation — Compensation — Injurious Affection — "Public Work" — Expropriation Act.

The defendant owns two islands named Piers and Knapp, separated from each other a distance of 1,250 feet, in the Gulf of Georgia. The Crown expropriated Piers Island for a term of five years for use as a peniten-

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tiary. The defendant, in addition to rental, claimed compensation for injurious affection to Knapp Island.

Held: That in determining the compensation under the circumstances here existing, the value of the freehold must be considered in order to reach a fair and just conclusion as to the amount of compensation.

2. That there is no unity of property in the two islands, they being separate holdings or estates; it is not a case of the severance of a single holding or estate.
3. That the fact of common ownership does not constitute the two islands one estate.
4. That to entitle a person to recover compensation for injurious affection, the damage must arise from something which would, if done without statutory authority, have given rise to a cause of action.
5. That the penitentiary on Piers Island is a public work within the meaning of s. 2 (*g*) of the Expropriation Act, R.S.C., 1927, c. 64, the construction of which is that "public work" includes all public undertakings, public buildings, or properties which the Government of Canada is authorized to construct, acquire, extend or maintain for any authorized public purpose.

INFORMATION by the Crown to have the compensation for the leasehold of the defendant herein fixed by the Court.

The action was tried before the Honourable Mr. Justice Maclean, President of the Court, at Victoria, B.C.

Lindley Crease, K.C., and *G. A. Cameron* for plaintiff.

C. H. O'Halloran and *R. D. Harvey* for defendant.

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

THE PRESIDENT, now (January 18, 1934) delivered the following judgment:

This case raises some rather unusual and troublesome questions. On June 16, 1932, the plaintiff for the purposes of a public work of Canada, expropriated, for the limited period of five years, under the authority and provisions of the Expropriation Act, Chap. 64, R.S.C., 1927, a certain island in the Gulf of Georgia, in the vicinity of Saanich Peninsula, British Columbia, known as Piers Island, hereinafter to be referred to as Piers, and which property was registered in the name of the defendant as a trustee. Other small islands closely adjacent to Piers were at the same time taken, but with that we are not here seriously concerned. The information refers to the estate or interest taken as a "leasehold interest," and

whether that term be strictly accurate or not, it will be convenient to continue its use. The leasehold interest expropriated included also

> the right on the part of His Majesty the King, His officers, agents and employees during the said term to cut and remove timber and upon the expiration of the said term to remove buildings, erections and fixtures from the said lands.

The sum of $420, payable in each and every year during the term, is pleaded by the plaintiff as sufficient compensation for and in respect of all claims of the defendant for "rental, damages and loss" occasioned by reason of the leasehold interest expropriated, and the location, erection, use and maintenance of a penitentiary thereon, or by reason of other lands of the defendant being injuriously affected by the said expropriation. Piers was taken by the plaintiff for the purpose of constructing and maintaining thereon a penitentiary for the detention of certain Doukhobors resident in Canada, who, I understand, were minded to roam the countryside in congregated numbers, in a nude state. The several buildings since erected on Piers for penitentiary purposes are not of a permanent character, although the facilities installed for water supply and fire protection services may be regarded as of a more permanent nature. The male and female prisoners, in almost equal numbers each and altogether numbering about 560 at the time of trial, are detained in separate compounds located in one corner of the island, and each compound is surrounded by wire fencing, and the whole penitentiary facilities are constantly under guard. Some of the prisoners are in rotation engaged in certain work outside the compounds but then under guard.

The defendant is the trustee of two trusts constituting what is called the James Swan Harvey Family Trust, and as such is the registered owner of Piers, and also an adjacent island called Knapp Island, hereinafter to be referred to as Knapp. The defendant, *inter alia,* alleges, that Piers and Knapp are two valuable residential island properties, the value of which lies not in their actual land value, but as pleaded in the statement of defence, in their natural beauty, topography, sheltered location, sand beaches, proximity and accessibility to Vancouver Island and the City of Victoria, variety of flora and silva, equable climate, and ample water supply, and that these particular advan-

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tages give these two islands a peculiar and special value; that Piers and Knapp are so near to each other and so situated, as to constitute one estate and that the possession and control of each imparts an enhanced value to both of them; that there is standing timber on Piers to the value of $5,000, but if the timber were cut and removed the damage and depreciation caused thereby to that island would amount to $37,500, an amount much in excess of the commercial value of the timber, and would destroy the value of the island for residential purposes,—the most valuable use to which it might be put—and render it suitable for farming only; that the construction and maintenance of a penitentiary on Piers deprives that island and Knapp of the benefits of the natural advantages mentioned, and of their selling or leasing value, by reason of the stigma cast upon the same in putting Piers to use as a penitentiary, and which stigma, it is said, will survive the expiration of the expropriated leasehold; that Piers has a fair value of $50,000, and that in any event the depreciation resulting from its use as a penitentiary will amount to $25,000, but, pleads the defendant, if the plaintiff will abandon his right to cut and remove the timber the defendant will abandon his claim of $37,500, as compensation for the right to cut and remove the timber; that Knapp, the fair value of which is $35,000, has been injuriously affected by reason of the penitentiary on Piers and that its immediate depreciation in value therefrom is $25,000. The defendant pleads that the sum of $420 per annum tendered by the plaintiff is not a just compensation, and the particulars of the compensation claimed are set forth in his statement of defence precisely as follows:

(*a*) For rental of Piers Island $4,000 per annum, being 8% upon the valuation of $50,000; (*b*) For depreciation of Piers Island for the cutting and removal of timber therefrom $37,500; (*c*) For the permanent depreciation of Piers Island (if the timber is not removed therefrom) $25,000; (*d*) Ten per cent of the amount awarded for the entry and taking; (*e*) Depreciation to Knapp Island for loss, damage and depreciation, resulting from a penitentiary on Piers Island, and including the depreciation and devaluation of the mortgagee's security $25,000; (*f*) such amount of compensation for the removal of buildings, erections and fixtures from the said lands, being Piers Island, as to this Honourable Court may seem just.

The defendant, I might say, challenges the power or authority of the plaintiff to expropriate the leasehold interest in question.

Piers is located about 2,600 feet from the mainland, and about twenty miles from the City of Victoria, and comprises about 241 acres of which somewhere in the vicinity of thirty-five acres was cleared land at the time of expropriation; the balance is wooded and with the exception of very small and scattered areas is, I think, unsuitable for cultivation; the cost of clearing wooded land on Piers ranges, it is said, from $100 to $300 per acre. The cleared land, consisting practically of two parcels, had not been cultivated for many years and must have been rapidly reverting to wild land; the penitentiary compounds and buildings are located on the larger parcel of the cleared land, containing about thirty acres, and one small portion of the same is presently being cultivated by the penitentiary authorities. Piers was purchased for residential purposes, in 1909 by Col. James Swan Harvey, through whom it may be said the defendant derived title, the consideration price being about $18,900, payable in instalments over a period of six years; at the date of such purchase by Col. Harvey there was a dwelling house and other buildings on the island, which were insured at $4,200, besides other improvements. The dwelling house was destroyed by fire in 1913 while it was being altered and enlarged into hotel premises by its then proprietor; the hotel project was not again revived and the dwelling house was never restored. At the date of expropriation there was on the property a barn sixty feet long and twenty feet wide, on blocks, and in fair condition, and during the construction of the penitentiary establishment it was used as a stable; there were also two small and dilapidated buildings on the property, but their value would be negligible. One of the defendant's witnesses stated that there were about three million feet of fir and cedar timber standing on Piers, chiefly the former, of old and young growth, but not of a first class grade. There is quite a growth of other trees and shrubs on the island such as oak, yew, arbutus, etc. It was agreed by all the witnesses, I think, that the chief value of the timber, trees and shrubs, on the island, would be in their enhancement of the value of the land itself for residential purposes, and it was generally agreed by all the witnesses that the value of the island would be greatly reduced if the timber were cut and removed and that no prudent

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person owning the island would do so. And with all this I agree. After the acquisition of Piers by Col. Harvey there soon followed a series of transactions in connection with this property which are somewhat difficult to follow and which were not very lucidly explained. It would appear that Piers was sold, in 1910 by Col. Harvey (or by the Harvey Family Trust) for $60,000, and apparently $20,000 was paid in cash on account of the purchase price, the balance, $40,000, being secured by a first mortgage on the property itself. The purchaser then, on terms, sold or agreed to sell the island after a few weeks to a company for $75,000, which company in turn, and in the same year, sold it to Piers Island Syndicate Ltd. for $85,000, the consideration being satisfied by the assumption of the mortgage of $40,000 just mentioned, and the balance in the fully paid shares of the purchasing corporation; this corporation made a paper sub-division of Piers into 41 lots, but it remained a paper sub-division having never been filed or recorded at the Land Registry Office, and no sales of lots were ever made. Whether I have stated the facts in connection with these transactions with strict accuracy matters little because in the end, and after protracted litigation, Piers reverted to the Harvey Family Trust in 1918. This series of transactions is not, I might at once say, of the character which affords any dependable assistance in determining the present freehold or leasehold value of Piers. Since 1918 no transactions have taken place in connection with Piers except, I think, that in 1928 or 1929 an option of purchase was given by the owners for a period of fifteen days, but this option was not exercised. From 1913 down to the date of expropriation Piers was unoccupied—with an exception hardly worth mentioning—and no revenue has since been derived therefrom by its owner.

It is perhaps desirable to review briefly certain of the evidence tendered by the defendant in support of the several grounds upon which he claims compensation. Mr. Macpherson, an experienced real estate broker, doing business at Victoria, valued Piers at $50,000, if sold en bloc, and at $75,000, if sub-divided and sold in lots. This witness based his valuation of Piers on its special adaptability for exclusive and high class residences. He mentioned as attractive features possessed by the island, its sand beaches,

its trees, its extensive shore line, its accessibility from the mainland, and the condition of the motor highway from Victoria to a point opposite the island. He referred to previous sales of island property in the vicinity, and stated that James Island comprising 736 acres, was sold in 1931 for $200,000, as a site for the manufacture of explosives; he mentioned also the sale of Portland Island, in 1927, for the sum of $40,000, the purchaser acquiring the same for the purpose of raising horses, and he thought this island suitable only for farming or stock raising purposes, and much inferior to Piers in respect of shelter, approaches, landing facilities, etc., and not so adaptable for sub-division purposes as Piers. He referred to the value of certain sub-division lots on the mainland which in some instances sold for $200 and $250 per acre. Other facts stated by this witness might be mentioned: Piers was assessed at $20,000 but this did not represent its true value; the rental value of Piers should be calculated on the basis of eight per cent of its valuation; there was no demand for real property in this region at the date of expropriation and any offers presently made for Piers would not be a true reflection of its real value; and that though a considerable portion of Piers was rocky, that did not diminish its value or its attractiveness as a location for a single residence, or several residences. Mr. Kalvog, of Seattle, U.S.A., a real estate broker, placed a valuation of $50,000 on Piers, in 1930, for the purpose of an individual estate, or as a group of small estates, and he then had in mind the idea of marketing the same himself with persons resident on the Pacific coast of the United States, but nothing seems to have come of it. He stated that islands on the British Columbia side of the Gulf of Georgia were much enquired after by certain classes of citizens of the United States, and that the prohibition laws of the United States had developed an interest in residential property in British Columbia, particularly in island properties. Another witness, Greubb, placed a value of $50,000 on Piers not only at the date of taking but for the previous twenty years; he stated that Piers in point of contour, water frontage, beaches, foliage, etc., possessed advantages over other islands in the gulf. A stigma, he said, would long remain upon Piers after the termination of the leasehold, by reason

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of its use as a penitentiary. The witness Punnett, a real estate agent, placed the value of the island at $200 per acre, or altogether at $48,000, and anywhere from $50,000 to $60,000 for sub-division purposes, providing certain improvements were first made; the normal value of Knapp he placed at $35,000, and he stated that this value had been already depreciated by fifty per cent by reason of the penitentiary placed on Piers. The witness Coton, a real estate broker, stated it would be difficult to sell Piers at the present time, but in time it might be sold for $50,000; that it would not be so readily marketed in the form of subdivision lots as would lots on the mainland because island property appealed only to a restricted class. The witness Ryan stated that, in 1931, he offered to pay $25,000 for Knapp, for his own use, but with a penitentiary on Piers he would not repeat the offer nor would he wish to purchase it even when the penitentiary was removed. The witness Brett, employed by Mrs. Harvey on Knapp, testified that at times one could hear the chopping of trees and the chanting of the prisoners on Piers. Col. Cooper, Warden of the British Columbia Penitentiary, stated that the wood required as fuel for the heating of the penitentiary buildings was obtained so far mainly from the beaches and fallen trees; but he was unable as yet to state what quantity of wood would be required for this purpose for a whole season, but he thought from five to six hundred cords per year. This witness also stated that the possibility of prisoners escaping from Piers was very remote, but if any did, it was unlikely that they would resort to a landing on Knapp in their efforts to escape confinement.

Reviewing now certain of the evidence submitted on behalf of the plaintiff. Mr. Pemberton, land surveyor, landowner, and for many years doing business as a real estate agent in rather a big way over the whole of Vancouver Island, and also with a considerable experience in land subdivisions, land valuations, and in real estate loans, testified first on behalf of the plaintiff. He stated that since 1929 the market demand for real estate had dropped and almost disappeared, few sales being made, and in very many instances sales merely represented an exchange of properties. He stated that of the 30 odd acres on Piers which might be cultivated, 15 or 20 acres were good land and worth

about $100 per acre, and that the whole island as a farm would not be worth more than $6,000; for residential purposes he thought it was worth $12,500 at the most, and if $15,000 was asked it could not be obtained. He thought Piers particularly desirable as a single residential property, or two such properties, and as such would realize its highest selling price; to cut the standing timber would, he thought, rob the property of its greatest attraction or beauty. This witness had a good deal to do with the sale of islands in the Gulf of Georgia and it would appear from his evidence that island properties possessed no peculiar or particular demand. Piers, for sub-division purposes, was not so valuable he stated as sub-division property on the mainland, because of its comparative inaccessibility at all seasons and the lack of conveniences and improvements, and he was of the opinion that a sub-division of Piers would not meet a favourable reception from the buying public at any time; he stated that many sub-divisions on the mainland, more accessible and more favourably located generally than Piers, had failed to sell. He stated that the opportunity of selling a group of two or more islands held by one owner would not be greater than in the case of a single island, and that the sale of one island would not influence the sale of another nearby island, unless they were connected together at low tide or in some other way. As to rental values this witness stated that country properties rented on the basis of from 1½ to 5 per cent of the going value of the property, and Piers would have to be regarded as farm land for rental purposes as it was without any residence; if there were a moderately priced and modern residence on Piers, say worth about $3,000, it would rent, he stated, for probably $20 or $25 per month, but without a residence it could not be rented, except possibly for farming purposes. He was of the opinion that after Piers was vacated as a penitentiary its marketability would not be adversely affected on account of the use to which it is now put, and that the market value of Knapp was not injuriously affected by the occupation of Piers as a penitentiary. Mr. Wolfenden and Mr. Foreman, real estate agents, who more than a month before the trial had examined Piers and Knapp at the request of the defendant, were called as witnesses by the plaintiff after it was learned that the defend-

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ant had no intention of calling them; some protest was made on behalf of the defendant to the reception of the evidence of these two witnesses but I fail to see any sound objection to their being called to testify on behalf of the plaintiff. Mr. Wolfenden valued Piers at $15,000, without including anything that might be allowed for forcible taking, or any damages for depriving the defendant of the possession of the island during the period of the leasehold interest. The rental value of the island he put at $100 per month, or $1,200 per year. He stated that no injury was being done Knapp by reason of the penitentiary on Piers; that if the growing trees on Piers were cut and removed the island would lose its real value; that the property was one that should not be sub-divided; and that if business conditions improved the value of Piers would rise. Mr. Foreman confirmed generally the evidence of Mr. Wolfenden, but he placed the rental value of Piers at $75 or $80 per month; he was of the opinion that water front lots on the mainland were more valuable and more marketable than water lots on islands in the gulf. The witness Hall valued Piers at about $14,000 and a good rental return, he stated, would be 5 per cent on that value; he stated that the James Seed Company had leased a large farm on Salt Springs Island, 300 acres, at a rental of $600 per year, there being about 200 acres under cultivation, and two good houses were upon the property; he also referred to the Patterson farm which, he stated, was an excellent farm, about 65 acres being under cultivation, with a good house and out buildings thereon, and it was presently rented at $25 per month, or $300 per annum. He thought that if the penitentiary was removed from Piers at the expiration of the leasehold its value would not be adversely affected by reason of its past use as a penitentiary, and he distinguished this penitentiary from the ordinary penitentiary; the former he thought more like a camp where a peculiar but harmless lot of people were detained, fed and clothed. The witness Foreman, I should also say, expressed much the same view.

I have thought it only fair to counsel, after their elaborate array of evidence touching the many points put in issue, and considering the possibility of an appeal from this judgment, to review the same at this length. The first point for decision is the amount of compensation that should be

allowed the defendant for the expropriated leasehold, that is, for the use and occupation of the island and regardless of any other claims for compensation arising incidentally from the expropriation itself. The case was put to me on the footing, by both sides, that the amount of compensation under this head should be calculated upon the basis of an annual rental, and this may be the proper method for doing so, but when the compensation so calculated becomes payable, may be another question. In order to determine the amount of compensation calculable on an annual rental basis, one must consider either the probable rate of annual rental which Piers would actually command in the market at the date of expropriation, or, what would be a fair return or compensation to the owner upon the ascertained market value of the freehold. Ordinarily, the anual rental of any property reflects a certain return upon the value of the property, or the amount of the investment therein, calculated usually at a certain rate of interest. It is difficult to say what annual rental Piers would bring if put on the market at the date of the expropriation: in the state in which it then was, any rental which might be secured would be small indeed, in my opinion. In the situation here I do not think that the compensation can be justly or adequately determined if based merely on the probable annual rental which the property would bring in the open market at the date of expropriation. The circumstances here are unusual, the whole of the island has been compulsorily taken for a limited time; it is devoted to an unusual purpose, one which the present owner, or Col. Harvey, never had in mind; the population of the island grows in a moment from nothing to probably near six hundred; several new wooden buildings have been erected on the property; there is the possibility of the occupation of the island as a penitentiary adversely affecting the value and marketability of the island after the termination of the leasehold; there is introduced a new fire risk by reason of the use to which the island is put which conceivably might turn out to be quite serious; there is the possibility of injury and deterioration to the real property particularly that portion occupied by the enclosed penitentiary compounds; and all these and other matters would be considered by a voluntary lessor. Now, it would hardly be

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just to say, that because the island could not be leased to a tenant farmer, or to a person desirous of residing on the island for a few months in the summer season and who was able and willing himself to erect thereon some sort of a dwelling, at any but a small rental, that the Crown should here pay as rental just what the ordinary tenant would likely pay for it, for some ordinary purpose. And yet the evidence shows that the freehold has presently a substantial value. Any owner of Piers approached for the purpose of leasing the island for the disclosed purpose of a penitentiary would undoubtedly take all the matters I have mentioned into consideration, because the whole situation would be an unusual one and hardly within the contemplation of the owner, and he would fairly demand a rental that he would not ordinarily expect others to pay. I think that is the position I should take if I owned the island. The full effect of the occupation of the island as a penitentiary is difficult to predicate, but it must not be considered lightly. Some might be inclined to look upon the island as being occupied by a reformatory rather than a penitentiary, and having visited the island myself in company with counsel I can quite understand that view, but the fact remains that it is known as a penitentiary to the general public. It seems to me therefore that in determining the compensation here something else besides the probable annual rental value of the island from tenants ordinarily available and in the market at the date of expropriation, must be considered. I think therefore that the value of the freehold must be considered in this case in order to reach a fair and just conclusion as to the amount of compensation. Before considering the value of the freehold, or the compensation for the leasehold interest, certain conclusions which I have reached might be stated briefly. The property in question is not to be valued on the basis of farm lands, that is, I think, generally agreed upon. The most advantageous use to which Piers could be put would, I think, be that of a limited number of select and high class residential properties; its sub-division into lots would not, I think, be practical or profitable, presently or in the near future. I think the commercial value of the standing timber should be disregarded entirely in a consideration of the freehold or rental value of the island;

Piers is not forest or timber lands and I doubt if it ever was regarded as such, and it is doubtful if the merchantable timber could be profitably cut and marketed. I agree with the witnesses who stated as their opinion that to cut and remove the standing timber would cause a serious injury to Piers and very materially reduce its selling value, as residential property. I do not mean to say that a prudent cutting of the trees would cause any damage to the property, it might rather improve it. Then, the value of the freehold, or the compensation for the leasehold interest, must be estimated as the property stood at the time of taking, with the standing timber, trees, buildings, improvements, and advantages of any kind which it then possessed.

Now, as to the value of the freehold, I agree generally with the valuation given to Piers by the witnesses Pemberton, Wolfenden, Foreman, and others, that is, anywhere from $12,000 to $15,000, and I am prepared to adopt the higher figure. That amount compares favourably with the price at which the island was purchased by Col. Harvey in 1909, because the island then possessed some improvements which have since vanished. It is true that the real estate market throughout Canada is now inactive, and one of the very great problems in fixing the compensation for lands taken by public authorities, to-day, is to determine just how far present depressed land values should weigh in fixing compensation. The owner here was not a willing lessor and ordinarily it would be his privilege to refrain from selling or leasing his property, until an active real property market, consonant with his own idea of values, arose. The selling or rental price of other islands in the Gulf of Georgia do not seem to render any reliable assistance in estimating the value of Piers. Nor do I think that the value of one island can be determined by comparison with the selling price of another; these islands differ in so many respects that it is impossible to say how far the price paid for one would influence a buyer seeking another. The values attached to Piers by the defendant's witness are, in my opinion, over-sanguine estimates of possibilities unlikely to be realized in the near future. I think that $15,000 would be a very fair valuation of Piers at the time of the expropriation in question. Starting then with that fact what is a fair compensation to allow the defendant?

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Considering the estimated value of the freehold, the purpose for which it was acquired and held, the possible damage to the marketability of the island on the termination of the leasehold by reason of its use as a penitentiary, the deprivation of the right of the owner to dispose of the unencumbered freehold during the term, the possible deterioration of some portions of the property owing to its occupation as a penitentiary, and, considering on the other hand, the state of the property with its buildings and improvements at the date of expropriation, that it had long been unoccupied, that no recent offers had been made for the sale or rental of the property, and the limited market for island properties, I think, on the whole, I will have dealt generously with the defendant if I fix the compensation at the rate of $1,400 per year, or $7,000, for the full period of the leasehold expropriated for any damage, loss, expense or inconvenience which the defendant may suffer by reason of the expropriation of the leasehold interest. In fixing this amount of compensation I have not considered the claims made by the defendant in respect of the right to cut and remove timber, or the alleged injurious affection to Knapp, both of which I shall presently discuss. Whether the total amount of compensation just mentioned should be paid forthwith or annually or otherwise, whether the compensation if payable periodically throughout the term of the leasehold should now be resolved into a principal sum representing the present worth of such recurring payments, and any question of interest, are matters possibly requiring further consideration, and they are reserved until the settlement of the minutes when I shall be pleased to hear counsel upon these several points.

Coming now to the claim that Knapp has been injuriously affected by reason of the occupation of Piers as a penitentiary. Knapp comprises 40 acres and contains a residence which cost about $8,500, a water supply, a landing place, and a private electric lighting system. Mr. Macpherson placed the normal value of Knapp at $30,000, but, he stated, the existence of a penitentiary on Piers would reduce the value of the former by fifty per cent and more, and for that reason, its present market value would be about $10,000, and its marketability would for a time suffer on this account. I do not think any weight is to be

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attached to the claim that an enhanced value is to be given to Piers or to Knapp, by reason of the fact of common ownership, nor do I think they constitute one estate; they are distinct and different properties, separated by a channel 1,250 feet wide—almost a quarter of a mile. The penitentiary compounds on Piers are not visible from Knapp, except from one position. The suggestion that prisoners, who might possibly escape from Piers would direct themselves to Knapp is highly improbable, as is also the suggestion that any noises originating from the penitentiary would be the cause of annoyance to residents of Knapp. It is laid down in Halsbury, Vol. 6, para. 51, that in order to entitle a person to recover compensation for injurious affection, the damage must arise from something which would, if done without statutory authority have given rise to a cause of action. That principle has been laid down time and again. Had the plaintiff purchased from the defendant the title to Piers and erected a penitentiary thereon, it could hardly be contended that the defendant, as owner of Knapp, would have a cause of action against the plaintiff for injurious affection. The defendant's case in this respect is no stronger than would be the similar claim if made by another person who happened, instead of the defendant, to be the owner of Knapp. In my opinion, such a claim is not well founded and the defendant is not entitled to any compensation for injurious affection to Knapp, caused by the use of Piers as a penitentiary. There is no unity of property in the two islands, they are separate holdings or estates, and this is not a case of the severance of a single holding or estate. It is not sufficient to say that before the taking of Piers there was common ownership of both islands. See the remarks of Lord Summer in *Holditch* v. *Canadian Northern Ontario Railway* (1), and the case of *Cowper Essex* v. *Acton Local Board* (2).

The right "to cut and remove timber" presents difficulties rarely encountered in expropriation cases. It is perhaps a little difficult to understand just what is meant by "timber"; I understand "timber" to mean standing trees which might be cut and devoted to some use, say in the construction or maintenance of a public work. The exercise of such a right is probably available to the Crown

(1) (1916) 1 A.C. 536 at p. 542. (2) (1889) 14 A.C. 153.

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in respect of standing timber on lands expropriated for a limited time, for the purposes of a public work; that right at least is not challenged. The defendant contends that the compensation for the right to cut and remove timber should now be assessed, once and for all, and apparently upon the assumption that any timber required by the Crown during the term of the leasehold, in connection with the public work in question, would be cut and removed. Counsel for the plaintiff argued that by virtue of the expropriation the parties here stood in the relation of landlord and tenant, and that the law in such a case would be applicable here. That proposition is not, I think, wholly accurate at least, if at all, as the right of the Crown to cut and remove timber in a case of the kind presently under consideration, is probably more extensive than the corresponding right of a tenant under a lease. The ordinary relationship of landlord and tenant presupposes a voluntary agreement wherein certain terms or conditions are expressed, or implied by law. Here, the plaintiff did not lease Piers, he took it without the leave of the defendant, for a limited period of time. However, the plaintiff's counsel put this particular phase of the case before me on the footing that the Crown stood ready to compensate the defendant according to the quantity and value of the timber or trees actually cut and removed, which, in the circumstances appears to me to be the proper thing to do, and that, I think, was probably intended when the expropriation proceedings were started. At the trial, it was, I thought, agreed that there would be a reference annually, or, at the end of the term of the leasehold, to determine the compensation to be allowed under this head. I do not see how such damages or compensation can now be determined. There is no means of determining what timber may be cut for the purpose of the public work, or its effect upon the value of the freehold, and one cannot assume that the whole of the standing timber, or even a small portion of it, will be cut and removed; it is to be assumed that none shall be cut except to meet the actual necessities of the public work on the property, but it is not possible presently to say what that shall be. So far a negligible amount only has been cut. It seems to me that by the exercise of just an ordinary amount of common sense and

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judgment the parties themselves should reach a definite agreement upon all aspects of this point of controversy. I have already stated that if the standing timber were extensively and indiscriminately cut and removed, a serious injury would be done the property; a limited and judicious cutting might improve the property. The matter should be settled amicably, or possibly upon consideration, the Crown might see fit to abandon the right altogether. However, the right taken to cut and remove timber, seems to me to be something apart from the use and occupation of the land and buildings taken, and was so intended; the compensation which I have fixed was reached upon the basis that the defendant would be compensated for any damage caused by the cutting and removal of timber, but I foresee difficulty in determining just what might constitute a cause of damage, and what are the precise "rights" of the plaintiff, under the expropriation, in this connection. For the time being I reserve the whole matter until the termination of the leasehold, with leave, however, to the defendant, if he is so advised, to move on the settlement of the minutes for a reference to assess the compensation under this head at fixed periods, instead of postponing the same to the end of the term. At the moment it strikes me that it would occasion a needless expense to attempt to assess the compensation annually; in the meanwhile I shall keep an open mind in the matter. The plaintiff at present is keeping an accurate record of all timber cut and removed. I hope however that the parties may themselves yet come to terms upon this point and thus avoid needless litigation and expense.

The defendant also urged that the Expropriation Act was *ultra vires,* but that proposition is not, I think, one of substance. It was also contended that lands could only be taken for a "public work," and that Piers was not taken for the purposes of a "public work," within the meaning of the Expropriation Act. First, I observe that this point was not raised in the pleadings, and I think it is now too late for the defendant to do so. In fact, the defendant in his statement of defence, pleaded admission of the allegation contained in the plaintiff's information that the lands taken were for the purpose of a "public work". Sec. 2 (*g*) of the Expropriation Act, defines a

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"public work," and it is said to mean and include certain enumerated public works, the public buildings, etc.; the true construction of the section is, I think, that "public work" includes all public undertakings, public buildings, or properties which the Government of Canada is authorized to construct, acquire, extend or maintain for any authorized public purpose. The penitentiary on Piers is, in my opinion, a public work within the meaning of the Act ,and the expropriation is one authorized by sec. 3 and sec. 9 of the Act.

While it is true that the defendant's claims for compensation appear unduly extravagant and excessive, yet I think he is entitled to his costs of the trial. The costs of any reference that may ensue is reserved.

Judgment accordingly.