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Sept. 7, 8.
Nov. 25.

J. ARTHUR MILLER ET AL.....SUPPLIANTS;

AND

HIS MAJESTY THE KING.....RESPONDENT.

Petition of Right—Expropriation—Injurious affection—Acquiescence—Equitable Rights—Building restrictions—Restrictive Covenant—Statute of Limitation.

Suppliants owned certain land, in the city of Halifax, described on a plan of subdivision as blocks J., K., L., and M., which was further subdivided into lots, less certain lots that had been sold. In January, 1913, they sold their remaining interest, 22 lots in K., to the Crown for railway purposes, being then well aware of the proposed use, the conveyance being made to Eastern Trust Company at the instance of the Crown. In March, 1913, the whole block K. was expropriated by the Crown under the Dominion Expropriation Act. The present action was to recover for injurious affection to the adjoining blocks J. and L., by reason of the use made of the land acquired in block K. It was conceded that the suppliants were required to establish an interest in the lands taken, to succeed in an action for compensation for injurious affection of the lands not taken. It was contended that a restrictive covenant or building condition contained in the deed of one lot in block K., sold to S. gave suppliants an equitable interest in this lot, which was a benefit for all their then unsold lands, and it was also contended that by reason of certain statutory building restrictions they had an equitable right in the lots in block K. acquired from others than the suppliants. Furthermore, that the Crown took the land subject to and with notice of these covenants or conditions, expressed or implied, that the building of the railway was in breach thereof, causing damage for which the suppliants were entitled to compensation. No restrictive covenant or condition was made part of the deed from the suppliants to the

(1) [1894] 11 R.P.C. 55.

Crown, and in fact, in all the lots sold by the suppliants in the blocks mentioned, a restrictive covenant or condition was made part of one deed only, that to S.

Held, that in so far as the action rested on equitable rights, it was subject to equitable defences, and that, by their participation in the acts complained of, by selling the lands to the Crown for the purpose of the railway, by their acquiescence in all that had been done, and by their laches, the suppliants were now estopped from enforcing or claiming under equitable rights based upon the restrictive covenant.

2. That statutory building restrictions, which may at any time be modified or repealed, by the legislative body creating them, are not in the nature of covenants creating an equitable interest in land (*Orpen* v. *Roberts,* [1925] S.C.R. 364 referred to).

3. That the claim for injurious affection falls under the provisions of sec. 2, subsec. *d* of the Statute of Limitations (Nova Scotia) requiring claims for direct injury to lands to be proceeded with within 6 years from the time when the cause of action arose, and, moreover, that if the injurious affection here alleged was not referable to direct injury to land, then it falls under another clause of the same section, "actions for all other causes which would formerly have been brought in the form of an action called trespass on the case . . . ."

PETITION OF RIGHT to recover from the Crown, for injurious affection to certain lands of the suppliants by reason of the operation of a railway on lands adjoining thereto, and which were expropriated by the Crown, and obtained from suppliants for this purpose.

The action was tried before the Honourable Mr. Justice Maclean, President of the Court, at the city of Halifax.

T. R. Robertson, K.C., and *Ingram Oakes* for suppliants.

W. H. Covert, K.C., and *J. E. Rutledge* for respondent.

The facts are stated in the reasons for judgment.

THE PRESIDENT, this 25th day of November, 1926, delivered judgment (1).

This is an action for alleged injurious affection of lands of the suppliants, situated at Halifax, N.S., in consequence of the construction upon and over certain of such lands of a portion of the railway from Bedford Basin to the Ocean Terminals on Halifax Harbour, forming a part or extension of what was then known as the Canadian Government Railways. The lands here said to be injuriously affected

(1) An appeal has been taken to the Supreme Court of Canada.

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are on both sides of the railway, as constructed, but separated from the railway in each case, by a street. The suppliants, or their predecessors in title, for a long time prior to the projection of this railway were the owners of the land in question, which came to them as interested parties in a larger area known as Miller's Fields upon partition proceedings. Since then there have been changes by death in the ownership, but I shall not attempt, nor is it necessary, to distinguish between the owners upon the partition and the suppliants. The particular tract of land which fell to the suppliants, and which is of importance here, was of substantial size, rectangular in shape, bounded on the west by Tower Road, and on the east by Young Avenue. These streets ran substantially north and south with well defined boundaries on the east and west. This area was subdivided into four blocks which on the plan of division and survey, were designated as J, K, L, and M, and these blocks in turn were subdivided into lots. Between each block were projected streets, running east and west, and at right angles to Tower Road and Young Avenue. These streets were actually conveyed to the Crown in the right of the province, it was stated at the trial, and thus the property and title of the suppliants therein became alienated. It is the lands in Blocks J and L that are said to be injuriously affected, and it was Block K, located between Blocks J and L and entirely surrounded by public streets, that was acquired or taken by the respondent.

When the construction of the railway in question was first projected and made public, G. W. Goddard, now one of the suppliants, then acting as agent of the suppliants, engaged the services of Mr. M. S. Clarke, a real estate broker of Halifax, to negotiate by private treaty, the sale to the respondent of such part of the right of way required for the railway as would likely pass through the suppliants' lands, it then being known that the projected railway must of necessity cross the suppliants' lands somewhere, and practically at right angles from Tower Road to Young Avenue. Clarke acted for Goddard throughout all the negotiations with the respondent's representatives in respect of the sale and acquisition of this portion of the right of way. Clarke apparently acted for the respond-

ent in acquiring many other portions of the right of way from other proprietors, but in this case his agency was for Goddard only. Goddard by letter informed Clarke of the lots in the entire area of the suppliants' lands already sold, and stated that they were open to sell to the respondent the balance, and expressed a desire to sell the whole of the unsold lots, or at least a large number of them. In correspondence passing between them, Clarke pointed out to Goddard that he might sell the whole of the lots if a reasonable price were named, and also pointed out that in his judgment much of the land between Tower Road and Young Avenue would become unfit for residential purposes if the railway went through it. He requested Goddard to state his selling price for the entire property, and also the price of the several blocks separately. A response came to Clarke on December 26, 1912, from one Theakston, presumably authorized by Goddard, offering to sell 22 lots in Block K, being the suppliants' remaining interest therein at the rate of $650 each or altogether $14,300. This offer was communicated by Mr. Clarke to Mr. T. F. Tobin, K.C., solicitor for the Department of Railways and Canals, the respondent, in the matter of acquiring the rights of way for the undertaking. On January 3, 1913, Mr. Tobin wrote Mr. Clarke accepting this offer on behalf of his client, and also informing him that the deed of conveyance would be made to the Eastern Trust Company, and would express the full consideration price. A draft conveyance it would appear, was made by a solicitor, upon the instructions of Goddard, and the conveyance from the suppliants to the Eastern Trust Company ultimately passed on January 18, 1913, and expressed the full consideration price, $14,300. These lands, along with numerous other parcels of land were much later conveyed by the Eastern Trust Company to the respondent. It is not subject to doubt I think that the suppliants sold such lands to the respondent, and for the purposes of the railway undertaking in question, and were well aware that while the conveyance was then passing to the Eastern Trust Company, doubtless for good and sufficient reasons, that the actual purchaser was the respondent. The intervening agency or trusteeship of the Eastern Trust Com-

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pany is not I think of importance. This finding will be acceptable to the suppliants because they claim that upon this footing, their case is much stronger than if a sale in the ordinary way was made to the Eastern Trust Company, and by it to the respondent. To whom the sale was made, and the use to which the land was to be put, is here the important thing. The suppliants knew of no other person in the negotiations leading to the sale and purchase except the respondent, and they carried out the sale by making the conveyance to a corporate body designated by the respondent, and whom they probably heard of then for the first time. In any event, they knew the lands were being acquired for the purposes of the railway. The evidence is so strongly that way, that any further discussion of it is I think unnecessary.

I should perhaps here say, that the whole of Block K was expropriated in March, 1913, by the filing of a plan and description of the same, under the provisions of the Expropriation Act. It is not clear to me at the moment whether the title to lot 94 in Block K sold to one Louisa Smith, and to some seven other lots in the same block previously sold by the suppliants, and to which I shall soon refer, passed to the respondent under the proceedings under the Expropriation Act, or by conveyances from the proprietors thereof, but in any event the title to the same passed to the respondent in either one way or the other. The expropriation proceedings would, of course, put the title to the 22 lots conveyed to the Eastern Trust Company, in the respondent, but as I have already stated, these lots, together with many other lots were later conveyed to the respondent by a deed of conveyance.

It is therefore to be seen that the suppliants sold to the respondent, and conveyed to the Eastern Trust Company, 22 lots in Block K, being their entire interest therein, the block containing altogether 30 lots. Eight lots in the same block had been previously sold to other purchasers by the suppliants. The first sale in the block was lot No. 94 to one Louisa Smith, in June, 1897. The conveyance contained the following restrictive covenant or condition:—

Subject however to the provisions of chapter 28 of the Statutes of Nova Scotia passed in the year 1896 entitled "An Act relating to Young Avenue, in the city of Halifax, and any amendments thereto, and also

subject to the agreement and condition that no dwelling house or other building shall be erected or maintained nearer than thirty feet to Young Avenue.

In April, 1899, lots 13, 17, and part of lot 18, facing on Tower Road, were conveyed to one Rent. In October, 1901, lots 93 and 95, facing on Young Avenue were conveyed to Louisa Smith. The next conveyance was in June, 1912, and comprised lots 90, 91, and 92, facing on Young Avenue. These four conveyances comprise the entire sales made by the suppliants in Block K up to the time of the conveyance to the Eastern Trust Company. In all the conveyances including the one to the Eastern Trust Company, there is no mention of any restrictive covenants or conditions, except in the case of the first conveyance to Louisa Smith. It might be convenient here to refer to the *habendum* clause in the conveyance to the Eastern Trust Company, and which is as follows:—

> Together with all and singular the buildings, easements, tenements, hereditaments and appurtenances to the same belonging or in anywise appertaining, with the revision and revisions, remainder and remainders, rents, issues and profits thereof, and all the estate, right, title, interest, claim, property and demand both at law and in equity of the said J. R. Miller and George W. Goddard as such executors and trustees of, in to or out of the same or any part thereof. To have and to hold the said lands and premises with the appurtenances and every part thereof the said the Eastern Trust Company, its successors and assigns its and their sole use, benefit and behoof forever.

The lots in Block K, facing on Young Avenue, numbered 90 to 95 inclusive, were subject to the statutory building restrictions and conditions prescribed by chapter 28 of the Statutes of Nova Scotia, 1896, entitled "An Act relating to Young Avenue in the city of Halifax." This statute must be examined with some care in order to understand its purpose, scope and effect. The preamble of this Act fully reveals the reasons for and the purpose of the legislation. It is as follows:—

> Whereas Young Avenue forms the main entrance to the Park, and said entrance extends from Inglis street to the Park gates, and large sums of money have been spent in building and grading said avenue, and it is desirable to build a sewer therein, to extend the water supply, beautify said avenue and otherwise improve the same, provided certain class and style of houses are built in order to make said avenue a residential part of said city.

Then section 1 provides that no building shall be erected abutting on Young Avenue, or within 180 feet of the same

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without first submitting for approval the plans, etc., to the City Council and declaring the object for which such building is intended; that the City Council may refuse to sanction said plans, etc., if in its opinion the building sought to be erected is not one suitable to be erected on this avenue; that any building erected contrary to this section should be deemed a public nuisance; that dwelling houses should not cost less than a stated sum. Following sections of the Act provide that any building erected in violation of sec. 1 might be removed at the instance of the City Council, and the procedure for enforcing this remedy is outlined; that no building erected shall be used or occupied as an hotel without the consent of the City Council, and a money penalty is provided for violation of the same; that any building then erected on Young Avenue but not erected in accordance with the Act, might be expropriated by the city, subject however to compensation being paid by the city to the proprietor. Sec. 6 enacts that no building shall be built on any street within a described area which comprised Blocks J, K, L, and M, costing less than $2,000, if a single dwelling home, etc., and a money penalty is provided for infraction thereof. Then the last section enacts that no dwelling house or other building shall be erected or maintained nearer than twelve feet from Young Avenue or on any lot on the Miller property fronting on any other street nearer than ten feet to such street. Then by another Act, the "City Charter, 1907," it was enacted *inter alia,* that no building erected on Young Avenue or within 180 feet of that street should be used for any other purpose than a private dwelling, the main portion of which should not be nearer than forty feet to the side line of that street. The City Charter also provided that no building should be erected on any lot having a frontage on any street, other than Young Avenue, in Blocks J, K, L, and M, at a distance of less than ten feet from such street. These two statutes cover practically the same ground, though it would appear that the City Charter required that no building should be erected nearer than forty feet from Young Avenue, while the other Act fixed this distance at twelve feet. The first conveyance to Louisa Smith contained the condition that no dwelling house or other

building should be erected nearer than thirty feet to Young Avenue, which in that respect it is to be observed, was a departure from the requirements of the City Charter.

It was conceded by counsel for the suppliants that where lands are injuriously affected, no part thereof being taken as in this case, the owners are not entitled to compensation. *Queen* v. *Barry* (1); *Sisters of Charity of Rockingham* v. *The King* (2). In order to meet this state of the law, the suppliants contend that the covenant or condition contained in the deed to Louisa Smith gave them an equitable interest in the land conveyed thereby which was a benefit for their unsold lands, and that also by reason of the building restrictions and conditions created by the statutes, they had an equitable right or benefit in all the lands taken. The suppliants urge that similar covenants are to be implied in all the deeds to which I have referred outside that of Louisa Smith, but I shall later refer to this. Having such equitable rights in the land taken, the suppliants contend they are within the principle of law which requires that land or an interest in land must be taken before an action for injurious affection to other lands can be sustained, and that they are in law entitled to compensation if they can shew that their remaining lands were injuriously affected. The suppliants claim that the respondents took the property in question subject to and with notice of the covenants or conditions actual or implied, and that the building of the railway and certain bridges was in breach or extinguishment of such covenants or conditions. The suppliants' claim to compensation was not put to me upon any other ground. The principal point for decision therefore is whether or not the suppliants had an equitable right or interest in the lands thus acquired by the respondent by reason of the restrictive covenant contained in the conveyance to Louisa Smith and by the provisions of the statutes referred to. The suppliants contend affirmatively and rely particularly upon the authority of *The Long Eaton Recreation Grounds* v. *The Midland Railway Co., Ltd.* (3).

(1) [1891] 2 Ex. C.R. 333. (2) [1922] 2 A.C. 315.
(3) [1902] 2 K.B. 574.

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I propose first a discussion of the case on the assumption that the statutory restrictions were not in existence, and that the suppliants were relying entirely upon the covenant in the Smith deed of conveyance. Frequently, a large tract of land is divided by the owner into lots to be sold for residential purposes, and each purchaser is required to enter into covenants with the vendor, usually for the benefit of all the purchasers, restricting the uses to which such land may be put. Such restrictions create equitable rights enforceable in equity against the covenantor, or his assigns who purchase with notice. Covenants affecting the user of lands are said to be a burden on the property of the covenantor, and a benefit to the user of the unsold property within the building scheme area. They are frequently described as negative easements and run with the land in equity, but not at law. The consideration for the acceptance of the burden of the covenant by the covenantor for the benefit of the unsold lands, is that the covenantee would impose the same burden upon other purchasers in conformity with a uniform building scheme, and in respect of the unsold land would deal with the same in a manner consistent with the covenants exacted of the covenantors. It is for that reason that a negative easement in equity runs with the land. If there is no consideration of this kind, the covenantee I apprehend would not acquire an equitable interest in the land of the covenantor. The covenant might remain, but it would be, I think, merely a personal covenant between vendor and vendee, and would not run with the land. If land burdened with such a covenant is taken for a public use, which would extinguish the benefits of the covenant to the vendor or user of the other land, in some circumstances at least, the latter would be entitled to compensation. The ordinary case is where the easement is of such a nature as a right of way.

It was said by Lindley L.J., in *Knight* v. *Simmonds* (1), a case involving restrictive covenants, that when a court is asked to enforce a covenant by decreeing specific performance or granting an injunction, in other words when equitable as distinguished from legal relief is sought, equit-

(1) [1896] 2 Ch. 294.

able as distinguished from legal defences have to be considered. The basis of this action rests upon the existence of equitable rights, and is subject to equitable defences. The conduct of a covenantee may disentitle him to relief. His participation in the acts of which he complains, conduct inconsistent with an expected observance or intended enforcement of a covenant, acquiescence in the breach of a covenant or delay in seeking relief, may be sufficient to preclude him from enforcing equitable rights or procuring equitable remedies. Courts of equity in such cases look not only to the conditions of the covenant, but to the object to attain which it was entered into, and when that object cannot be obtained, equitable relief may be refused a covenantee. The respondent now having the legal estate in the Smith lot particularly, and generally all the lots in Block K, may I think be heard to say all this. The suppliants here conveyed and sold their entire remaining right, title and interest of every kind in Block K, being about $^{22}/_{30}$ of the whole, well knowing it was to be used for the purposes of the railway to be constructed. The deed purports to convey all the right, title, interest, property and demand, both at law and in equity, of the grantor, together with all the easements to the same belonging. No restrictive covenant of any nature is to be found in the conveyance. This was in January, 1913. The railway was in operation late in December, 1917. The suppliants remained silent until 1925, when they commenced this action, which is I think corroborative of the view that their silence had been preceded by knowledge of the exact user to which the property was to be put. Having sold the 22 lots to the respondent without exacting any restrictive covenants, and knowing what it was to be used for, I am of the opinion that they cannot now be heard to say that the sole restrictive covenant exacted of all the purchasers in this block, that entered into by Louisa Smith, gives them an enforceable equitable right in the property of that covenantor, and that they are not now entitled to compensation for injurious affection of the other lands. They cannot be heard to say, "you committed a breach of our equitable right in the Louisa Smith Lot" when they themselves were parties to it, and they cannot in equity

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be heard to say that the respondent put a "building" on the Louisa Smith lot in contravention of the covenant when they themselves furthered and acquiesced in the construction of the same "building" upon contiguous lands, knowing it was likely to extend to the Smith lot. I think by their acquiescence in all that has been done, and by their laches, they are now estopped from enforcing any equitable rights originating in such covenants or now claiming anything thereunder. The covenants were I think waived and the suppliants acquiesced in their breach, and they were no longer possible of attainment or performance. The suppliants are not now entitled to relief. See N.S. Statute of Limitations, ch. 238, sec. 30. The following authorities might usefully be referred to: *Baily* v. *De Crespigny* (1); *Renals* v. *Cowlishaw* (2); *Peek* v. *Matthews* (3); *Sobey* v. *Sainsbury* (4); *Kelsey* v. *Dodd* (5); *Roper* v. *Williams* (6); *Sayers* v. *Collyer* (7); *Gaskin* v. *Balls* (8). Much might be said in favour of the view that the covenants entered into by Louisa Smith were never enforceable as covenants running with the land against her assigns. There is not very clear evidence of the existence of what is usually deemed a building scheme, with restrictive covenants intended to be consistently exacted of all vendees by the vendor, and there is no evidence whatever that the suppliants had expressly or impliedly contracted not to deal with any part of the unsold land, in a manner inconsistent with the covenants exacted in the case of the Smith lot. Indeed it is doubtful whether upon a proper construction of the so-called covenants in the Louisa Smith Deed, they were binding or were intended to be binding upon the covenantor's assigns. This, however, I need not decide.

There remains for consideration the effect of the statutes referred to and which I have so far entirely disregarded. These statutes contain the usual building restrictions frequently enacted by legislatures or by municipal bodies with legislative authority. Statutory building restrictions

(1) [1869] L.R. 4 Q.B. 180.
(2) [1878] 9 Ch. D. 125.
(3) [1867] L.R. 3 Eq. 515.
(4) [1913] 2 Ch. D. 513.
(5) [1883] 52 L.J. Ch. 34.
(6) [1822] Turn. & R. Rep. 18.
(7) [1884] 28 Ch. D. 103.
(8) [1879] 13 Ch. D. 324.

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are quite different I think from covenants passing from vendee to vendor, which usually continue to run with the land unless they have been expressly relaxed or waived, or for other causes have become unenforceable. Such covenants undoubtedly create an equitable interest in property. I do not think this can be said of statutory building restrictions, which at any time may be modified or repealed by the legislative body creating them without reference to the owners of the property affected by them. So long as they are in force they are not subject to waiver or modification on the part of the vendor or vendee, or by any owner of property subject thereto. I know of no authority or reason for holding that such legislative restrictions create an equitable interest or right of any kind in one property for the benefit of any other property owner who is affected by them, unless the statute so says. The statute might expressly give them the legal right to enforce such restrictions. The obligations to observe the restrictions apply to all property owners alike. They are statutory building restrictions nothing more and nothing less, and are not in the nature of covenants creating equitable interest in land. As to the legal rights created by statutes of this character see *Orpen* v. *Roberts* (1).

I must briefly refer to the case of *Long Eaton Recreation Grounds Co.* v. *Midland Railway Company* (*ubi supra*), upon which the suppliants rely so much. The plaintiff was owner of a large tract of land, a part of which was devoted to a recreation ground, and the remainder was laid out as building land. The building land was sold to various grantees, subject to certain restrictive covenants limiting the user by the purchasers of the land. The defendant company before obtaining statutory powers to construct a proposed line of railway, purchased the whole of the lands there acquired from the plaintiff's grantees, and took the same with notice of the restrictive covenants. The defendant subsequently obtained an Act of Parliament authorizing the construction of a railway, and incorporating the Lands Clauses Consolidation Act, 1845, and in the construction of the railway, the defendant erected an embankment for the railway on the land so bought by

(1) [1925] S.C.R. 364 at 369-371.

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them in breach of the covenants of the vendees. It was held that the embankment was a "building" within the meaning of and in breach of the covenants contained in the plaintiff's deeds of conveyance, not to erect any building but a private dwelling, and that the land which was entitled to the benefit of these restrictive covenants was injuriously affected if that benefit was extinguished, although no part of the plaintiff's land was taken. I think this case is easily distinguishable from the one under consideration. There the covenantee was not a party to the sale of the land to the railway company, and did not expressly or impliedly waive its covenants, nor did it acquiesce in the sale of the lands by its covenantors for railway purposes. Here it was the suppliants themselves that in fact almost wholly deprived their property of the benefit of the covenant affecting the land sold to Louisa Smith. It was they who relieved that lot of land of the burden of that covenant when they sold 22 lots to the respondent for the purpose of the railway. This is not the case of a third party purchasing from the suppliants' covenantor, with or without notice. It is the case of the vendor and covenantee being one and the same person. I do not therefore think that the authority referred to is applicable here.

This case was very largely tried upon the grounds which up to this point I have discussed, and it was for that reason and also on account of the importance of such grounds that I have dealt with them at considerable length and delayed discussion of another important and formidable defence pleaded to the suppliants action, which plea if well founded is in itself a sufficient answer to the action. The respondent pleaded the Statutes of Limitations to the claim asserted in the Petition of Right, and while during the opening of the defence the respondent's counsel referred to this issue, still it was not pressed at the end of the trial. It is to be mentioned, however, that this issue was dealt with at length by Mr. Robertson of counsel for the suppliants in the course of his argument. However, this plea was not withdrawn in any formal way, and that being the case, it still stands of record as an issue between the parties, and calling I think for my determination. The suppliants

contended on the issue of limitation that their action was really and substantially an action of debt upon a statute. Upon examination of the character of their claim I am of the opinion that it is one of unliquidated damages, based upon the expropriation of land under the authority of the Dominion Expropriation Act. In order to determine the question it is necessary to examine into what the word "debt" means, in the terminology of the law. Turning to one of the ancient authorities for a definition we find that Blackstone (3 Com. 154) defines a debt as follows:—

> A sum of money due by certain and express agreement.

Turning to one of the more modern books, Byrne's Dictionary of English Law (1923) at p. 281, we find a more comprehensive definition:—

> In the strict sense of the word, a debt exists when a certain sum of money is owing from one person (the debtor) to another (the creditor). Hence "debt" is properly opposed (1) to unliquidated damages; (2) to "liability," when used in the sense of an inchoate or contingent debt; and (3) to certain obligations not enforceable by ordinary process. "Debt" denotes not only the obligation of the debtor to pay, but also the right of the creditor to receive and enforce payment. Debts may be created under the provisions of various statutes, as in the case of penalties imposed by penal statutes, and payable to an informer or to the party aggrieved; debts in respect of calls under the Companies Acts; debts for tolls payable under the statutes, and the like. By the provisions of the Acts creating them, some of these debts have the same effect as debts created by specialty.

It does not appear by the cases that I have been able to examine that there is any support for the view that a claim for compensation given by the Dominion Expropriation Act amounts to a debt by statute.

In the case of *Wilson* v. *Knubley* (1), it was held that the action of debt upon Bonds and Specialties given by 3 W. & M., c. 14, did not extend to cover a claim for damages on a covenant. It might perhaps be argued with some plausibility—although I here express no opinion upon the point—that a claim for compensation for lands taken or for injurious affection raises some sort of a contractual relation between the Crown and the owner of the property taken or injuriously affected, inasmuch as the Expropriation Act, section 22, declares that the compensa-

(1) [1806] 7 East 127.

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tion money agreed upon or adjudged stands in the stead of such land or property, and that any claim upon the land shall be converted into a claim to the compensation money. But that relationship is only an inchoate one for it will be observed that the Act says: "Compensation money so agreed upon or adjudged," so that those words would reasonably exclude a claim to compensation which has not been "agreed upon or adjudged," and therefore is not a debt upon the statute.

But there is authority in the books which negatives a contractual position of vendor and vendee arising even upon a claim for compensation for lands actually taken. It is the case of *Richardson* v. *Elmit* (1), in which it was held that where a notice to treat had been given by a railway company, under the Lands Clauses Consolidation Act, 1845, and nothing further had been done, that the mere notice to treat did not establish a debt between the company and the owner of the lands in respect of which the notice to treat had been given. The court held that there was no debt created under the circumstances. It has also been held that a verdict for damages until judgment obtained is not a debt, *Jones* v. *Thompson* (2). Salary or pension not yet payable has also been held not to be a debt upon a statute, *Booth* v. *Trail* (3). It is reasonable to say that the claim in question here for damages for injurious affection amounts to no more than a claim for money payable on a contingency, the contingency being judgment for or against the plaintiff. And on this point see *Howell* v. *Metropolitan District Railway Company* (4), and the case of *Richardson* v. *Elmit* above cited. Secondly, and with special reference to the contention that the Crown in the circumstances of this case has been guilty of a breach of a restrictive covenant, and therefore the claim arising is a claim on specialty and cannot be barred until the expiration of twenty years after the action arose. This contention seems to me to be negatived by the facts of the case which show that the Crown did not rely on any deed from the suppliants or their assigns, but proceeded on March 6, 1913, subsequent to the date of the deed from

(1) [1876] 2 C.P.D. 9.
(2) [1858] E.B. & E. 63.
(3) [1883] 12 Q.B.D. 8.
(4) [1881] 19 Ch. D. 508.

the suppliants to the Eastern Trust Company, to expropriate the land in respect of which this claim for injurious affection is asserted. I think that where an expropriation has been formally made as in this case, the Crown's title must be held to be referable to that; and so we come back to a consideration of the claim as one arising upon an expropriation and not as upon a breach of a restrictive covenant.

If the claim under the Petition of Right herein is to be regarded as a claim to compensation under the Expropriation Act, it would seem to fall under the provisions of sec. 2, ss. (*d*), of the Nova Scotia Statute of Limitations, which requires claims for direct injury to land to be proceeded with within six years after the cause of action arose. Under the authority of such cases as *Long Eaton Recreation Ground Co.* v. *Midland Ry. Co.* (1), a claim for injurious affection of property expropriated is no more nor less than a claim for compensation under the statute, and the person whose land is injuriously affected may not maintain an action for damages or seek an injunction to restrain the continuance of the injury. In such case then it would seem that the damages should be assessed as of the time of the construction of the public work for the purpose of which the land was expropriated. In that view the right of action must be taken to have arisen upon the construction of the public work, and as it was an injury to land under the provisions of the Nova Scotia Statute of Limitations, sec. 2, ss. (*d*) an action should have been brought within six years from such date of construction. Upon the facts I must hold that this was not done, and, therefore, the suppliants' action is barred.

It may be contended that this provision of the Statute of Limitations, sec. 2, ss. (*d*): "all actions for direct injuries to real property," refers only to direct injuries and not to indirect injuries, and that in this case the injuries and the damages are both indirect. The only allegations of injury alleged in the case at bar is a depreciation of the value of the remaining property, and lessened demand, by reason of the construction of the railway. If this be true, it would be the proximate cause of the injury, and direct

(1) [1902] 2 K.B. p. 574.

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injury flows always from proximate causes. The general rule is that no action lies for indirect injuries, but this must not be confused with indirect or consequential damages, which may arise from direct injuries. But if the injurious affection here alleged is not referable to direct injuries to real property, then there is another clause in the same section within which it would surely fall, and which reads as follows:—

> and actions for all other causes which would formerly have been brought in the form of action called trespass on the case, except as herein excepted, within six years after the cause of such action arose.

I am of the opinion that the present action clearly falls within one or the other of these clauses, and that therefore the suppliants' action is barred. For reference to the action " trespass on the case," see Bouvier's Law Dictionary, vol. 1, p. 425; vol. 3, 3319; Brown's Law Dictionary 2nd ed., 540; and Byrne's Law Dictionary 16-17.

For the reasons which I have above given the suppliants' action is dismissed, the respondent to have his costs of action.

Judgment accordingly.