

Between

WILLIAM E. VROOM, TRUSTEE OF
THE ESTATE OF EDMUND I. } SUPPLIANT;
SIMONDS..... }

1903
Dec. 7.

AND

HIS MAJESTY THE KING..... RESPONDENT.

Petition of Right—Damage to lands—Subsidence—Release of claim—Liability.

In connection with the work of affording better terminal facilities for the Intercolonial Railway at the port of St. John, N.B., the Dominion government acquired a portion of the suppliant's land and a wharf, the latter being removed by the Crown in the course of carrying out such works. For the lands and wharf so taken by the Crown, the suppliant was paid a certain sum, and he released the Crown from all claims for damages arising from "the expropriation by Her Majesty of the lands and premises, or the construction and maintenance thereon of a railway or railway works of any nature." One of the effects of the removal of the wharf was to leave a wharf remaining on the suppliant's land more exposed than it formerly had been to the action of the waves and tides; but no sufficient measures were taken by the suppliant to protect his property or to keep it in a state of repair.

Held, that there was no obligation upon the Crown, under the circumstances, to construct works for the purpose of protecting the suppliant's property; and as the injury complained of happened principally because the suppliant had failed to repair his wharf the Crown was not liable therefor.

PETITION OF RIGHT for damages alleged to have been occasioned to the suppliant's property by certain works executed by the Crown in improving the shipping facilities of the Intercolonial Railway at St. John, N.B.

The facts are stated in the reasons for judgment.

May 26th, 27th, 28th, 30th and September 8th, 9th and 10th, 1903.

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Argument
of Counsel.

The trial of the case proceeded at St. John, N.B.

November 6th and 7th, 1903.

The case was now argued at Ottawa.

W. Pugsley, K. C., for the suppliant, contended that the cause of the damage to the suppliant's property was the negligent way in which the dredging had been done by the servants of the Crown, in the vicinity of the suppliant's property, for the purposes of the deep water terminus of the Intercolonial Railway in the harbour of St. John. The evidence showed that the angle of the dredging was two to one, and the witnesses produced by the Crown admitted that this was an improper and unsafe angle. This was the cause of the subsidence which undermined a wharf remaining on suppliant's property. The removal of lateral support caused this wharf to settle. The Crown is bound by the rules of law in this respect as well as the subject. The doctrine of *sic utere tuo ut alienum non laedas* applies to the Crown under the circumstances of this case.

The release given by the suppliant to the Crown does not exonerate it from the obligation we seek to enforce here. It was a release from all damages arising from "the railway or works of a railway nature." Dredging the bottom of the harbour for the purpose of accomodating ships cannot be said to be "works of a railway nature."

E. H. McAlpine, K.C., for the respondent.

The injury done to the suppliant's property was caused by the natural action of the seas and tides. If he had protected his wharf after the removal of the other wharf which was acquired by the Crown, no injury would have occurred. He was bound to do this. The evidence as a whole shows that there was no subsidence arising from the works done by the Crown, and

that what did happen was only the natural result of the action of the water there in washing away the silt and chips that had accumulated on the surface. He cited *Backhouse v. Bonomi* (1).

As to the release, it clearly covers the damages sought in this action. The suppliant in the expropriation proceedings received \$28,000 for his property taken, and released all claims for damages arising from "works of a railway nature." Surely it is a work of a "railway nature" to provide a deep water terminus for the Intercolonial Railway.

THE JUDGE OF THE EXCHEQUER COURT now (December 7th, 1903) delivered judgment.

The petition is brought to recover damages in respect to certain lands and premises adjacent to the terminus of the Intercolonial Railway at the City or Port of St. John, in the province of New Brunswick, of which the suppliant is seized in fee, on certain trusts, and which are alleged to have been injuriously affected by the construction, by the Crown, of certain public works intended to afford better terminal facilities and conveniences for traffic to and from the sea. With that end in view a property known as the Long Wharf was acquired and improved, and the berths adjacent thereto were dredged out to afford accommodation for large steamships. In connection with these improvements the Crown expropriated a portion of the suppliant's lands, and valuers were appointed to assess the damages sustained as well by the suppliant and those for whom he holds in trust, as by the lessees of the lands and premises in respect of a term of which they were in possession at the date of the expropriation.

The valuers made their awards, the amounts awarded by them to the suppliant, and to the lessees

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respectively, were accepted and the amounts thereof paid to them, and all parties interested discharged and released the Crown "of and from all actions, cause "and causes of action, suits, claims and demands whatsoever, either at law or in equity or otherwise howsoever which they or any of them may have, or ever "had, or might, could or would have against Her "Majesty the Queen for or by reason of the expropriation by Her Majesty of the lands and premises "or the construction and maintenance thereon of a "railway or railway works of any nature." Upon the lands expropriated, and afterwards conveyed by deed to Her Majesty, there were at the date of the expropriation certain wharves that were removed by the Crown in the course of the works that were carried out. There can, I think, be no doubt that the Crown had a right to remove these wharves, and that the suppliant has discharged the Crown from any injury or damage that has accrued or may accrue to adjoining property from their removal in a reasonable and careful manner, as to which there is no complaint. One of the effects of the removal of these wharves was to leave an inner wharf (the property now in question), more exposed than it formerly had been to the action of the waves and tides, but no sufficient measures were taken to protect this property or to keep it in a state of repair. It has fallen into decay and been damaged, and for the injury sustained the suppliant brings this petition.

Now there can, I think, be no doubt that the injury complained of happened principally because nothing was done to protect or repair this wharf; and as that was a matter for the suppliant or his tenants to look after, the Crown is not as to that liable for damages.

But it is said, and the fact is admitted, that in dredging a berth for steamships, the side of the prism

near, but not actually adjoining, the suppliant's lands was left at a slope or incline of one to two; which it is said was too great, and not a prudent or reasonable thing to do having regard to the character of the soil in which the dredging was done. Since the work was finished the slope has, from natural causes, been lessened, until at present it is one to two and one-half in some places, and in other places one to three which is considered sufficient. It is further alleged that as a result of this, and the withdrawal of support to the adjacent land, a slide or subsidence occurred, the effect of which extended to the suppliant's wharf and caused it to settle, thereby occasioning in part at least the injuries complained of. There is no direct evidence of any such slide or subsidence having taken place. It is a matter of opinion. Some of the witnesses see, they think, indications of a slide having taken place. Others do not. To sustain the petition with respect to any portion of the relief asked for, one must come to the conclusion (1) that such a slide or subsidence has taken place; and (2) that it was to some extent at least the cause of the injuries complained of. I have not been able to come to that conclusion. On the evidence as a whole I am not satisfied that a slide or subsidence has taken place as suggested, and consequently I am not able to find that issue of fact in favour of the suppliant. But even assuming that it did occur, there is, it seems to me, no reason to think that its effect extended to that part of the soil on which the suppliant's wharf is built, causing the wharf to settle and thereby contributing to the injuries complained of. On the contrary, the weight of evidence leads, I think, to an opposite conclusion.

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The judgment will be that the suppliant is not entitled to any portion of the relief sought by his petition.

*Judgment accordingly.*

Solicitor for the suppliant: *A. G. Blair, Jr.*

Solicitor for the respondent: *E. H. McAlpine.*

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